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ROSCOE'S DIGEST

OF THE

LAW OF EVIDENCE

ON THE TRIAL OF

Actions at *Nisi Prius*.

EIGHTEENTH EDITION.

BY

MAURICE POWELL, M.A.,

OF THE INNER TEMPLE, ESQUIRE, BARRISTER-AT-LAW, LATE SCHOLAR OF  
TRINITY COLLEGE, CAMBRIDGE.

*IN TWO VOLUMES.*

VOL. I.

LONDON:

STEVENS AND SONS, LIMITED,  
119 AND 120, CHANCERY LANE.

SWEET AND MAXWELL, LIMITED,  
3, CHANCERY LANE.

Law Publishers.

1907.

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R7195n  
1907

RTE 17 Nov 53

## ADVERTISEMENT

TO THE EIGHTEENTH EDITION.



THE same arrangement and subject matter as in the previous edition has been retained.

The subject of civil liability for Conspiracy recently attained so much importance that the law relating thereto has now been treated under a separate heading, and the fundamental changes in that law, as well as in the law of Nuisance and Seduction, caused by the Trades' Disputes Act, 1906, are pointed out under those headings.

The Marine Insurance Act, 1906, has been fully incorporated in the division of the work relating to that subject. Other statutes, too numerous to mention here, have also been inserted.

The decisions and statutes have been brought down to the commencement of the present month. The number of fresh cases inserted is considerably in excess of one thousand.

M. P.

TEMPLE.

*July, 1907.*

THE AUTHOR  
AND  
FORMER EDITORS AND EDITIONS OF  
THIS WORK.

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- 1st to 4th editions (1827–36), by HENRY ROSCOE (the Author).\*
- 5th edition (1839), by CHARLES CROMPTON † and EDWARD SMIRKE. ‡
- 6th to 8th editions (1844–51), by EDWARD SMIRKE.
- 9th edition (1858), by EDWARD SMIRKE and SAMUEL PRENTICE. §
- 10th edition (1861), by EDWARD SMIRKE.
- 11th edition (1866), by WILLIAM MILLS and WILLIAM MARKBY. ¶
- 12th and 13th editions (1870–75), by JOHN CHARLES DAY ¶ and the present Editor.
- 14th edition (1879), by JOHN CHARLES DAY and the present Editor assisted by HUNGERFORD TUDOR BODDAM §§).
- 15th to 17th editions (1884–1900), by the present Editor.

\* Died 1836.

† Puisne Judge, Q.B.

‡ Vice-warden of the Stannaries.

§ County Court Judge.

¶ Puisne Judge, Calcutta.

¶¶ Puisne Judge, Q.B.D. & K.B.D.

§§ Puisne Judge, Madras.



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## ADDENDA.

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*These are referred to by the letters "Add" following the page to which the particular addendum refers.*

- p. 41, l. 16. *Add* "User is evidence of extent of a market. *Gingell &c. v. Stepney Borough Council*, (1906) 2 K. B. 468;" affirm. in C. A., July 31st, 1907.
- " , l. 14 *Add* "*In re Jackson*, (1907) W. N. 168, *cor. Kekewich, J.*"  
fr. bottom.
- p. 203, l. 19 *Add* "No action will lie for arrears of alimony due under a decree of the Probate and Divorce Division. *Robins v. Robins*, (1907) 2 K. B. 13."  
fr. bottom.
- p. 205, l. 11. *Add* "On condemnation as prize, the property in the prize is vested in the captors by relation back to the time of the capture. *Andersen v. Marten*, (1907) 2 K. B. 248."
- p. 206, l. 16 *Add* "As to the effect of an order of a Naval Court summoned under the Merchant Shipping Act, 1894, s. 483, discharging a seaman from his ship, see *Hutton v. Ras S. S. Co.*, (1907) 1 K. B. 834, C. A."  
fr. bottom.
- p. 207, l. 17 *After* "1033" *insert*, "See also *Eaton v. Swansea Waterworks Co.*, *post*, p. 841."  
fr. bottom.
- p. 262, l. 11. *Add* "See further *Lyons v. Tramways Syndicate*, (1906) 2 Ch. 216."
- p. 299, l. 3. *For* "*Benning v. Ilford Gas Co.*, (1907) W. N. 106," *read* "See *Benning v. Ilford Gas Co.*, (1907) 2 K. B. 290."
- p. 319, l. 6. *For* "*Hawkins*" *read* "*Howkins*," *and add* "*McManus v. Fortescue*, *post*, *Add.*, p. 535."
- " , l. 9. *Add* "*Thurman v. Best*, (1907) W. N. 170, *cor. Parker, J.*"
- p. 406, l. 20. *Add* "A cheque may be countermanded by telegram. The countermand is effective from the time at which the telegram would have been received by the proper officer of the bank, but for the default of its own servants, and the bank cannot debit the drawer with the amount of the cheque if paid after that time. *Curtice v. L. City & Midland Bank*, 23 T. L. R. 594, *per Darling, J.*, *diss. A. T. Lawrence, J.*"
- p. 434, l. 27. *For* "449i" *read* "449k."
- p. 439, l. 24. *Add* "See *Andersen v. Marten*, (1907) 2 K. B. 248, *ante*, *Add.* p. 205."
- p. 460, l. 25. *Add* "*Moel Tryvan Ship Co. v. Krüger*, was affirm. in D. P., and is noted (1907) W. N. 173."
- p. 464, l. 11 *Add* "Where work in loading is done on a Sunday, &c., after the lay days have begun to run, see *Whittall & Co. v. Rahtken's Shipping Co.*, (1907) 1 K. B. 783 and *Nelson (James) & Sons v. Nelson Line*, *Id.* 788, n.; affirm. (1907) W. N. 179, C. A."  
fr. bottom
- p. 466, l. 2. *Add* "Under the strike clause only so much time will be allowed as was actually caused by the strike if the charterer had used due diligence in loading. *Elswick S. S. Co. v. Montaldi*, (1907) 1 K. B. 626."



- p. 473, l. 17 fr. bottom. *Add* " *Accord. Nelson (James), & Sons v. Nelson Line, &c.* (No. 2), (1907) 2 K. B. 769, C. A."
- p. 494, l. 18 fr. bottom. *After* "innocently" insert "putting the transfer forward in the usual way and."
- p. 535, l. 15 fr. bottom. *Add* "Where the sale is known to be subject to a reserve, the acceptance of a bid is conditional on the reserve having been reached. *McManus v. Fortescue*, (1907) 2 K. B. 1, C. A."
- p. 544, l. 26. *For* "Hawkins" read "Howkins."
- p. 589, l. 24 fr. bottom. *Add* "*Caine v. Palace SS. Co.* was affirmed in D. P., July 29th, 1907."
- p. 613, l. 20 fr. bottom. *Add* "See also *Kettlewell v. Refuge Assur. Co.*, (1907) 2 K. B. 241."
- " 1. 11 fr. bottom. *For* "pubile" read "public."
- p. 634, l. 30. *Add* "See further as to evidence of inequality, *Taylor v. Metropolitan Ry. Co.*, (1906) 2 K. B. 55."
- p. 638, l. 8 fr. bottom. *Add* "The Act applies to a railway passenger's ordinary luggage carried free of charge. *Casswell v. Cheshire Lines Committee*, (1907) W. N. 140."
- p. 644, l. 2. *For* "W. N. 117 read 2 K. B. 222, C. A."
- p. 655, l. 18 fr. bottom. *Add* "So also does the Carriers Act, 1830, ss. 1, 2, *ante*, pp. 636, 637. *Casswell v. Cheshire Lines Committee*, (1907) W. N. 140."
- p. 666, l. 24. *Add* "*Holden v. Thompson*, (1907) W. N. 129, K. B. D."
- p. 733, l. 21. *Add* "*Jenkins v. Price*, 23 T. L. R. 153, *cor.* Swinfen Eady, J."
- p. 736, l. 17. *Add* "Such a covenant runs with the reversion. *Chapman v. Smith*, (1907) 1 Ch. 97."
- p. 801, l. 17. *Add* "The defence is good although the plaintiff is an infant. *Young v. Hoffman &c. Co.*, 23 T. L. R., 671 C. A., following *Cribb v. Kynoch, Id.* 550."
- p. 819, l. 21 fr. bottom. *Add* "See also *Hyman v. Van den Bergh*, (1907) W. N. 183, *cor.* Parker, J."
- p. 821, l. 10. *Add* "Although the plane was altered in the time during which the right was being acquired. *Andrews v. Waite*, (1907) W. N. 860, *cor.* Neville, J."
- p. 833, l. 7 fr. bottom. *Add* "*Chorley Cor. v. Nightingale* was affirmed in C. A., and is noted (1907) W. N. 107."
- p. 834, l. 7. *Add* "*Gingell &c. v. Stepney Borough Council*, was affirm. in C. A., July 31st, 1907."
- p. 892, l. 4, &  
p. 910, l. 8. *For* "Trades" read "Trade."
- pp. 892, 910, & 1091 *Note* "In the Trade Disputes Act, 1906, 6 E. 7, c. 47, by sect. 5 (3), 'the expression "trade dispute" means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of the employment, or with the conditions of labour, of any person, and the expression "workmen" means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises.'"
- p. 1183, l. 29. *Add* "See also *Field v. Receiver of Metropolitan Police*, Times, July 30th, 1907, K. B. D."





# DIGEST OF THE LAW OF EVIDENCE AT NISI PRIUS.

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## PART I.

### EVIDENCE IN GENERAL.

In forming a digest of the law of evidence, the subject may be considered with regard to, first, the *nature* of evidence; secondly, the *object* of evidence; thirdly, proof of *documentary evidence*; fourthly, proof by *witnesses*; fifthly, proof by *affidavits or depositions*; and sixthly, the *effect* of evidence.

It will be well here to premise that the Supreme Court of Judicature Acts, 1873, 1875,\* do not, nor may any rules made thereunder, alter the rules of evidence, except in empowering the court or a judge to order that in certain cases affidavits or depositions may be used in lieu of oral evidence. J. Act, 1875, s. 20, *post*, p. 153, and see Rules of the Supreme Court, 1883, † O. xxxvii. and O. xxxviii. Special orders may, however, under the Judicature (Procedure) Act, 1894, s. 3, and O. xxx. r. 7, *post*, p. 154, be made as to the proof of particular facts.

### NATURE OF EVIDENCE.

With regard to its nature, evidence may be considered under the following heads:—Primary evidence; secondary evidence; presumptive evidence; hearsay; admissions.

#### PRIMARY EVIDENCE.

It is a general rule, that the best evidence, or rather the highest kind of evidence, must be given of which the nature of the case admits; and evidence of a nature which supposes better proof to be withheld is only secondary evidence. Thus, where a will of lands was to be proved, the primary evidence of it was the will itself, and not the probate; for the Ecclesiastical Court had no cognizance of reality. B. N. P. 246. So, in general, where a contract has been reduced into writing by the parties, the writing is the best evidence of its contents and must be produced.

\* These Acts are hereinafter cited, for brevity, as J. Acts, 1873, 1875.

† These rules (see preamble and Appendix O) came into force on October 24th, 1883, and replace all former rules, except R. G. H. T. 1853, rr. 44 to 49, relating to juries, but they provide by O. lxxii. r. 2, that, "where no other provision is made by the Acts or these rules, the present procedure and practice remain in force." To these rules there have been numerous subsequent amendments and additions, but as these have been numbered in with the original rules, they are all hereinafter cited as "Rules, 1883."

*Fenn v. Griffiths*, 6 Bing. 533. So where a person was engaged as secretary on the terms contained in a resolution entered in a certain book of the employer, in action for his salary the book must be produced. *Whitford v. Tutin*, 10 Bing. 395, cited *post*, pp. 3, 4. In an action for infringement of a musical composition, the defendant cannot ask a witness whether he has not seen printed copies of it at a certain place and time, or heard it performed, in order to disprove the originality; such copies, if any, must be produced and proved, or inability to produce them shown. *Boosey v. Davidson*, 13 Q. B. 257.

But it is not universally necessary, where the matter to be proved has been committed to writing, that the writing should be produced. If, for instance, the narrative of an extrinsic fact has been committed to writing, the fact may yet be proved by oral evidence. Thus, a receipt for money will not exclude oral evidence of the payment. *Rambert v. Cohen*, 4 Esp. 213. So where, in trover, the witness stated that he had orally required the defendant to deliver up the property, and at the same time served upon him a notice in writing to the same effect, Ld. Ellenborough, C.J., ruled that it was not necessary that the writing should be produced. *Smith v. Young*, 1 Camp. 439. In the same manner, what a party says, admitting a debt, is evidence, although the promise to pay is reduced into writing. *Singleton v. Barrett*, 2 C. & J. 369. So where the fact to be proved was that a certain person occupied land so as to gain a settlement by 13 & 14 C. 2, it was held that, although there was a written demise, the fact might be proved by oral evidence. *R. v. Holy Trinity*, 7 B. & C. 611; 1 M. & Ry. 444. But the parties to the lease, the amount of rent, and the terms of the tenancy, can only be shown by the writing. S. C.; *Strother v. Barr*, 5 Bing. 136; *R. v. Merthyr Tydvil*, 1 B. & Ad. 29. In an action *inter alios*, the landlord cannot be called to prove the rent due without producing the written lease if there be one. *Augustien v. Challis*, 1 Exch. 279. And the fact of a tenancy under a particular person cannot be so proved where there is a writing. *Doe v. Harvey*, 8 Bing. 239; *semb. contra, per Alderson, B.*, in *Augustien v. Challis, supra*. Although there exists a deed of partnership, yet the fact of partnership may be proved by the acts of the parties. *Alderson v. Clay*, 1 Stark. 405. The fact of the employment of an agent to sell may be proved by oral evidence, though the terms of his commission are contained in a letter. *Semb. Whitfield v. Brand*, 16 M. & W. 282. Where it is necessary to prove a marriage, the entry in the parish register is not the only evidence; but the fact may be proved by the testimony of persons who were present and witnessed the ceremony, or by general reputation. *Evans v. Morgan*, 2 C. & J. 453; *R. v. Wilson*, 3 F. & F. 119; *Campbell v. Campbell*, L. R. 1 H. L. Sc. 201, *per Ld. Cranworth*. And where evidence of reputation was given, proof of a fiat for a special licence, and of the affidavit on which it was founded, and of an entry in a parish register stating a private marriage in a house, purporting to be signed by the parties, was admitted to confirm the other evidence. *Doe d. El. of Eyremont v. Grazebrook*, 4 Q. B. 406. On an indictment for an unlawful assembly, the inscriptions and devices on banners displayed at a public meeting may be proved by oral evidence, and it is not necessary to produce the banners themselves. *R. v. Hunt*, 3 B. & A. 566. And the transactions and proceedings of such a meeting may be proved by oral evidence, as resolutions entered into; although it should appear that those resolutions were read from a paper. *Id.* 568. So an inscription on a fixed monument, or writing on a wall, may be proved by oral evidence. *Doe d. Coyle v. Cole*, 6 C. & P. 359; *Mortimer v. McCullan*, 6 M. & W. 68, 72, *per Cur.*; *Sayer v. Glossop*, 2 Exch. 409; *Bartholomew v. Stephens*, 8 C. & P. 728. In an action for infringement of the copyright of a picture by a photograph, it is not necessary to produce

the picture; a witness who has seen it can prove that the photograph is taken from an engraving which is the copy of the picture, the engraving and photograph being produced. *Lucas v. Williams*, (1892) 2 Q. B. 113, C. A.

The admission of one of the parties to a suit is primary evidence as against him, and the reported cases which favour a contrary opinion must be considered as overruled by *Slatterie v. Pooley*, 6 M. & W. 664, where it was decided that oral admissions are evidence against the party making them, although they relate to the contents of a written instrument. See also *Newhall v. Holt*, *Id.* 662; and *Henman v. Lester*, 12 C. B., N. S. 776; 31 L. J., C. P. 366. So a copy of a document delivered by a party is primary evidence against him of that document. See *Stowe v. Querner*, L. R., 5 Ex. 155, 159; and further under tit. *Admissions*, *post*, pp. 61 *et seq.*

The proper evidence of all judicial proceedings is the production of the proceedings themselves or of examined (or office: Rules, 1883, O. xxxvii. r. 4, *vide post*, p. 97) copies of them. *Thellusson v. Shedden*, 2 N. R. 228. It has even been held that oral evidence was not admissible of the day on which a cause came on to be tried; as the proper proof is the *postea*. *Thomas v. Ansley*, 6 Esp. 80; *R. v. Page*, *Id.* 83. But as adjournments during sitting are not noticed on the record, it may well happen that oral evidence is the best and only evidence of the actual day of trial; *Roe d. Wrangham v. Hersey*, 3 Wils. 274; *Whittaker v. Wisbey*, 12 C. B. 52; 21 L. J., C. P. 116; though the record may be the only legal evidence of the proceeding at *Nisi Prius* recorded in it. Where, to prove that the plaintiff had been discharged under the Insolvent Act, it was proposed to give in evidence his admission to that effect, *Ld. Ellenborough, C.J.*, held it insufficient. *Scott v. Clare*, 3 Camp. 236; but see the cases cited under tit. *Admissions*, *post*, pp. 63, 64. So oral evidence was not admissible to prove the taking of oaths required by the Toleration Act, which must appear by the records of the court where the oaths were taken. *R. v. Hube, Peake*, 132. Where the deposition of a witness in a case of misdemeanor was taken under 7 G. 4, c. 64, s. 3, and the plaintiff in an action against the witness offered oral evidence of an admission made by him in such deposition, the court held such evidence to have been rightly rejected. *Leach v. Simpson*, 5 M. & W. 309.

The counterpart of a deed is admissible as original or primary evidence against the party executing it, and those claiming under him, though no notice to produce the other part has been given; *Burleigh v. Stibbs*, 5 T. R. 465; *Roe d. West v. Davis*, 7 East, 363; *Houghton v. König*, 18 C. B. 235; 25 L. J., C. P. 218; so a duplicate original may be adduced in evidence without notice to produce the other original; *Colling v. Treweek*, 6 B. & C. 394, 398; and in the case of printed matter each copy of the same impression is an original. *R. v. Watson*, 2 Stark. 129.

Though a written contract must be produced in an action founded on it, yet a mere memorandum, not signed by the parties nor intended to be final, will not prevent the introduction of oral evidence of a contract. *Doe d. Bingham v. Curtwright*, 3 B. & A. 326; and see *Hawkins v. Warre*, 3 B. & C. 698. So where an oral contract is made for the sale of goods, and is put into writing afterwards by the vendor's agent for the purpose of assisting his recollection, but is not signed by the vendee, the contract may be proved by oral evidence. *Dalison v. Stark*, 4 Esp. 162. A vendee may give evidence of warranty, although a note of the sale and receipt of the money, given by the vendor to the vendee after the conclusion of an oral contract, contained no notice of any warranty. *Allen v. Pink*, 4 M. & W. 140. So of the memorandum of the terms of a lease, not signed by the lessor, but only by the wife of the lessee. *R. v. St. Martin's, Leicester*, 2 Ad. & E. 210. See also *R. v. Wrangle, Id.* 514. The case of *Whitford v.*

*Tatin*, 10 Bing. 395, may seem hardly distinguishable in principle from some of the above. There it was held that a secretary, who accepted an engagement under a society on the terms contained in a *resolution* entered in the society's book, was held bound to produce the book in an action for his salary, though not a party to the resolution. The distinction seems to be, that the hiring was expressly upon the written terms, though the writing was not in itself a contract. The general proposition established by the cases seems to be that a mere unaccepted proposal, executory memorandum, private minute or unauthorised entry of one of the parties, will not exclude oral proof. But where an oral contract expressly incorporates, or refers to, a written paper as part of its terms, that paper ought to be produced in order to prove those terms. See *Hill v. Nuttall*, 17 C. B., N. S. 262; 33 L. J., C. P. 303.

In order to render the production of a writing necessary, it must appear to relate to the matter in question. Thus where oral evidence is offered to prove a tenancy, it is not a valid objection that there is *some* written agreement relative to the holding, unless it also appear that the agreement was between the parties as landlord and tenant, and that it continues in force at the very time to which the oral evidence applies. *Doe d. Wood v. Morris*, 12 East, 237. Oral evidence of the terms of a demise is admissible, although the witness called to prove them states that the lessor read them from some paper held in his hand at the time, but which was not shown to, or signed by the lessee. *Trewhitt v. Lambert*, 10 Ad. & E. 470.

If, in an action for work and labour, it appear that the claim is for extras on a written contract, the written contract must be produced. *Buxton v. Cornish*, 12 M. & W. 426. But if an entirely separate order be given for the extras, then production of the written contract is not necessary. *Reid v. Batte*, M. & M. 413.

If oral evidence of an agreement be given at a trial, the party desirous of excluding it may at once interpose and ask the witness whether it was not in writing; if the witness deny this, he may then give evidence on a collateral issue to show that the agreement was in writing; *Cox v. Couvless*, 2 F. & F. 139; or he may reserve the question for cross-examination, and may inquire as to the contents of the writing, so far as may be necessary, to show that oral evidence is inadmissible. *Curtis v. Greated*, 1 Ad. & E. 167. It is not enough to prove, by a witness, that the solicitor of the opposite party has admitted in conversation that there was a written agreement on the subject; for a solicitor is not an agent of his client to make such admissions. *Watson v. King*, 3 C. B. 608.

Whether the existence of a writing is sufficiently proved to exclude oral evidence is a question for the judge.

#### SECONDARY EVIDENCE.

Secondary evidence is admitted in cases where the principle which excludes it, namely, the supposed existence of better evidence behind, which it is in the power of the party to produce, does not apply. Thus, it is admissible if a ground be laid for it by proving that better evidence cannot be obtained. *Rainy v. Bravo*, L. R., 4 P. C. 287. In the case of a lost deed, the loss or destruction must be proved; and if it appear that two or more parts have been executed, the loss of all the parts should, it is said, be proved, otherwise "perhaps" a copy will not be admitted. B. N. P. 254; and see *R. v. Castleton*, 6 T. R. 236; and *Munn v. Godbold*, 3 Bing. 292, 294, *per* Best, C.J. So where an instrument is in the possession of the opposite party, oral evidence of its contents may be given, on proof of the service of a notice to produce it. All the proper sources from which the primary

evidence can be procured must be exhausted before secondary evidence can be admitted. Thus, the party who has the legal custody of an instrument must be applied to. *R. v. Stoke Golding*, 1 B. & A. 173. So where a letter, which had been in the possession of the defendant, was filed in the Court of Chancery pursuant to an order of that court, it was ruled that secondary evidence of it was not admissible, it being in the power of either party to produce it on application to the court. *Williams v. Munnings*, Ry. & M. 18. The construction of a lost document, though proved by oral evidence, is for the judge, where the veracity of the witness as to its contents is not questioned. *Berwick v. Horsfall*, 4 C. B., N. S. 450; 27 L. J., C. P. 193.

The wrongful refusal of a third party to produce a document in his possession on *subpœnâ duces*, will not let in oral evidence of it. *Jesus College v. Gibbs*, 1 Y. & C. 156; *R. v. Llanfaethly*, 2 E. & B. 940; 23 L. J., M. C. 33. But where a document is in the hands of a party, as a solicitor, who is called to produce it, but declines to do so, relying upon his privilege or upon his lien, secondary evidence of its contents may be given. S. C.; *R. v. Leatham*, 8 Cox, C. C. 498; 30 L. J., Q. B. 209, *per* Hill, J.; *Culcraft v. Guest*, (1898) 1 Q. B. 759, C. A. See further, *post*, p. 158. The secondary evidence cannot be received unless the solicitor has been duly served with a *subpœnâ duces*; *Hibberd v. Knight*, 2 Exch. 11; or has the document in court, and refuses on demand to produce it. *Semb. Dwyer v. Collins*, cited *post*, p. 8. Where a private letter is in the hands of a person resident abroad, and out of the jurisdiction of the English courts, who refused to part with it or produce it on the trial of a cause, the contents may be proved by secondary evidence, if all reasonable exertions have been made to produce the original. *Semb. Boyle v. Wiseman*, 10 Exch. 647; 24 L. J., Ex. 160. In such a case, the person requiring the production should disclose to the proprietor of the instrument the object of the application. See *Brown v. Thornton*, 6 Ad. & E. 185; *Quilter v. Torss*, 14 C. B., N. S. 747.

The contents of documents of a public nature, required by law to be kept, may be proved by examined (and in some cases by office or certified) copies without accounting for the non-production of the original document; *vide Proof of documents by copies, post*, pp. 96 *et seq.*; and the same rule applies to public registers and documents kept abroad; *vide post*, pp. 97, 98. But in the case of a private document filed in a foreign court, it is necessary to prove that an unsuccessful application has been made to the legal custodian thereof, viz., to the court, before secondary evidence is admissible; an application to an inferior officer of the court, though he have the actual custody of it, is not enough. *Crispin v. Doglioni*, 32 L. J., P. M. & A. 109.

In some cases secondary evidence of *oral testimony* is admitted; as where the testimony of a witness on a former trial is admitted on another trial without producing him in person. The circumstances under which this may be done will be found *post*, p. 116. So, where the evidence of a witness is taken out of court by affidavit or deposition, by proper authority; *vide Proof by affidavits or depositions, post*, p. 185.

[*Proof of loss of document.*] Where secondary evidence is offered in consequence of the loss of the primary evidence, it must be shown to the satisfaction of the judge that diligent search has been made in those quarters in which the primary evidence was likely to be procured. Where the publisher of a newspaper, in which a libel had appeared, stated that he believed the original was either destroyed or lost, having been thrown aside as useless, this was held sufficient to let in secondary evidence. *R. v. Johnson*, 7 East, 66. So where a licence to trade had been returned to the secretary of the governor who had granted it, and the secretary swore that it was his

custom to destroy or put aside such licences as waste paper, and that he had disposed of the licence in question in the same manner as other licences; that he had searched for it, but had not found it, the court held the loss sufficiently proved. *Kensington v. Inglis*, 8 East, 278. So where it became necessary to account for the non-production of a policy, and it was proved that it had been effected about seven years before, and, having become useless on account of a second policy being effected, had probably been returned to the plaintiff; and the clerk of the plaintiff's attorney searched for it in the plaintiff's house, not only in every place pointed out by the plaintiff, but in every place likely to contain a paper of this description, the search was held to be sufficient. *Brewster v. Sewell*, 3 B. & A. 296. As a general rule, to admit secondary evidence of a deed of apprenticeship, proof should be given that a search has been made for the original instrument among the papers both of the master and apprentice. *R. v. Hinchley*, 3 B. & S. 885; 32 L. J., M. C. 158. But in that case it was held that long after the expiration of the term of apprenticeship, the deed was probably in the custody of the apprentice, as he was then most interested in it, and that a search among his papers was sufficient. So in another settlement case, where it was proved that one part only of an indenture had been executed, that the pauper apprentice and master were both dead at the time of trial, and that an inquiry for it had been made of the pauper shortly before his death, who said that the indenture had been given up to him after the expiration of the apprenticeship, and that he had burnt it; and that an inquiry had also been made of the daughter and sole executrix of the master, who said she knew nothing about it, it was held that a sufficient inquiry had been made to render parol evidence of the contents admissible. *R. v. Morton*, 4 M. & S. 48. See *R. v. Piddelinton*, 3 B. & Ad. 460. But where the only evidence of loss consisted of the declarations of the deceased pauper, who stated that the indenture had been given back to him and worn out, parol evidence was held inadmissible. *R. v. Rawden*, 2 Ad. & E. 156.

When the party, in whose possession the instrument was, is alive, it has in some cases been held that he ought to be called, and his declarations are not admissible. *R. v. Denio*, 7 B. & C. 620. But, generally, the declarations of the persons applied to are received in evidence, to show that due inquiry and search has been made, and the judge determines whether the search is sufficient. *R. v. Braintree*, 1 E. & E. 51; 28 L. J., M. C. 1. And the inclination of the court in *R. v. Saffron Hill*, 1 E. & B. 93; 22 L. J., M. C. 22, seems to have been that it is not in every case necessary to call the person applied to, as a witness; it is a question for the judge, subject to review by the court.

Where the loss or destruction of the paper is probable, very slight evidence of its loss or destruction will be required, and a useless paper will be presumed to have been destroyed. *Brewster v. Sewell*, 3 B. & A. 296, *per* Abbott, C.J., and cases cited *supra*. Thus, where depositions had been delivered to the clerk of the peace or his deputy, it appearing to be the practice to throw them away as useless, slight evidence of a search for them was held sufficient, and the deputy need not be called, it being his duty to deliver them to his principal. *Freeman v. Arkell*, 2 B. & C. 496. A constable, who levied under a warrant issued by the defendant, and was entitled to the custody of it, said that he had deposited it in his office, but was unable, upon search, to find it: held, that secondary evidence of it was admissible against the defendant, though no notice to produce was served on him. *Fernley v. Worthington*, 1 M. & Gr. 491. The degree of diligence to be used in searching for a deed must depend on the importance of the deed, and the particular circumstances of the case. *Per Cur.* in *Gully v. Exeter*, *Bp. of*, 4 Bing. 298. If not found in its proper place of deposit, further search may

generally be dispensed with; as where it was the duty of the party in possession of a document to deposit it in a particular place, and it is not found in that place, the presumption is that it is lost or destroyed. Thus a fruitless search in the parish chest for indentures, given up to the parish officers long ago, is sufficient to let in parol evidence of them. *R. v. Stourbridge*, 8 B. & C. 96; 2 M. & Ry. 43. See also *R. v. Hinchley*, *ante*, p. 6.

A cheque drawn on account of a parish was delivered to the defendant, who was then paying clerk of the parish; it was shown that the bankers of the parish, on the same day, paid the cheque, and that their custom was to return the paid cheques to the paying clerk, who deposited them in an apartment in the workhouse; the defendant was no longer in office as paying clerk, and his successor was not called; a witness stated that he had made application to him for an inspection of the cheques, and that he had handed him several bundles, which the witness looked through without finding the cheque in question; it was held that secondary evidence of the contents of the cheque was admissible. *McGahey v. Alston*, 2 M. & W. 206. In *Pardoe v. Price*, 13 M. & W. 267, a search for a security given to one K. in an attorney's office, where the papers of K. and of his executrix were deposited, was held to be sufficient to let in secondary evidence.

If there are several places of probable deposit, all should be searched. Where a conveyance of freehold and leasehold in trust was alleged to be lost, and one of the trustees and the heir of another, deceased, negatived possession of it, it was held insufficient unless the executor of the deceased trustee was also questioned, who had taken possession of his papers. *Doe d. Richards v. Lewis*, 11 C. B. 1035; 20 L. J., C. P. 177. And where there were duplicate instruments executed, a search for both seems necessary; *ante*, p. 4.

Secondary evidence of a bill or note in a negotiable state cannot be admitted, when the loss is specially pleaded, unless the destruction, and not the mere loss, of it be proved. See *Action on Bills of Exchange; Production of the Bill*, *post*, p. 356.

Though proof of the destruction of the original lets in secondary proof, yet if the destruction is alleged to have been by, or while in the possession of, the opposite party, a notice to produce is required. *Doe d. Phillips v. Morris*, 3 Ad. & E. 46, cited *post*, p. 8.

The objection, that secondary evidence of a document is offered, without proof of due search for the original, must be distinctly made at the trial; otherwise the court will not entertain it on a motion for a new trial. *Williams v. Wilcox*, 8 Ad. & E. 314.

[*Notice to produce when necessary.*] In general, when any written instrument is in the possession or power of the opposite party, secondary evidence of its contents is inadmissible without previous proof of a notice to produce the original. *R. v. Elworthy*, L. R., 1 C. C. 105. The object of the notice is to give the party an opportunity to produce it if he please. *Dwyer v. Collins*, *post*, p. 8. Where, however, from the nature of the proceedings, the party in possession of the instrument necessarily has notice that he is to be charged with the possession of it, as in the case of trover for a bond, a notice to produce is unnecessary. *Hov v. Hall*, 14 East, 274; *Scott v. Jones*, 4 Taunt. 865. And the plaintiff may prove the nature and description of the document, for which trover is brought, by secondary evidence, though the defendant offers to produce it; for that is part of the defendant's evidence. *Whitehead v. Scott*, 1 M. & Rob. 2. So a notice is not required where the party has procured the possession of the instrument by fraud, after the action commenced, from a witness called for the purpose of producing it under a *subpœna duces tecum*. *Leeds v. Cook*, 4 Esp. 256. A counterpart executed

by the defendant may be read by the plaintiff without a notice to produce the original. *Burleigh v. Stibbs*, 5 T. R. 465. See also other cases cited *ante*, p. 3. In trover against a sheriff for executing a *fi. fa.*, plaintiff may give evidence of the contents of the warrant and its loss, without notice to produce it. *Minshall v. Lloyd*, 2 M. & W. 450. In an action by a seaman, secondary evidence of the contents of any agreement with the crew or otherwise to support his case is admissible under 57 & 58 V. c. 60, s. 123, without notice to produce it. See *Bowman v. Mouzelman*, 2 Camp. 315, decided under an earlier statute. But where defendant pleaded to an action by drawer of a bill, that he accepted in part payment of a debt due from defendant to plaintiff, in order to induce him to prove his debt under a fiat then pending against the defendant, to which plaintiff replied by denying acceptance in part payment of such debt: held that plaintiff was not bound to produce the bill without notice to produce; *Goodered v. Armour*, 3 Q. B. 956; and the same point was ruled where the defendant pleaded that his acceptance was obtained by fraud, and issue was joined thereon. *Lawrence v. Clark*, 14 M. & W. 250. In ejectment the defendant relied upon a will; on the cross-examination of one of his witnesses he stated that, about a fortnight after the execution of the will, a second will was prepared, which had come into the possession of the defendant; the plaintiff's counsel was not allowed to ask whether the latter paper was duly signed by three witnesses, and whether the testator had declared it to be his last will, no notice to produce it having been given. *Doe d. Phillips v. Morris*, 3 Ad. & E. 46.

Notice to produce a notice to produce is, for obvious reasons, not necessary; and, generally, a notice to produce any notice on which the action is founded is also unnecessary. It is usual in business to make two copies of a notice, and to serve one and retain the other; indorsing on the one retained the time and mode of service. There can be no doubt that in this case the notice served is, strictly speaking, the only *primary* evidence. But a custom, and not an unreasonable one, of admitting the copy, which is almost a duplicate original, has obtained. There is some little doubt as to what are the notices to which the rule extends. It clearly extends to a notice to produce documents; it has also been held to extend to a notice to quit; *Doe d. Fleming v. Somerton*, 7 Q. B. 58; to a notice of dishonour; *Swain v. Lewis*, 2 C. M. & R. 261; *Kine v. Beaumont*, 3 B. & B. 288; and to a notice of demand of a copy of the warrant pursuant to the 24 G. 2, c. 44, s. 6; *Jory v. Orchard*, 2 B. & P. 39. But the rule does not extend to notice of dishonour of bills other than the bill sued on. *Lanauze v. Palmer*, M. & M. 31.

In order to prove the delivery of a solicitor's signed bill of costs, it is not necessary to give notice to produce the bill delivered, which is itself a notice. *Colling v. Treweek*, 6 B. & C. 394. See also the 6 & 7 V. c. 73, s. 37.

By Rules, 1855, O. xxxii. r. 8, "an affidavit of the solicitor or his clerk of the service of any notice to produce and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served." It would seem that "sufficient evidence" means in this rule *prima facie* evidence only; see *Barracrough v. Greenhough*, L. R., 2 Q. B. 612, Ex. Ch., *post*, p. 151. This rule dispenses with the notice to admit which was required under the C. L. P. Act, 1852, s. 119, now repealed.

Where a party has the document in court at the trial, a requisition to produce it, given at the trial, will be sufficient to let in secondary evidence of it, if production be refused; and the solicitor of one party may be asked in court whether he has the document in court, and is bound to answer the question, though he may be justified in refusing to produce it on the ground of confidence. *Dwyer v. Collins*, 7 Exch. 639; 21 L. J., Ex. 225.



Although the contents of a document may be proved by an admission of the opposite party out of court, yet it seems that the party cannot himself be cross-examined (when produced as a witness) respecting its contents, unless he has had notice to produce it. *Darby v. Ouseley*, 25 L. J., Ex. 227. In this last case it did not appear that the party interrogated had the document in his power or possession, and the language of the court almost goes to the extent of showing that a party cannot be called on to say whether he *admits* the contents of any document, though his admission *out of court* would have been evidence according to *Slatterie v. Pooley*, *ante*, p. 3. The court considered that there was a difference between proving an admission and calling upon the party in court to make one. See also *Whyman v. Garth*, 8 Exch. 803; 22 L. J., Ex. 316, cited *post*, p. 132.

An admission in the usual form, under a notice to admit, as now required, of the accuracy of a copy, will not dispense with a notice to produce the original, if in the opposite party's possession, or with other pre-requisites for the reception of secondary evidence. See *Sharpe v. Lamb*, 11 Ad. & E. 805; *Admission under notice to admit*, *post*, pp. 73 *et seq.*

[*Notice to produce; proof of possession of original.*] In order to render a notice to produce available, it must be proved that the original instrument is in the hands of the opposite party, or of some person in privity with him. The nature of this evidence must vary according to the nature of the instrument. Where it belongs exclusively to the party, slight evidence is sufficient to raise a presumption that it is in his possession. Thus, where a solicitor proved that he had been employed by the defendant to solicit his certificate, and that looking at his entry of charges he had no doubt the certificate was allowed, this was held to be presumptive proof of the certificate having come to the defendant's hands. *Henry v. Leigh*, 3 Camp. 502. Where the instrument has been delivered to a third person, between whom and the party to the suit there exists a privity, notice to the latter is sufficient; as in an action against the owner of a vessel for goods supplied to the use of the vessel, a notice to the defendant to produce the order for the goods, which had been delivered to the master by the defendant, is sufficient. *Baldney v. Ritchie*, 1 Stark. 338. So in an action against the sheriff, a notice to his solicitor to produce a warrant, which has been returned to the under-sheriff while the defendant was in office, is sufficient, whether the defendant be in or out of office at the time of notice. *Tuplin v. Atty*, 3 Bing. 164; *Suter v. Burrell*, 2 H. & N. 867; 27 L. J., Ex. 193. So also notice to a defendant to produce a cheque drawn by him, and paid by his banker, is sufficient to entitle the plaintiff to give secondary evidence of its contents, although the cheque remains in the banker's hands. *Partridge v. Coates*, Ry. & M. 156. So notice to a party to the action to produce a document in the possession of his solicitor in another action is sufficient. *Irwin v. Lever*, 2 F. & F. 296. If the instrument were in possession of the party at the time of the service of notice he cannot afterwards voluntarily part with it so as to get rid of the effect of the notice. Dallas, C.J., in *Knight v. Martin*, Gow, 104; and Best, C.J., in *Sinclair v. Stevenson*, 1 C. & P. 585. But where the plaintiff was nonsuited in a cause in which he had given defendant notice to produce a lease, and afterwards defendant assigned the lease, and on a second trial plaintiff again gave defendant's attorney notice to produce it, and was then told by him of the assignment, it was held that secondary evidence was inadmissible and a *subpanâ* necessary. *Knight v. Martin*, Gow, 103. Where a paper had been delivered to a third person under whom the defendant justified in an action of trespass, and by whose directions he acted, a notice to produce, served upon the defendant, was held not sufficient to authorise the admission

of secondary evidence. *Evans v. Sweet*, Ry. & M. 83. It is said, however, in B. N. P. 254, that "if it were proved that the deed came into the hands of the defendant's brother, under whom the defendant claims, a copy ought to be read, even though the defendant have sworn in an answer in Chancery that he has not got the original." For this the learned author refers to *Thurston v. Delahay*, Hereford Ass. 1744; *Pritchard v. Symonds*, Hereford, 1744; *Bartlett v. Gawler*, 14 G. 2, K. B. But the statement is rather loose. When a document is in the hands of a person who holds it as stakeholder between the defendant and a third party, the notice to produce is not sufficient to let in secondary evidence; *Parry v. May*, 1 M. & Rob. 279; for though it need not be shown that the document is in the actual possession of the party, it must be in the hands of some one who is bound to give up possession to him. S. C. See also *Wright v. Bunyard*, 2 F. & F. 193.

The question whether there is sufficient proof of possession in the opposite party, is in general solely for the judge; and, where the notice to produce is given by the plaintiff, the defendant may interpose with evidence to disprove possession; and such evidence (being, in fact, for the information of the judge) gives the plaintiff no reply to the jury. *Harvey v. Mitchell*, 2 M. & Rob. 366. Notice to produce a book containing the terms of an agreement was served on defendant; at the trial defendant produced such a book, but plaintiff denied that it was the right one, though defendant denied possession of any other; the question of the existence of another was held to be for the judge, but he might, by consent, take the opinion of the jury on it as an interlocutory issue. *Froude v. Hobbs*, 1 F. & F. 612. "Where the objection to the reading of a copy concedes that there was primary evidence of some sort in existence, but defective in some collateral matter, as, for instance, where the objection is a pure stamp objection, the judge must, before he admits the copy, hear and determine whether the objection is well founded. But where the objection goes to show that the very substratum and foundation of the cause of action is wanting, the judge must not decide upon the matter, but receive the copy, and leave the main question to the jury." *Stowe v. Querner*, L. R., 5 Ex. 155, 158, 159, *per* Bramwell, B. This was an action on a policy of insurance, in which the existence of the policy was in issue; the defendant did not produce the policy at the trial pursuant to notice, and thereupon the plaintiff put in a copy received from defendant's broker; the defendant objected, and offered evidence to show that there never was an original policy, but the judge admitted the copy. The evidence was subsequently given, and the judge left it to the jury to say whether the defendant had executed a stamped policy. The jury found in the affirmative. It was held that the question was rightly left to them, inasmuch as if the judge himself had decided it he would have decided the main issue between the parties.

*Notice to produce; form of.*] A notice to produce must now be in writing, as Rules, 1883, O. xxxii. r. 8, specifies the form of a notice to produce, and O. lxvi. r. 1, provides that "all notices required by these rules shall be in writing, unless expressly authorised by the court or a judge to be given orally." It is not easy to say precisely to what extent the notice to produce a document ought to define it. Several documents are generally required, and the practice is to include them all in one notice. It is also usual to give some particular description of the documents required, but it is better to give a general description than to risk giving an erroneous one. A notice to produce "all letters written by plaintiff to defendant relating to the matters in dispute in this action" (*Jacob v. Lee*, 2 M. & Rob. 33, Pattenon, J.), or "all letters written to, and received by, plaintiff between 1837 and 1841, both inclusive, by and from the defendants, or either of them,

and all papers, &c., relating to the subject-matter of this cause" (*Morris v. Hauser*, *Id.* 392, *Ld. Denman*, C.J.), has been held sufficient to let in secondary evidence of a particular letter not otherwise specified. So in *Rogers v. Custance*, *Id.* 179, *Ld. Denman*, C.J., held a notice to produce "all accounts, papers, and writings in any way relating to the matters in question in this case" sufficiently to particularise a written account of the work done by the plaintiff, delivered to the defendant, and admitted by him to be correct; affirmed by Q. B. *Id.* 181. And in the case of *Conybeare v. Farries*, L. R., 5 Ex. 16, a notice to produce "all letters relating to your tenancy of a room, &c." was held sufficient to include a letter which, with the plaintiff's reply, constituted the tenancy. The notice, must not, however, be too general, as "all letters." *Gardner v. Wright*, 15 L. T. 325, *Blackburn*, J. See also *Jones v. Edwards*, M'Cl. & Y. 139. If the title of the cause be misdescribed in the notice, it has been held bad; *Harvey v. Morgan*, 2 Stark. 19; but *semb.* no title at all was necessary, and there were other grounds of decision in this case; nor was there in that case any ground for supposing that the misdescription could mislead. In a later case, where the notice was entitled in a wrong court, it was considered sufficient. *Lawrence v. Clark*, 14 M. & W. 250. Notice to produce a letter purporting to enclose an account is sufficient notice to produce the account. *Engall v. Druce*, 9 W. R. 536, E. T. 1861, C. P.

[*Notice to produce; service of, on whom.*] In general it is sufficient to serve the notice to produce on the solicitor or agent of the party. *Cates v. Winter*, 3 T. R. 306. Indeed, it seems more proper to do so where there is a solicitor. *Houseman v. Roberts*, 5 C. & P. 394. But notice served on the party is sufficient. *Hughes v. Bull*, 8 Dowl. 315. A notice to produce papers not necessarily connected with the cause, served on the solicitor so late as to prevent the party (*i.e.*, his client) from receiving it in time before the trial, is not good. *Vice v. Anson*, *Lj.*, M. & M. 96. Where the solicitor has been changed, a notice to produce served on the first solicitor before the change will entitle the party to call for production of the paper. *Doe d. Martin v. Martin*, 1 M. & Rob. 242. It is sufficient to leave the notice with the servant of the party at his dwelling-house. *Evans v. Sweet*, Ry. & M. 83, 84, *per Best*, C.J.

[*Notice to produce; time and place of service.*] The proper time and place of service of a notice to produce will depend on the circumstances of the case. The notice must be such as to satisfy the judge that the party called upon to produce the document might, by using reasonable diligence, have done so. Service of the notice, upon the wife of the defendant's attorney in a town cause, late in the evening before the trial, was held insufficient. *Doe d. Wartney v. Grey*, 1 Stark. 283. So service in the attorney's office letter-box late over-night. *Lawrence v. Clark*, 14 M. & W. 250. But notice to produce a letter, served on the attorney of the party on the evening next but one before the trial, was ruled to be sufficient, though the party was out of England; the presumption being that, on going abroad, the party had left with his attorney the papers necessary for the conduct of the trial. *Bryan v. Wagstaff*, Ry. & M. 327. See also *Aflalo v. Fourdrinier*, M. & M. 335, n. A notice served on the 10th of April, the trial being on the 14th, was ruled to be sufficient to let in secondary evidence of letters written eighteen years back, and addressed to the defendant, a foreigner, at his residence abroad. *Drabble v. Donner*, Ry. & M. 47. A notice to produce certain deeds was served on an attorney in Essex on Saturday, Monday being the commission day; he fetched them from London; on Monday evening notice was given to produce another deed; the attorney said it was in London,

but should be fetched if the party would pay the expense of the journey; no offer to pay was made, and the trial came on on Thursday: the second notice was held insufficient. *Doe d. Curtis v. Spitty*, 3 B. & Ad. 182. Notice served on the attorney at his office on the evening before the trial, at 7 h. 30 m. P.M., was held insufficient to let in secondary evidence of a letter in his client's possession. *Byrne v. Harvey*, 2 M. & Rob. 89. And now, by Rules, 1883, O. kv. r. 11, service of notices shall be made before 6 P.M., on every day but Saturday, when it must be before 2 P.M., otherwise it will be deemed service on the next following day, or on Monday, respectively. This rule includes notices to produce, at least when served on solicitors. *Sed quare*, if it apply to such notices as the above given at assizes or sittings at Nisi Prius? In a town case, both party and attorney living there, service at 7 P.M. over-night was held sufficient by Alderson, B. *Leap v. Butt*, Car. & M. 451; *Meyrick v. Woods*, *Id.* 452.

Notice to produce must in general be served before the commission day, when parties are living away from the assize town; *Twist v. Johnson*, 1 M. & Rob. 259; *accord. R. v. Ellicombe*, *Id.* 260; but there seems to be no inflexible rule as to time; for where both attorney and client lived in the assize town, a notice served two days before trial, though after the commission day, has been held sufficient; *Firkin v. Edwards*, 9 C. & P. 478; and where a paper might be expected to be in the solicitor's hands, a notice on him at his office a day before the trial of a town cause may be good. *Gibbons v. Powell*, *Id.* 634. A three days' notice was held sufficient in the case of letters written by defendant to a person in New South Wales, where long litigation on the subject of them made it presumable that they had been remitted to him in this country. *Sturge v. Buchanan*, 10 Ad. & E. 598. But in one case a notice served on a defendant shortly before the assizes to produce a letter written to his firm at Bombay, where their only place of business was, was held insufficient. *Ehrensperger v. Anderson*, 3 Exch. 148. Service of a notice on Sunday is probably bad; or, at all events, will only operate as service on the next day. *Hughes v. Budd*, 8 Dowl. 315, 317. The notice may be served even after the trial has commenced, if there be time to produce before the adjournment day. *Sturm v. Jeffrey*, 2 Car. & K. 442.

All the cases prior to *Dwyer v. Collins*, 7 Exch. 639; 21 L. J., Ex. 225, *ante*, p. 8, ought now to be considered with reference to that case. It had formerly been sometimes thought that the object of a notice to produce a document was to inform the opposite party of the intention to use it, but this notion was entirely repudiated in that case after full consideration. And it was there held that the object of the notice to produce was merely to give the party holding the document an opportunity to produce it, if he wished, and, in default of his doing so, to enable the party giving the notice to give secondary evidence of its contents. And on this ground the court held that the attorney of one of the parties present in court, and having the document with him, could be called upon, then and there, to produce it, and if he did not do so, that secondary evidence was admissible.

After a new trial is ordered it is not necessary to serve fresh notices to produce, those served on the former trial being available. *Hope v. Beadon*, 17 Q. B. 209; 21 L. J., Q. B. 25.

[*Notice to produce; effect of.*] If the party refuse to produce the papers required, such a circumstance is not of itself evidence against him; it merely entitles the other party to give secondary evidence. *Cooper v. Gibbons*, 3 Camp. 363; *Lawson v. Sherwood*, 1 Stark. 315. The refusal to produce them is, however, matter for observation to the jury. *Semb. Ld. Lyndhurst, C.B., Bate v. Kinsey*, 1 C. M. & R. 41. But see *Doe d.*

*Bridger v. Whitehead*, 8 Ad. & E. 571. If the party giving the notice decline to use the papers when produced, this, though matter of observation, will not make them evidence for the adverse party; *Sayer v. Kitchen*, 1 Esp. 210; though it is otherwise if the papers are used or inspected by the party calling for them, and are material to the issues. *Wilson v. Bowie*, 1 C. & P. 10; *Calvert v. Flower*, 7 C. & P. 386; and see *Wharam v. Routledge*, 5 Esq. 235. Notice to produce papers will not entitle the party who gives it to cross-examine a witness as to their contents; *Graham v. Dyster*, 2 Stark. 23; except after refusal to produce. If the party refuse, he cannot afterwards use the original either to contradict the secondary proof; *Doe d. Thomson v. Hodgson*, 12 Ad. & E. 135; or to show that there are attesting witnesses who ought to be called; *Jackson v. Allen*, 3 Stark. 74; *Edmonds v. Challis*, 7 C. B. 134; or to refresh the memory of a witness; *Till v. Ainsworth*, Bristol, 1874, Wilde, C.J., *M.S.*; or it seems for any purpose, *Collins v. Garbon*, 2 F. & F. 47, Byles, J. He is, in effect, bound by any legal and *satisfactory* evidence produced on the other side.

This principle has been extended by Rules, 1883, O. xxxi. r. 15, which provides that, "Every party to a cause or matter shall be entitled at any time, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such cause or matter unless he shall satisfy the court or a judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the court or judge shall deem sufficient for not complying with such notice; in which case the court or judge may allow the same to be put in evidence on such terms as to costs and otherwise as the court or judge shall think fit." Rules 16—18 regulate the procedure under this rule. See hereon *Quilter v. Heatly*, 23 Ch. D. 42, C. A., and *Roberts v. Oppenheim*, 26 Ch. D. 724, C. A. "Pleadings" include particulars, *Cass v. Fitzgerald*, (1884) W. N. 18, Mathew, J.; for these "are really supplemental to the pleadings," *Milbank v. Milbank*, (1900) 1 Ch. 376, 385, *per* Vaughan Williams, L.J. And "affidavits" include answers to interrogatories, *Moore v. Peuchey*, (1891) 2 Q. B. 707.

[*General nature of secondary evidence.*] There are no degrees of secondary evidence; or, in other words, if the production of the original document is dispensed with, its contents may be proved by the same evidence as any other fact is capable of being proved, and no other restriction is laid upon the party producing the evidence, as to the kind of evidence which he shall produce for this purpose, except that which arises from the risk of having it treated as unsatisfactory by the jury. This is what a jury would very probably do, and might possibly by a judge be advised to do, if it were patent that more satisfactory evidence was available to the party than that which he had thought fit to produce. *Doe d. Gilbert v. Ross*, 7 M. & W. 402.

The only exception is where, as in the case of public documents hereafter to be noticed, a special kind of secondary evidence is substituted for the original. But even in this case, if good reason can be shown why neither the original evidence nor the substituted evidence can be produced, secondary evidence of the ordinary kind will be admissible. 1 Taylor, *Evid.*, 10th ed. § 552; *Thurston v. Slatford*, 1 Salk. 285; *Macdougall v. Young*, Ry. & M. 392; *Anon.*, 1 Vent. 257.

*Proof of documents by copies.*] It is a general custom, especially of persons in business, to keep copies of all the more important documents relating to the matters in which they are engaged. And there is no doubt that a well-authenticated copy is by far the most satisfactory substitute for the original document.

But, of course, no copy whatever is admissible in evidence unless its accuracy be sworn to, or there be some presumption attached to it from which its accuracy may be inferred. *Fisher v. Samula*, 1 Camp. 190. It is not necessary to call the very person who wrote the copy; any person who can testify on oath to the accuracy of it is sufficient. *Everingham v. Roundell*, 2 M. & Rob. 138.

A copy of a letter taken by a copying machine, though still only a copy, will be presumed to be a correct copy. *Nodin v. Murray*, 3 Camp. 228; *Simpson v. Thoreton*, 2 M. & Rob. 433. And such copy may be used as an admission. *Nathan v. Jacob*, 1 F. & F. 452. As to the use of an unstamped copy or part as secondary evidence of an original or part, see *Stamps—Copy and Duplicate*, *post*, pp. 252, 255. Where the plaintiff gave the defendant notice to produce certain letters written by the defendant to a third party, and a letter book containing copies thereof, and the defendant consented to admit the copies and produce the book: held, that the copies when produced must be presumed to be correct. *Sturge v. Buchanan*, 10 Ad. & E. 598. An entry by the plaintiff's deceased clerk in a letter book, purporting to be a copy of a letter from the plaintiff to the defendant, is presumed to be correct, proof being given that, according to the course of business, letters of business written by the plaintiff were copied by this clerk. *Pritt v. Fairclough*, 3 Camp. 305; *Hagedorn v. Reid*, *Id.* 377. See further *Hearsay—Entries in course of business*, *post*, p. 59.

Among instances in which copies, though not verified by oath, are admissible, are the following:—a very old instrument purporting to be a copy or abstract of a conveyance, and which for many years had gone along with the possession of the land, was admitted in evidence without proving it to be a true copy. B. N. P. 254. A copy of an old decree in Chancery, establishing certain customs as against the lord of the manor, found among the muniments of his successor, was held to be admissible and presumed to be correct, against the successor, on account of its place of deposit. *Price v. Woodhouse*, 3 Exch. 616. See further *Lauderdale Peerage*, 10 Ap. Ca. 722 *et seq.*

An old ledger or cartulary of an abbey, containing amongst other things an account of the several endowments, and found in the possession of the person who had succeeded to part of the abbey estates, was admitted as secondary evidence of the endowments, search having been made for the original endowment. *Bullen v. Michel*, 2 Price, 399; 4 Dow, 297. So also in *Williams v. Wilcox*, 8 Ad. & E. 314, a copy of a grant in an old cartulary seems to have been held admissible as secondary evidence. It is not clear whether the admission of old monastic cartularies stands on the same footing as that of Episcopal Registers, mentioned *post*, p. 215 (*sub tit. Effect of Documentary Evidence—Bishop's Registers*), or of old copies and abstracts already referred to. In either case the antiquity of the document, and the inevitable exposure to destruction and loss of very old originals, gave them a title to reception, which recent unexamined copies cannot claim; and the known usage of preserving verbatim enrolments and registers of the title deeds of religious houses imparts to such collections, in some sort, an official character. Such copies, however, have never been admitted unless traced to the custody of some grantee of the corporate lands, and tendered as evidence in support of ancient possession, or preserved among the crown records as muniments of its title. If they come from custody unconnected with the

lands, and even from a public national library, they are inadmissible. *Swinerton v. Stafford*, *Mqs. of*, 3 Taunt. 91; *Potts v. Durant*, 3 Anst. 789. See further *Doe d. Padwick v. Wittcomb*, 6 Exch. 601; 20 L. J., Ex. 297; 4 H. L. C. 425; and *Proof of Documents—Custody of Ancient Writings*, *post*, p. 102.

Where a will was lost the register or ledger book of the Ecclesiastical Court, or a copy of it, has been admitted as secondary evidence of a will of lands. B. N. P. 246. It is presumed that in this last case the will was of personal as well as real estate. See further, *Proof of Probate*, *post*, pp. 118, 119. Where the assignment under a commission of bankrupt was lost before it was enrolled pursuant to the old Act, 6 G. 4, c. 16, s. 96, the counterpart of it was admitted as secondary evidence. *Giles v. Smith*, 1 C. M. & R. 462.

As to the admissibility of secondary evidence where the original document has been attested, *vide Proof of Documents—Proof of attested deed by secondary evidence*, *post*, p. 139.

In numerous instances copies of public books and registers are good evidence of documents which are in existence without imposing any obligation to produce, or even to account for the non-production of, the originals. This sort of evidence is no doubt secondary in its nature, but is allowed by common law or statute on the ground of public convenience; *vide Proof of Documents*, *post*, p. 96.

#### ORAL EVIDENCE TO EXPLAIN OR ADD TO DOCUMENTS.

The rule of law is clear that, where a contract is reduced into writing, it is presumed that the writing contains all the terms of it, and evidence will not be admitted of any previous or contemporaneous oral agreement which would have the effect of adding to or varying it in any way. This is a rule of evidence at common law. The Statute of Frauds, and the Sale of Goods Act, 1893, s. 4, also require that certain contracts should be in writing, and therefore, by implication, evidence relating to such contracts which is not in writing is excluded. In other cases it is the duty of certain officers to record, in a manner more or less solemn, what is said or done; as in the case of records of courts of law, or depositions taken before magistrates on a criminal charge. How far such authentic memorials are conclusive is not very well settled, but they are certainly so in some cases. It is obvious that evidence might frequently be objected to as infringing more than one of these rules, and, where several objections might be good, it is not always easy to see which of the two in a particular case forms the *ratio decidendi*. The cases which we are about to consider are those where the decisions have been founded, or seem likely to have been founded, on the common law rule now under consideration.

Another remark which appears to be useful is this: that although the principles upon which the admissibility of evidence in these cases depends would appear to be general as regards all written instruments, they have not been applied in a precisely similar manner to all classes of cases. But perhaps this may be partly explained in the following manner. Inasmuch as the question is whether the written memorandum *by its terms* excludes oral evidence, the admissibility of the latter is in all cases, to a certain extent, and in some exclusively so, a question of *interpretation* of the written document. And inasmuch as, in analogy to the use of technical terms, language, by being constantly used for the same purpose, almost always acquires conventional meaning, such corresponding groups of cases as have been mentioned naturally arise. In fact, there are two questions of interpretation to be solved, whenever oral evidence is objected to on the ground that it

contradicts a written instrument. First, the interpretation of the written contract as it stands; secondly, the interpretation of the clause which it is proposed to insert by way of addition or explanation, for that is really what is done; and hence the same question as that which is raised upon the admissibility of evidence, may be sometimes raised on the record by an objection in point of law.

Under a system of law like our own, in which there are scarcely any canons of interpretation, and in a country where contracts, especially mercantile contracts, are very loosely drawn, a decision as to the meaning of one contract is rarely an authority as to the meaning of another.

Bearing these remarks in mind, it will be found that the apparent conflict between many of the cases may be reconciled. A good example of the truth of this remark will be found in the cases of *Field v. Lelean*, and *Spartali v. Benecke*, *post*, pp. 23, 25.

The following decisions will illustrate what is said above. Thus where it was agreed in writing that A., for certain considerations, should have the produce of Boreham meadow, it was held that he could not prove that it was at the same time agreed orally that he should have both Milcroft and Boreham meadow. *Meres v. Ansell*, 3 Wils. 275; *Angell v. Duke*, 32 L. T. 320, E. T. 1875, Q. B.; and see *Hlope v. Atkins*, 1 Price, 143. So oral evidence is inadmissible to show that a note, made payable on a day certain, was to be payable on a contingency only. *Rawson v. Walker*, 1 Stark. 361; *Foster v. Jolly*, 1 C. M. & R. 703. So where a promissory note is expressed to be made payable on demand, oral evidence of a contemporary agreement, that it should not be paid until a given event happened, is inadmissible. *Moseley v. Hanford*, 10 B. & C. 729; see also *Besant v. Cross*, 10 C. B. 895; 20 L. J., C. P. 173; *Adams v. Wordley*, 1 M. & W. 374; *Henderson v. Arthur*, (1907) 1 K. B. 10, C. A. So the terms of a bill of lading cannot be varied by oral evidence. *Leduc v. Ward*, 20 Q. B. D. 475, C. A. But defendant may show that the agreement, though not under seal, was in the nature of an escrow, and signed on the express condition that a third party approved. *Pym v. Campbell*, 6 E. & B. 370; 25 L. J., Q. B. 277; *Davis v. Jones*, 17 C. B. 625; 25 L. J., C. P. 91; *Wallis v. Littell*, 11 C. B., N. S. 364; 31 L. J., C. P. 100; *Rogers v. Hadley*, 32 L. J., Ex. 241; *Lindley v. Lacey*, 17 C. B., N. S. 578; 34 L. J., C. P. 7, *cited post*, p. 18. Where the conditions of sale described the number and kind of timber trees to be sold by lot, but not the weight of the timber, it was held, in an action for the purchase-money, that oral evidence could not be given by the defendant that the auctioneer had, at the sale, warranted the timber of a certain weight. *Powell v. Edmunds*, 12 East, 6; *Shelton v. Livius*, 2 C. & J. 411. So oral evidence is inadmissible to alter the legal effect and construction of a written agreement. Thus, where an agreement for the sale of goods was silent as to the time of delivery, in which case the law implies a contract to deliver in a reasonable time, it was held that oral evidence of an agreement to take them away immediately was inadmissible. *Greaves v. Ashlin*, 3 Camp. 426; *Halliley v. Nicholson*, 1 Price, 404. So where a contract of sale, being silent as to time of payment, implies payment on delivery, proof of intended credit is inadmissible. *Ford v. Yates*, 2 M. & Gr. 549. Where the defendant, the day after a sale by him of flour to the plaintiff, sent a memorandum of the sale, "Sold White's X. S.;" and delivered "White's X. S." accordingly; it was held, that the plaintiff could not show that the contract was for "White's X. X. S." *Hamor v. Groves*, 15 C. B. 667; 24 L. J., C. P. 53. It is observable, however, that the four last cases were for non-performance of executory contracts within the Statute of Frauds, which ought to contain *all* the terms of agreement. So where the written agreement was to take goods on board a ship "forthwith," oral evidence to show that they were to be received on



board in two days was not allowed. *Simpson v. Henderson*, M. & M. 300. An absolute sale of a reversion was held not to be qualified by proof of an oral agreement to apportion the accruing rent. *Flinn v. Calow*, 1 M. & Gr. 589. Nor is a release, by proof of an oral agreement to reserve rights against a co-surety. *Mercantile Bank of Sydney v. Taylor*, (1893) A. C. 317, J. C. Parol evidence is not in general admissible to vary the terms fixed for payments to be made under a mortgage deed. *Williams v. Stern*, 5 Q. B. D. 409, C. A., disapproving of *Albert v. Grosvenor Investment Co.*, L. R., 3 Q. B. 123. As to rectification of a deed or writing on the ground of common mistake, see *Johnson v. Bragge*, (1901) 1 Ch. 28, and *post*, p. 320.

But in order to exclude oral proof of a contract, the writing must purport to be a *complete contract*. Therefore where a written order for goods was sent without mentioning a time of payment, and they were delivered with an invoice accordingly, it was ruled in an action for goods sold, that an oral agreement for six months' credit might be proved; for the order *per se* was no contract, but only evidence of some of the terms of one. *Lockett v. Nicklin*, 2 Exch. 93. So where a written proposal was not accepted, oral evidence of the terms of the contract is admissible. *Scones v. Dowles*, 29 L. J., Ex. 122. See also *Eden v. Blake*, 13 M. & W. 614, *post*, p. 29. And it would seem that when a writing is not *ex necessitate legis* (as under the Stat. of Frauds, s. 4, or Sale of Goods Act, 1893, s. 4), the *apparent deficiencies* of a written agreement as to some particulars of price, time of delivery, &c., may be supplied by oral evidence, although the jury would be directed to presume a reasonable price, or reasonable time, &c., in the absence of such evidence; for such evidence does not *contradict* or *vary* the written document as far as it goes; and it may be that the parties themselves did not intend to commit to paper the *whole* of the contract. See *Valpy v. Gibson*, 4 C. B. 837. So evidence of what took place prior to the sale of goods is admissible to raise a warranty under the Sale of Goods Act, 1893, s. 14, although the contract was in writing. *Gillespie v. Chewy*, (1896) 2 Q. B. 59, *vide post*, pp. 487, 488. Where the Statute of Frauds, &c., apply, oral evidence to supply the intention of the parties would not be admissible, as we have seen above. See further the title *Action on Contract of Sale of Goods*, *post*, pp. 535, 536.

If a party sign an agreement in his own name he cannot afterwards defeat an action on it by proving that he signed only as agent for another. *Magee v. Atkinson*, 2 M. & W. 440; *Jones v. Littledale*, 6 Ad. & E. 486; *Higgins v. Senior*, 8 M. & W. 831. Where A. signed a charterparty as shipowner, and was so designated in it, A.'s principal could not sue on it, and prove that he was owner, and not A. *Humble v. Hunter*, 12 Q. B. 310. But if a sold note be in the form "sold to our principals," oral evidence is admissible to show who those principals are. *Cropper v. Cook*, L. R., 3 C. P. 194. Where an instrument professed to be made between plaintiff and A., and signed by B. as agent for A., it was held that B. was not liable on the contract, if it turned out that he had no authority to bind A. *Jenkins v. Hutchinson*, 13 Q. B. 744. In an action on a written contract between plaintiff and B., oral evidence is admissible, in behalf of the plaintiff, to show that the contract was in fact, though not in form, made by B. as agent of the defendant; for the evidence tends not to discharge B., but to charge the dormant principal; *Wilson v. Hart*, 7 Taunt. 295; and it is admissible although B. named his principal at the time he entered into the contract. *Calder v. Dobell*, L. R., 6 C. P. 486, Ex. Ch. Where a deed between A. and Y., which contained a clause, "it is further understood between the parties that S. guarantees payment to Y. of all moneys due to them under this contract," was executed by S. on behalf of A. under a power of attorney, thus, "P.P.A.—A.—S.," oral evidence was held admissible to show that S.

signed on behalf of himself as well as for A., as this was doubtful on the face of the agreement. *Young v. Schuler*, 11 Q. B. D. 651, C. A. And see further 2 Smith's L. C., *Thompson v. Davenport, in notis*; and *Variance, post*, pp. 92, 93.

A patent ambiguity is to be explained by the judge, and not left to the jury. Thus, although "months" denote at law "lunar months" the context may show "calendar months" to have been intended, this is a question for the judge; but extrinsic evidence is admissible that a word is used in a sense peculiar to some trade, business, place, or local usage, in which case it is for the jury to find the meaning. *Simpson v. Margitson*, 11 Q. B. 23; *Bruer v. Moore*, (1901) 1 Ch. 305; *Smith v. Thompson*, 8 C. B. 44. See *Hills v. London Gas Co.*, 27 L. J., Ex. 60, where it seems to have been considered that the judge must construe the contract, though its terms be technical or scientific, and that expert evidence on the point would be for the information of the judge, and not of the jury. In that case a patent for the use of *hydrate* of iron was contested, by showing that the use of *carbonate* of iron was not new, and that, in commerce, the scientific distinction between those two substances was not preserved, and Pollock, C.B., thereupon directed a nonsuit. But if their commercial identity had been disputed at the trial, there would have been a question for the jury, and on this ground, *ut semble*, a new trial was granted.

There are cases in which an oral agreement may exist between the parties to a written agreement on a matter collateral and superadded to it, so that both may well subsist together. In such cases oral evidence of the collateral matter is admissible, for the original contract is unaffected by it. Orally, where the parties to an indenture of charterparty afterwards agreed orally for the use of a ship at a period before the charterparty attached, oral evidence of this was held admissible in an action on this latter agreement. *White v. Parkin*, 12 East, 578. Where there was an oral agreement by the landlord to pay 20*l.* towards repairs in consideration that plaintiff would become tenant, and plaintiff accepted a lease, and did the repairs, which defendant, the landlord, then promised to repay; held, that plaintiff could recover on an account stated, although the lease itself contained no such agreement. *Seago v. Deane*, 4 Bing. 459. So where a tenant executed a lease, which reserved the right of shooting to the lessor, on an oral promise by the latter that he would keep down the game: held, that the tenant could sue the lessor for breach of this promise. *Morgan v. Griffith*, L. R., 6 Ex. 70; *Erskine v. Adeane*, L. R., 8 Ch. 756. The decision in *Mann v. Nann*, 43 L. J., C. P. 241, is to the like effect; it was, however, doubted by Blackburn, J., in *Angell v. Duke*, 32 L. T. 320, E. T. 1875, Q. B. So evidence may be given of a contract made by a lessor with the lessee on the occasion of a lease of a house, as to the user of the adjacent houses of the lessor. *Martin v. Spicer*, 34 Ch. D. 1, C. A., affirmed in D. P. on other grounds, 14 Ap. Ca. 12. On the sale of land by auction, evidence was admitted of an oral statement by the auctioneer that there was a certain right of way to the land. *Brett v. Clowser*, 5 C. P. D. 376. Where A. orally agreed with a railway company that they should carry his cattle to K. station, and at the same time signed, without noticing its contents, a consignment note for the carriage of the cattle to an intermediate station, E.; it was held that the oral agreement was admissible in evidence as not contradicting, but being supplemental to, the written contract. *Malpas v. L. & S. W. Ry. Co.*, L. R., 1 C. P. 336. Where the plaintiff agreed in writing to purchase certain furniture of the defendant, and by that agreement the defendant was authorised to settle an action of *C. v. L.*, it was held that, in an action for not settling the action of *C. v. L.*, evidence was admissible of a distinct oral agreement to settle that action, made immediately before the written agreement. *Lindley v. Lacey*, 17 C. B.,

N. S. 578; 34 L. J., C. P. 7. These cases are plainly not exceptions to the general rule.

Nor is it an exception to this general rule that it does not extend to the exclusion of all the *legal incidents* which by the general law merchant, or common law, attach to certain instruments. Thus, the days of grace allowed to the parties to bills; the necessity of notice of dishonour, &c., are not specified on the bill; so of implied warranties on policies, &c. In such cases no evidence is admissible; for the court will take notice of all legal incidents. It is otherwise in regard to particular usages or local customs, which will be mentioned hereinafter. *Vide post*, pp. 21 *et seq.*

*Oral evidence, when admissible to prove a consideration, or to vary the date, or description, &c.*] The cases as to proof of consideration stand somewhat apart, and it would be dangerous to draw any inference from them with respect to the general law upon the subject under discussion. It is constantly the practice to show that no consideration has been given for a bill or note, although the instrument bears on its face the words "value received," which clearly import a consideration for the promise contained in the instrument. Upon a contract under seal it is not, as in a contract not under seal, generally necessary to prove that there was any consideration, or the nature of it. But if the consideration come in question at all, it seems generally to have been permitted to inquire into it, notwithstanding any averment in the deed. Thus where the considerations mentioned in a deed were 10,000*l.*, and natural love and affection, an issue was directed to inquire whether natural love and affection formed any part of the consideration. *Filmer v. Gott*, 4 Bro. P. C. 230. So a deed operating under the Statute of Uses, and reciting no consideration, may be supported by showing that a pecuniary one in fact passed. *Mildmay's case*, 1 Rep. 176. So a deed which recites only a pecuniary consideration, may be shown to have been also founded on the consideration of marriage. *Id.*; *Villers v. Beaumont*, Dyer, 146 *a.*; *Tull v. Parlett*, M. & M. 472; and *Clifford v. Turrill*, 1 Y. & C. C. C. 138; 14 L. J., Ch. 390; S. C., on appeal, *Id.* 396. So evidence is admissible to show that the consideration stated in a bill of sale is not the true consideration, and that it is, therefore, as against trustees in bankruptcy and execution creditors, void under the Bills of Sale Act, 1878, s. 8. *Ex. pte. Carter*, 12 Ch. D. 908. The same principle applies to the Bills of Sale Act, 1882, s. 9 and schedule; see *Cochrane v. Moore*, 25 Q. B. D. 57, 73, C. A. A guarantee purported to be "in consideration of your *having* advanced this day," &c.; oral evidence was admitted to show that the advance was contemporaneous with the guarantee, and was therefore a good consideration. *Goldshede v. Swan*, 1 Exch. 154. See also the following cases in which words of guarantee, founded on a consideration ambiguously expressed, so as to import either a past or future credit, were explained by extrinsic evidence that the credit was *in fact* a future or continuing credit; or that the consideration and guarantee were simultaneous. *Edwards v. Jerons*, 8 C. B. 436; *Colbourn v. Dawson*, 10 C. B. 765; 20 L. J., C. P. 151; *Bainbridge v. Wade*, 16 Q. B. 89; 20 L. J., Q. B. 7; *Hesfield v. Meadows*, L. R., 4 C. P. 595; *Jaurie v. Schotfield*, *Id.* 622. See *Morrell v. Cowan*, 7 Ch. D. 151.

A deed takes effect from the delivery, and not from the date; therefore oral evidence was allowed to show that a lease dated on Lady Day, 1783, and purporting to commence on *Lady Day last past*, was in fact executed after the date, and that the term therefore commenced on Lady Day, 1783, and not 1782. *Steele v. Mart*, 4 B. & C. 272. In such case there is no real contradiction. The same consideration will also explain the ground on which oral proof was permitted to be given by the defendant that the plaintiff had made certain admissions on his examination before commissioners of bankrupt,

although the written examination produced contained no such admissions. *Rowland v. Ashby*, Ry. & M. 231. So, although the written information taken by a magistrate on a criminal charge is the best evidence of such information, yet any additional statements made by the informant, and not reduced to writing, may be proved by oral evidence. *Venafrá v. Johnson*, 1 M. & Rob. 316.

Although no oral evidence can be used to add to or detract from the description in a deed, or to alter it in any respect, yet such evidence is always admissible to show the condition of every part of the property, and all other circumstances necessary to place the court, when it construes an instrument, in the position of the parties to it, so as to enable it to judge of the meaning of the instrument. *Baird v. Fortune*, 4 Macq. 127, 149, *per* Ld. Wensleydale; *Magee v. Lavell*, L. R., 9 C. P. 107, 112; *Devonshire, Dk. of v. Pattinson*, 20 Q. B. D. 263, C. A.; *Roe v. Siddons*, 22 Q. B. D. 224, C. A. "It may be laid down as a broad and distinct rule of law that extrinsic evidence of every material fact which will enable the court to ascertain the nature and qualities of the subject-matter of the instrument, in other words to identify the persons and things to which the instrument refers, must of necessity be received." 2 Taylor, Evid., 6th ed. § 1082; 10th ed. § 1194, cited in *Krell v. Henry*, (1903) 2 K. B. 740, 753, *per* Vaughan Williams, L.J. See *post*, p. 30. See also *Inglis v. Battery*, 3 Ap. Ca. 552, D. P. The same rule applies in the case of a will, *vide post*, p. 31; and see *Way v. Hearn*, 13 C. B., N. S. 292; 32 L. J., C. P. 34; *Newell v. Radford*, L. R., 3 C. P. 52; and *Lewis v. Gt. W. Ry. Co.*, 3 Q. B. D. 195, C. A. See, however, *Stanton v. Richardson*, L. R., 7 C. P. 428, 434, *per* Brett, J.

Mere words of description in a deed of conveyance, not operating by way of estoppel, may be contradicted by oral evidence; thus the lessee of land, described as "meadow," may prove it to have been arable in an action by the lessor for ploughing it up; *Skipwith v. Green*, Stra. 610; or he may show that land described as containing 500 acres does not in fact contain so many: S. C. as reported Bac. Ab. Pleas I. 11; or contains many more. *Jack v. McIntyre*, 12 Cl. & F. 151; *Manning v. Fitzgerald*, 29 L. J., Ex. 24.

In a settlement case, where the deed of conveyance stated the consideration of the purchase to be 28*l.*, oral evidence was admitted to show that the consideration was in fact 30*l.*; *R. v. Scammonden*, 3 T. R. 474; and that money, stated in a deed of apprenticeship to have been paid by J. M., was in fact parish money. *R. v. Llangunnor*, 2 B. & Ad. 616. In these cases, however, the oral proof was admissible, not on the ground of its consistency with the writing, but because the recital in the deed was *res inter alios*, which the parishes were not estopped from correcting even by testimony inconsistent with the writing. So a parish may show a settlement by renting a tenement in parish B., though the lease describes it as in parish A. *R. v. Wickham*, 2 Ad. & E. 517.

[*Oral evidence, admissible to prove fraud, illegality, or error.*] Where fraud is imputed, any consideration or fact, however contrary to the averment of a deed, may be proved to show the fraudulent nature of the transaction; B. N. P. 173; *Paxton v. Popham*, 9 East, 421; for fraud is a matter extrinsic and collateral, which vitiates all transactions, even the most solemn. Thus, in order to set aside a will, oral evidence may be given of what passed at the signing, and what the testator said, to show that his signature was obtained by fraud. *Doe d. Small v. Allen*, 8 T. R. 147; and *vide post*, p. 145. And, in general, matter which in law avoids an instrument, whether it be fraud, forgery, duress, illegality, &c., may be proved orally, however contradictory to its tenor, provided the pleadings be adapted to such evidence.

See *Doe d. Chandler v. Ford*, 3 Ad. & E. 649; and 1 Smith's L. Cases, *Collins v. Blantern*, in notis.

Evidence is sometimes admissible to show a mistake in a writing; thus a contract, usurious on the face of it, might have been explained by showing it was made so by a clerical error. *Anon.*, Freem. 253; *Booth v. Cooke*, Id. 264. So a house, misdescribed in a lease as No. 38, may be shown to be really No. 35. *Hutchins v. Scott*, 2 M. & W. 816, per Cur.; *Cowen v. Truefitt*, (1899) 2 Ch. 309, C. A. See also *Hutchin v. Groom*, 5 C. B. 515. But where a verdict and judgment were given in evidence to prove a public way, the court will not admit proof that the verdict was entered erroneously by the mistake of the officer. *Reed v. Jackson*, 1 East, 355. The record in the first action should have been amended by leave of the court. But where a N. P. record was put in evidence to prove damages in a suit against the plaintiff, and the *postea* did not show on which of two different counts the damages were in fact given, oral evidence was admitted to prove that they were recovered, substantially, on one of the counts only, this being no contradiction of the record, the verdict and damages having been entered generally. *Preston v. Peeke*, E. B. & E. 336; 27 L. J., Q. B. 424. Proof of a material and substantial error in the frame of a subsisting contract cannot in general be set up in an action upon it; *Perez v. Oleaga*, 11 Exch. 506; 25 L. J., Ex. 65; *Solvency Mutual Guarantee Co. v. Freeman*, 7 H. & N. 17; 31 L. J., Ex. 197; except by way of a claim for rectification under the J. Act, 1873, s. 24 (1-3), on the ground of common mistake. But there is no occasion to reform the contract where an agent is wrongly described as principal; *Wake v. Harrop*, 6 H. & N. 768; 30 L. J., Ex. 273; 1 H. & C. 202; 31 L. J., Ex. 451, Ex. Ch.; or where it has been completely executed according to the intention of the parties; *Steele v. Haddock*, 10 Exch. 643; 24 L. J., Ex. 78; *Luce v. Izod*, 1 H. & N. 245; 25 L. J., Ex. 307; *Vorley v. Barrett*, 1 C. B., N. S. 225; 26 L. J., C. P. 1; or where the full performance has become impracticable by reason of the default of the plaintiff. *Borrowman v. Rossel*, 16 C. B., N. S. 58; 33 L. J., C. P. 111. And in such cases the mistake will afford a defence without rectification. As to when rectification will be ordered, see Story, Eq. Jur. §§ 152 *et seq.*

*Oral evidence, when admissible to explain mercantile contracts and words of art.*] Where the parties have contracted in writing, in many instances oral evidence is admitted to prove an usage affecting the contract, on the ground that, where such usage exists, the parties must be taken to have made their contract subject to its operation. And such evidence is sometimes admitted as explanatory of the language of the writing, and sometimes as superadding a tacitly implied incident. Thus, oral evidence is always admitted to show the sense in which, according to the custom of merchants, a mercantile contract is to be understood. See 1 Smith's L. Cases, *Wigglesworth v. Dallison*, in notis. In such a case it is unobjectionable to ask a witness whether there is any generally understood meaning of certain words among persons engaged in the particular trade or commerce under investigation. *Robertson v. Jackson*, 2 C. B. 412. And such a question must be put to the witness before he is asked what he understands by the written contract to which it is meant to apply the usage. *Curtis v. Peck*, 13 W. R. 230, M. T. 1861, Ex. Ch. The usage may be excluded by the terms of the contract. *Brenda S.S. Co. v. Green*, (1900) 1 Q. B. 518.

Where a ship was warranted to depart with convoy, evidence of usage was admitted to show that this meant convoy from the usual place of rendezvous. *Lethulier's case*, 2 Salk. 443. So, to explain the meaning of "days" in a bill of lading; *Cochran v. Retbery*, 3 Esp. 121; to show that the Gulf of Finland is considered by mariners to be within the Baltic; *Uhide*

v. *Walters*, 3 Camp. 16; or the Mauritius to be an East Indian island. *Robertson v. Money*, Ry. & M. 75. So evidence was admitted to explain the term "privilege" in a contract between shipowner and captain; *Birch v. Depeyster*, 4 Camp. 385; and to show the received meaning of "mess pork of S. & Co." *Powell v. Horton*, 2 N. C. 668. Where the captain of a ship agreed to convey a boat of certain dimensions for the plaintiff, evidence was admitted on behalf of the captain that the practice was to remove the deck of such boats when put on board. *Haynes v. Holliday*, 7 Bing. 587. Apparent variances in bought and sold notes may be reconciled by the evidence of brokers. *Bold v. Rayner*, 1 M. & W. 343; *Kempson v. Boyle*, 3 H. & C. 763; 34 L. J., Ex. 191, cited *sub. tit. Action for not accepting Goods, post*, p. 535. Where it was represented to an insurer that the ship would sail from St. Domingo in October, he was permitted to show in his defence that this was understood among merchants to mean between the 25th and the end of October, whereas the ship sailed on the 11th. *Chaurand v. Angerstein*, Peake, 43. Oral evidence may be given to explain the meaning of the word *level* in a mining lease; *Clayton v. Gregson*, 5 Ad. & E. 302; and of the words "across the country" in a wager on a race. *Evans v. Pratt*, 3 M. & Gr. 759. In a contract for the purchase of "1,170 bales of gambier," it was held that it might be shown that by the usage of that trade a "bale" meant a compressed package, weighing about two cwt. *Gorrissen v. Perrin*, 2 C. B., N. S. 681; 27 L. J., C. P. 29. See also *Taylor v. Briggs*, 2 C. & P. 525. So where instructions were given by a principal residing out of England to his factor to sell corn, a custom in the London corn market to sell in the factor's own name is admissible to explain the instructions. *Johnston v. Usborne*, 11 Ad. & E. 549. On a sale of goods by a manufacturer who is not a dealer, evidence is admissible of a custom in the particular trade to deliver goods of another manufacturer. *Johnson v. Raylton*, 7 Q. B. D. 438, C. A. A sale of tobacco may be explained to be a sale by sample, by the general usage of the trade, although the bought and sold notes are silent as to sample. *Syers v. Jonas*, 2 Exch. 111. As to the variation, by usage, of a right or liability under the Sale of Goods Act, 1893, s. 5, see *In re Walkers, &c., & Shaw & Co.*, cited *post*, p. 541. An engagement by a public singer for three years, may be explained to mean three theatrical seasons. *Grant v. Maddox*, 15 M. & W. 737. Where a charterparty is signed by a shipbroker S. in the form "by telegraphic authority" of the charterer "as agent," this may be explained by usage to warrant only that S. had received a telegram which, if correct, authorised him to enter into such a charter. *Lilly v. Smales*, (1892) 1 Q. B. 456. In an action by a shipowner on a contract to pay freight at a certain rate per lb., defendant was allowed to show a custom of the trade at a particular port to allow three months' discount on freights on goods coming from certain ports. *Brown v. Byrne*, 3 E. & B. 703; 23 L. J., Q. B. 313. "After arrival" at a named island may be explained to mean after arrival at a place at sea some miles off the usual port, if it be a place of ordinary anchorage; and this is a question for the jury. *Lindsay v. Janson*, 4 H. & N. 699; 28 L. J., Ex. 315. Where by a charterparty the shipowner agreed to consign the ship to A. B., at Calcutta, "on the usual and customary terms," a custom may be proved for consignee to procure the homeward freight on commission; *Robertson v. Wait*, 8 Exch. 299; 22 L. J., Ex. 209; but where the charter provides that the consignment is to be "free of commission," and says nothing of usual terms, the charterer cannot set up such custom by oral evidence, in an action against the shipowner for not allowing the consignee to procure the homeward freight. *Phillipps v. Briard*, 1 H. & N. 21; 25 L. J., Ex. 233. "A full and complete cargo of sugar" may be explained to mean full and complete according to the customary mode of

packing and loading sugar at the port where it is loaded. *Cuthbert v. Cumming*, 11 Exch. 405; 24 L. J., Ex. 310, Ex. Ch. So “regular turns of loading,” or “in turns to deliver,” may be explained by local usage. *Leidemann v. Schultz*, 14 C. B. 318; 23 L. J., C. P. 17; *Robertson v. Jackson*, 2 C. B. 412; *Barque Quilpué v. Brown*, (1904) 2 K. B. 264, C. A. So the custom of the port as to when lay days commence; *Norden Steam Co. v. Dempsey*, 1 C. P. D. 654; or as to how running days are to be calculated; *Nielsen v. Wait*, 16 Q. B. D. 67, C. A.; or as to the course of delivery, where “the steamer is to be discharged as fast as she can deliver.” *The Jaederen*, (1892) P. 351. And a custom that in discharging long lengths of timber, the shipowner is bound to put them into lighters brought alongside, is not inconsistent with the terms of the charterparty that the timber shall be taken from alongside at the merchant’s expense. *Aktieselskab v. Ekman*, (1897) 2 Q. B. 83, C. A. “Fifty tons best palm oil, with a fair allowance for inferior oil, if any,” may be explained to be satisfied by the delivery of 50 tons, of which the greater part is inferior. *Lucas v. Bristow*, E. B. & E. 907; 27 L. J., Q. B. 364. A contract in writing to do stone and brickwork at the rate of “3s. per superficial yard of work 9 inches thick, and finding all materials, deducting all lights,” was held not to exclude a custom in the trade to reduce all brickwork for the purpose of measurement to 9 inches in thickness. *Symonds v. Floyd*, 6 C. B., N. S. 691. So a contract to do certain work and to deliver “a weekly account of work done” was held not inconsistent with a usage in the building trade, that this clause related not to all the work contracted to be done, but to that part only which was of a particular kind. *Myers v. Sarl*, 3 E. & E. 306; 30 L. J., Q. B. 9. Where there was a written contract for the sale of shares at a certain price, “for payment half in 2, half in 4 months,” it was held, that evidence was admissible that the seller was by usage not bound to deliver the shares until the appointed time for payment, unless the buyer chose to pay for them earlier. *Field v. Lelean*, 6 H. & N. 627; 30 L. J., Ex. 168, Ex. Ch. See the case of *Spartali v. Benecke*, *post*, p. 25, and observations thereon. The usage of a particular port, that the underwriters are not liable for general average in respect of the jettison of timber stowed on the deck, can be annexed to a policy making the underwriter liable for general average without restriction. *Miller v. Tetherington*, 6 H. & N. 278; 30 L. J., Ex. 217; 7 H. & N. 954; 31 L. J., Ex. 363, Ex. Ch. By a bill of lading of wool, freight was to be paid “at the rate of 80s. per ton of 20 cwt. gross weight, tallow and other goods, grain or seed, in proportion as per London Baltic printed rates;” evidence was admitted to show that by the usage of the trade this meant that 80s. per ton of 20 cwt. of tallow was to be taken as the standard by which the rate of freight on all other goods was to be measured. *Russian S. Navigation Trading Co. v. Silva*, 13 C. B., N. S. 610. The question whether a cargo “for shipment in June” was satisfied by a cargo which was loaded half in May and half in June, was held by Martin, B., and Lush, J. (*dub. Kelly, C.B., and Blackburn, J.*), to be a question for the jury. *Alexander v. Vanderzee*, L. R., 7 C. P. 530, Ex. Ch. See observations on this case in *Shand v. Bowes*, 2 Ap. Ca. 455, D. P. So, on a sale of goods to be paid for in from “6 to 8 weeks,” the question of the length of credit thereby allowed was left to the jury, the words apart from usage being insensible. *Ashford v. Redford*, L. R., 9 C. P. 20. A written agreement at a yearly salary and a bonus at the year’s end in case of the employer’s approval, may be qualified by proof of a trade custom to dismiss at a month’s notice. *Parker v. Ibbetson*, 4 C. B., N. S. 346; 27 L. J., C. P. 236; and see *Action for wrongful dismissal*, *post*, p. 516.

With reference to the evidence necessary to support an alleged usage,

it was said in *Ghose v. Manickchand*, 7 Moo. Ind. App. 263, 282, that "there needs not either the antiquity, the uniformity, or the notoriety of custom, which in respect of all these becomes a local law. The usage may be still in course of growth; it may require evidence for its support in each case; but in the result it is enough, if it appear to be so well known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract." The usage must be shown to be certain and reasonable, and so universally acquiesced in that everybody in the particular trade knows it, or might know it if he took the pains to inquire. *Plaice v. Alcock*, 4 F. & F. 1074, *per* Willes, J.; *Focall v. International Land Credit Co.*, 16 L. T. 637, *cor.* Byles, J.

Where it is attempted to engraft on a contract some usage of a particular trade or local custom, the opposite party is at liberty to disprove the usage or custom by the like evidence, and for that purpose to show other previous transactions in like cases between the same parties wherein the supposed usage or custom was not acted on. *Bourne v. Gatliffe*, 3 M. & Gr. 643.

If the usage exists, and it is not inconsistent with the written contract, it is precisely the same as if it were written in words attached to the contract, and it cannot be got rid of by proof of an oral agreement to waive or vary it. *Fawkes v. Lamb*, 31 L. J., Q. B. 98. See also *Burges v. Wickham*, 3 B. & S. 669; 33 L. J., Q. B. 17; *Clapham v. Langton*, 5 B. & S. 729; 34 L. J., Q. B. 46, Ex. Ch.

It has been said that "the words 'usage of trade' are to be understood as referring to a particular usage to be established by evidence, and perfectly distinct from that general custom of merchants, which is the universal established law of the land, which is to be collected from decisions, legal principles and analogies, not from evidence *in pais*, and the knowledge of which resides in the breasts of the judges." 1 Smith, L. C., 11th ed., p. 556. Thus, in *Suse v. Pompe*, 8 C. B., N. S. 538; 30 L. J., C. P. 75; *Meyer v. Dresser*, 16 C. B., N. S. 646; 33 L. J., C. P. 289, evidence of a general custom was not admitted to contradict the law merchant. That law has, however, been gradually developed by judicial decisions, ratifying the usages of merchants in the different departments of trade; *Goodwin v. Roberts*, L. R., 10 Ex. 337, 346, *per* Ex. Ch.; and "where a general usage has been judicially ascertained and established it becomes part of the law merchant which courts of justice are bound to know and recognise." *Id.* citing *Brandão v. Barnett*, 12 Cl. & F. 805, *per* Ld. Campbell. It is not easy to define the period at which a usage so becomes incorporated into the law merchant. See further, *post*, p. 83, and 1 Smith's L. C., 11th ed., pp. 556 *et seq.* See also *Kidston v. Empire Marine Insurance Co.*, L. R., 1 C. P. 535; L. R., 2 C. P. 357, Ex. Ch.

Proof of the usage of trade is not admissible to contradict the plain words of an instrument not used in a technical sense; as where a policy of insurance was "on the ship till moored at anchor 24 hours, and on the goods till discharged and safely landed," evidence of a usage that the risk on the goods, as well as the ship, expired in 24 hours, was held inadmissible to qualify the unequivocal words of the policy. *Parkinson v. Collier*, 2 Park. Ins. 8th ed. 653-4. So where a charterparty provides that the vessel is to deliver at H., "or so near thereto as she could safely get," a custom that the charterer should take delivery at H. only, is excluded. *Hayton v. Irwin*, 5 C. P. D. 130, C. A. See also *The Nifa*, (1892) P. 411; and *The Alhambra*, 6 P. D. 68, C. A. So a contract for payment in money cannot be explained to mean payment *in goods*; but it may be shown that goods were in fact accepted as cash in the particular transaction. *Smith v. Battams*, 26 L. J. Ex. 232. So where goods are sold under a memorandum to be paid for by bill, oral evidence is inadmissible to show that bill means



approved bill. *Hodgson v. Davies*, 2 Camp. 530. So in an action on a warranty of "prime singed bacon," oral evidence was rejected of a practice in the bacon trade to receive bacon in some degree tainted as "prime singed bacon." *Yates v. Pym*, 6 Taunt. 446; 2 Marsh. 141. So oral evidence is not admissible to explain the meaning of the words "more or less" in a mercantile contract; *semble*, *Cross v. Eglin*, 2 B. & Ad. 106; or to show that "cargo" and "freight" apply to passengers as well as goods; *Lewis v. Marshall*, 7 M. & Gr. 729; or to show that boats on the outside of a ship, slung upon the quarter, are not protected by a marine policy in the usual form on the ship and furniture; *Blackett v. R. Exchange Assur. Co.*, 2 C. & J. 244; or to show a custom within the port of London that the insurers of jettisoned goods are only liable for the share of the loss cast upon the owner of jettisoned goods in the general average statement; *Dickenson v. Jardine*, L. R., 3 C. P. 639; or to show that a contract to sell "ware potatoes" means a certain sort of "ware potatoes"; *Smith v. Jeffryes*, 15 M. & W. 561; or that on a contract to sell wool "to be paid for by cash in one month, less 5 per cent. discount," the vendor has a lien on it for payment by usage of the trade; *Spartali v. Benecke*, 10 C. B. 212; 19 L. J., C. P. 293; *Godts v. Rose*, 25 L. J., C. P. 61. The case of *Spartali v. Benecke*, *supra*, was a good deal observed upon by the Ex. Ch. in *Field v. Lelean*, 6 H. & N. 627; 30 L. J., Ex. 170; *ante*, p. 23; but the difference of opinion is not as to the principle, but as to the meaning of the contract and the effect of the custom. See also *Phillipps v. Briard*, 1 H. & N. 21; 25 L. J., Ex. 233; *ante*, p. 22. Oral evidence of what the parties meant by a provision in the sale of a cargo, that "14 days are to be allowed for delivery," was not admitted; but if evidence of a *general usage* explaining those words had been offered, it would perhaps have been admissible. *Sotilichos v. Kemp*, 3 Exch. 105. In a contract for the sale of tallow by defendant in the name of a broker who was his known representative, the defendant was not allowed to show a custom of trade upon such a contract to look to the broker for its completion. *Trueman v. Loder*, 11 Ad. & E. 589. But usage of trade is admissible to show that the broker is personally liable on a contract of sale on behalf of an undisclosed principal. *Hunfrey v. Dale*, 7 E. & B. 266; 26 L. J., Q. B. 137; E. B. & E. 1004; 27 L. J., Q. B. 390, Ex. Ch. See also *Cropper v. Cook*, L. R., 3 C. P. 194, 199. So where a broker sells goods "for and on account of the owner," evidence was held admissible of a usage of trade that a broker who does not disclose the name of his principal at the time of making the contract is personally liable. *Pike v. Ongley*, 18 Q. B. D. 708, C. A. See also *Hutchinson v. Tatham*, L. R., 8 C. P. 482. The evidence of such usages may be confirmed by evidence of a similar custom in a similar trade in the same place, *e.g.*, in the colonial market, to corroborate the usage in the fruit market. *Fleet v. Murton*, L. R., 7 Q. R. 126. So by evidence of a similar custom in the same trade at a neighbouring place. *Plaice v. Allcock*, 4 F. & F. 1074, *cor.* Willes, J. The distinction between these latter cases and *Trueman v. Loder*, *supra*, is founded on the rule that oral evidence may be given to establish the right or liability of an undisclosed principal, but not for the purpose of excluding from liability a person liable on the face of a written contract, for the effect of evidence admitted for this latter purpose would be to contradict the written document. But a custom that an agent's authority to underwrite policies is limited to a particular sum, is good, though the insured is not aware of the limitation. *Baines v. Ewing*, L. R., 1 Ex. 220. A clause in a contract of sale for the final settlement of any difference under the contract by the selling brokers is inconsistent with their personal liability. *Barrow v. Dyster*, 13 Q. B. D. 635.

It has been doubted whether the practice of admitting oral evidence in

these cases has not been carried to an inconvenient length. See *Anderson v. Pitcher*, 2 B. & P. 168. "How far a mercantile contract reduced to writing and signed by the parties, which is silent on a particular point, may have that silence supplied by evidence of a general course and usage of the trade to which it relates, is a question which it would be difficult to answer with exactness and precision." *Per Tindal, C.J., in Whittaker v. Mason*, 2 N. C. 369, 370; and *per Cur.* in *Trueman v. Loder*, *ante*, p. 25, "The cases go no further than to permit the explanation of words used in a sense different from their ordinary meaning, or the addition of known terms not inconsistent with the written contract."

The usages of a market are binding on principals ordering goods to be bought on a market by their agents; *Ireland v. Livingstone*, L. R., 2 Q. B. 99, 107 (affirm. L. R., 5 H. L. 395, on another ground); *Bayliffe v. Butterworth*, 1 Exch. 425; *Masted v. Paine*, L. R., 6 Ex. 132, Ex. Ch.; *Merry v. Nickalls*, L. R., 7 H. L. 530. It is immaterial whether the principal did or did not know of the usage, provided it be reasonable, *Grissell v. Bristowe*, L. R., 4 C. P. 49, but not otherwise; *Perry v. Barnett*, 15 Q. B. D. 388, C. A.; or if the usage not only regulate the mode of performing the contract, but also change its intrinsic character. *Robinson v. Mollett*, L. R., 7 H. L. 802, 836. A person employed to act as broker cannot, by the custom of the market, assume the character of principal, where his employer is ignorant of the custom. S. C. The customer of a bank is bound by the custom of bankers. *Emanuel v. Roberts*, 9 B. & S. 121. So are mercantile persons having dealings with bankers. *Misa v. Currie*, 1 Ap. Ca. 554, D. P.

*Oral evidence, when admissible to control or explain agricultural contracts.]* A custom affecting the contract may be proved by oral evidence in other, as well as in mercantile, contracts; as in the case of agricultural contracts. Thus, it may be proved that a heriot is due by custom on the death of a tenant, though not expressed in the lease. *White v. Sayer*, Palm. 211. Or, that a lessee by deed or writing is entitled by custom to an away-going crop, though it be not mentioned in the deed. *Wigglesworth v. Dallison*, 1 Doug. 201; *Senior v. Armytage*, Holt, N. P. 197. But where a covenant excludes the customary right by an express provision on the subject-matter of the custom, evidence of such right is inadmissible. *Webb v. Plummer*, 2 B. & A. 746; *Roberts v. Barker*, 1 Cr. & M. 808; *Clarke v. Roystone*, 13 M. & W. 752. So where a brickfield was let at a yearly rent of 3s. per 1,000 bricks made, it was held that evidence of a custom that a lease of brickland on those terms should operate as a longer tenancy than a yearly one, was inadmissible. *In re Stroud*, 8 C. B. 502. Yet the custom may still prevail, though the terms of the holding are inconsistent with it, if it only relate to the period of quitting. *Holding v. Pigott*, 7 Bing. 475. And even where there is an express stipulation respecting the quitting, it may not always be sufficient to exclude the custom. Thus, where the custom was for the tenant to be paid for the last year's ploughing and sowing, and to leave the manure if the landlord would buy it; and the lease provided that the tenant should spend more manure than the custom required, leaving the rest to be paid for by the landlord at the end of the term; held that the tenant was still entitled to be paid for the last year's ploughing and sowing under the custom. *Hutton v. Warren*, 1 M. & W. 466. A custom to sell flints turned up in the ordinary course of good husbandry, for the tenant's benefit, is not inconsistent with a reservation of minerals to the landlord. *Tucker v. Linger*, 8 Ap. Ca. 508, D. P. See *Dashwood v. Magniac*, (1891) 3 Ch. 306, C. A. (the case of a devise). On the lease of a rabbit warren, oral evidence was admitted to show that by the custom of the county, the word "thousand" means 1,200 when applied to

rabbits. *Smith v. Wilson*, 3 B. & Ad. 728. A contract for the sale of cider may be explained, by local usage, to mean apple juice before it has been made into cider in its usual form. *Studdy v. Sanders*, 5 B. & C. 628. A sale of hops at "100s." may be explained to mean 5*l.* per *cwt.* *Spicer v. Cooper*, 1 Q. B. 424. A contract of hiring may be qualified by proof of customary holidays. *R. v. Stoke-upon-Trent*, 5 Q. B. 303. As to such proof, see *Devonald v. Rosser*, (1906) 2 K. B. 728, C. A.

*Oral evidence, when admissible to explain words having a statutory meaning.*] Certain weights and measures were fixed by the Weights and Measures Act, 1878 (41 & 42 V. c. 49), which by sect. 19 provided that a contract made by any other measures than those defined by the Act was void; but the metric system is now allowed, 60 & 61 V. c. 46, s. 1. The general rule is that where a statute has given a definite meaning to a word denoting quantity, evidence of custom is not admissible to show that it is used in a written contract in another sense. *Smith v. Wilson*, 3 B. & Ad. 728, 732, 733. See also *Wing v. Earle*, Cro. Eliz. 267; *Noble v. Durell*, 3 T. R. 271; *Hockin v. Cooke*, 4 T. R. 314; *S. Cross, Master of, v. Ld. Howard de Walden*, 6 T. R. 338.

A somewhat similar question arises upon the statute 24 G. 2, c. 23, which changes the style. In *Furley d. Mayor, &c., of Canterbury v. Wood*, 1 Esp. 198, Runnington on Eject., 2nd ed., 129, it was held by Ld. Kenyon that evidence was admissible to show that by the custom of the country the word "Michaelmas," in a notice to quit, meant "Old Michaelmas." It has been since assumed that this was a parol demise; but as the lands are stated to have been held by lease from a corporation, this was probably not so. In *Doe d. Spicer v. Lea*, 11 East, 312, however, it was held that evidence was rightly rejected when offered to show that "the feast of S. Michael," in a lease under seal, meant Old Michaelmas. A few days afterwards, M'Donald, C.B., held that a notice to quit at "Michaelmas" might be shown to mean "Old Michaelmas." *Doe d. Hinde v. Vince*, 2 Camp. 256; S. P. ruled by Ld. Ellenborough in *Doe v. Brookes*, at Hereford, same assizes, *ut aulivi*. *Id.* 257, n. It does not appear whether the leases in these last two cases were by deed or parol. In *Doe d. Hall v. Benson*, 4 B. & A. 588, the distinction between leases under seal and those not so, was taken by the court, and it was held that on a parol demise it might be shown that "Lady Day" meant "Old Lady Day." The cases of *Doe d. Peters v. Hopkinson*, 3 D. & Ry. 507; and *Rogers v. Hull Dock Co.*, 34 L. J., Ch. 165, are to the same effect. In pleading, it was held that "Martinmas" must mean "New Martinmas," even though followed by the words "to wit, the 23rd of November," which is the day on which Old Martinmas fell. *Smith v. Walton*, 8 Bing. 235. In many parts of the country the practice of letting lands, according to the old style, is still retained; and many text writers have expressed a general opinion that evidence of a custom of the country is always admissible to show that the feast day mentioned in the lease is referable to the old style, even though the lease be by deed. *Vide tamen*, 1 Smith's L. C. 11th ed. 569-571.

*Oral evidence, when admissible to explain ancient charters, grants, &c.*] Long user may serve to explain an ambiguous Act of Parliament. *Stewart v. Lawton*, 1 Bing. 377. In the construction of ancient charters, expressed in obscure or general terms, oral evidence has always been admitted to prove the continual and immemorial usage under the instrument. 2 Inst. 282; *R. v. Varlo*, Cowp. 248; *Chad v. Tilsed*, 2 B. & B. 406. Thus, in a Crown grant of "tithes," contemporaneous leases, proceedings in causes, and oral testimony, may be resorted to in order to show the species of tithes intended to be conveyed. *Lucton School Governors v. Scarlett*, 2 Y. & J. 330. An

ancient Crown grant of a seigniorship or lordship, or of "terra de Gower," may be shown by modern user to include the seashore between high and low water; *Beaufort, Dk. of, v. Mayor of Swansea*, 3 Exch. 413; see also *Hastings Cor. v. Irall*, L. R. 19 Eq. 558, and *Van Diemen's Land Co. v. Table Bay, &c., Board*, (1906) A. C. 92, J. C.; although the grant from the Crown contains no appropriate words. *Culmady v. Rowe*, 6 C. B. 861. Where a private deed of 1656 gave the nomination of a curate to "inhabitants," it was held that the word was properly explained by past usage to mean all housekeepers. *A.-G. v. Parker*, 3 Atk. 576. So it was held that in an ancient charter, the word "inhabitants" might be explained by local usage. *R. v. Mashiter*, 6 Ad. & E. 153, and this decision was recognised in *R. v. Davie*, *Id.* 374, 386, where the same word, in a charter of Edward VI., was explained by usage to mean inhabitants paying church and poor-rates. So where an old charter granted and confirmed certain port-duties, it may be shown by user that the grantee is also entitled to other immemorial port-duties not named in the charter. *Bradley v. Newcastle, Pilots of*, 2 E. & B. 427; 23 L. J., Q. B. 35, Ex. Ch.

There seems to be no distinction in this respect between charters and private deeds. *Withnell v. Gartham*, 6 T. R. 398. The words "three acres of meadow," in a surrender and admittance, may be confined by long user to the *prima tonsura*; *Stammers v. Dixon*, 7 East, 200; and *pastura bosci* may be explained by usage and later admittances to mean the soil and wood itself. *Doe d. Kinglake v. Beviss*, 7 C. B. 456. So evidence of usage is admissible to show what is comprehended in parcels described by words of a general nature or doubtful import. *Waterpark, Id. v. Fennell*, 7 H. L. C. 650; *Hastings Cor. v. Iwall, supra*. See also *Forbes v. Watt*, L. R., 2 H. L. Sc. 214.

But evidence of usage, however long, will not be admitted to overturn the clear words of a charter. *R. v. Varlo, ante*, p. 27. And in the case of modern deeds evidence of the acts of the parties is not admissible to show their construction of it. *Clifton v. Walmesley*, 5 T. R. 565; *Iggulden v. May*, 9 Ves. 333; 2 N. R. 449, Ex. Ch.; *N. E. Ry. Co. v. Hastings, Ltd.*, (1900) A. C. 260, D. P. Even the conditions of sale, and the admissions of the grantee, are insufficient and inadmissible to narrow the operation of a deed of conveyance; *Doe d. Norton v. Webster*, 12 Ad. & E. 442; although we have seen that, in the absence of the deed, such admissions might be evidence of its contents. *Ante*, p. 3. Nor can the subsequent correspondence or conduct of the parties be submitted to a jury as evidence by which "alone" to explain the meaning of a contract. *Simpson v. Margitson*, 11 Q. B. 23; *Doe d. Morgan v. Powell*, 7 M. & Gr. 980.

[*Oral evidence admissible to discharge written agreements*]. A deed cannot be revoked or discharged by parol, *i.e.* word of mouth, or writing not under seal; *Rutland's (Cts. of) Case*, 5 Rep. 26 a; *West v. Blakeway*, 2 M. & Gr. 729, 751 *et seq.* But an executory agreement in writing not under seal (other than a bill of exchange or promissory note, *vide infra*) may, before breach, be discharged by a subsequent oral agreement. B. N. P. 152. After breach, it cannot be discharged except by release under seal, or accord and satisfaction, *Id.*; *Willoughby v. Buckhouse*, 2 B. & C. 824; or by proof of a valid agreement substituting a new cause of action in place of the old, for an invalid agreement will not discharge the former one. *Case v. Barber*, T. Raym. 450; *Noble v. Ward*, L. R. 2 Ex. 135, Ex. Ch. In these cases, wherever the subsequent oral agreement has had the effect, in point of law, of varying or discharging the original one, it is (apart from statute, as to which *vide infra*) admissible in evidence. Thus, in an action for not accepting goods, where it appeared that the agreement in writing was to deliver at a fixed time, the plaintiff may show a subsequent extension of the time by

oral agreement. *Cuff v. Penn*, 1 M. & S. 21. Where an auctioneer sold for 6*l.* an article described as silver in a printed catalogue, but which he publicly stated at the sale to be only plated; held, that this was an oral sale of a plated article. *Eden v. Blake*, 13 M. & W. 614.

A distinction, however, is to be observed on this head between simple contracts in writing under the Stat. of Frauds or the Sale of Goods Act, 1893, s. 4, and contracts at common law. In the former case, an oral contract will not be admitted to show a subsequent variation in the written contract; *Vezey v. Rashleigh*, (1904) 1 Ch. 634; as where several lots of land were bought together, it cannot be shown that the purchaser has, orally, waived the contract as to one lot to which the vendor could not make title; *Goss v. Nugent, Ltd.*, 5 B. & Ad. 58; or, that the parties varied the day of completion. *Stowell v. Robinson*, 3 N. C. 928; *Marshall v. Lynn*, 6 M. & W. 109; *Stead v. Dawber*, 10 Ad. & E. 57; *Noble v. Ward, ante*, p. 28. See also *Sanderson v. Graves*, L. R., 10 Ex. 234. But it would have been otherwise if the contract had not been subject to the control of a statute; for where such a contract has been reduced into writing, it is competent to the parties, at any time before the breach of it, by a new contract not in writing, either altogether to waive, dissolve or alter the former agreement, or to qualify the terms of it, and thus to make a new contract to be proved partly by the written agreement, and partly by the subsequent oral terms engrafted upon it. *Goss v. Nugent, Ltd.*, 5 B. & Ad. 65, *per Cur.*

A contract within the Stat. of Frauds, &c., can, it seems, be wholly discharged orally. *Goman v. Salisbury*, 1 Vern. 240; *Goss v. Nugent, Ltd.*, 5 B. & Ad. 66, *per Cur.*; *Vezey v. Rashleigh, supra, per Byrne, J.* See, however, *Harvey v. Grabham*, 5 Ad. & E. 61, 74, *per Cur.* But a contract in writing, good under the Stat. of Frauds, is not rescinded by a subsequent invalid oral contract intended to be substituted for the former one. *Noble v. Ward, ante*, p. 28. By the Bills of Exchange Act, 1882, ss. 62, 89, the renunciation by the holder of a bill of exchange or promissory note of his rights against the acceptor must be in writing unless the bill or note is delivered up to the acceptor.

[*Oral evidence admissible to explain latent ambiguity.*] Where an ambiguity, not apparent on the face of a written instrument, is raised by the introduction of oral evidence, the same description of evidence is admitted to explain it; for example, where a testator devises his estates of Blackacre, and has two estates called Blackacre, evidence may be admitted to show which of the Blackacres was meant; or if one devises to his son John Thomas, and he has two sons of the name of John Thomas, evidence may be admitted to show which the testator intended. *Per Gibbs, C.J., Doe v. Chichester*, 4 Dow, 93; *Doe d. Morgan v. Morgan*, 1 Cr. & M. 235. And where the description of the devisee, or thing devised, is true in part, but not true in every particular, oral evidence is admissible to show the person or thing intended, provided there be enough on the face of the will to justify the application of the evidence; *Miller v. Travers*, 8 Bing. 218-9, *per Cur.*; *Charter v. Charter*, L. R., 7 H. L. 361. Thus, an error in a christian or surname may be proved. S. CC., and see *Careless v. Careless*, 1 Meriv. 381. Where the grantor has no lands agreeing exactly with the description in the deed of grant, the lands intended may be shown by the contract of sale, or by letters written between the parties and their agents. *Beaumont v. Field*, 1 B. & A. 217. Where a farmer contracted in writing (as required by the Stat. of Frauds) to sell his "wool" at a certain price, evidence of a previous conversation between him and the buyer was held admissible to prove that his "wool" meant wool in his possession bought by him of other farmers, as well as wool of his own growth, but not admissible to prove that only a

limited quantity of such wool was intended to be bought. *Macdonald v. Longbottom*, 1 E. & E. 977; 28 L. J., Q. B. 293; 1 E. & E. 987; 29 L. J., Q. B. 256, Ex. Ch. See also *Burton v. Rust*, L. R., 7 Ex. 280, 281, Ex. Ch. per Willes, J., and *Bank of New Zealand v. Simpson*, (1900) A. C. 182, J. C. So in construing a written contract of service under which A. was "to enter into the employ" of B., or A. was "to give the whole of his services to B.," oral evidence is admissible to show in what capacity A. was to serve B. *Mumford v. Gething*, 7 C. B., N. S. 305; 29 L. J., C. P. 105; *Price v. Mouat*, 11 C. B., N. S. 508; even although the Stat. of Frauds required a written contract. S. C. See also *Chadwick v. Burnley*, 12 W. R. 1077; T. T. 1864, Q. B. So where there was a written contract to hire a flat for certain days, evidence was admitted that it had been previously announced that on those days processions would pass along a route visible from the flat, and that the taking place of those processions was the basis of the contract. *Krell v. Henry*, (1903) 2 K. B. 740, C. A. Where by a written agreement purporting to be between a company and the plaintiff, three of the directors of the company, who signed the same, agreed, in consideration of the advance of 500*l.* by the plaintiff to the company, to repay the same to the plaintiff, oral evidence was held admissible to prove that it was binding on the directors personally. *McCollin v. Gilpin*, 6 Q. B. D. 516, C. A. Where C. D. signed a voting paper, which had been filled up in the body of it with the name of A. B. as the person giving it, oral evidence was admitted to explain the mistake. *Summers v. Moorhouse*, 13 Q. B. D. 388.

Where a devise was to S. H., second son of T. H., but in fact S. H. was the third son, evidence of the state of the testator's family, and of other circumstances, was admitted to show whether he had mistaken the name or the description. *Doe d. Le Chevalier v. Huthwaite*, 3 B. & A. 632. There are also other authorities for admitting evidence that the testator was accustomed to misname a person, and thus to show who was meant by him, although there be a person in existence whose name corresponds with that in the will. *Blundell v. Gladstone*, 11 Sim. 467; 1 H. L. C. 778; *Lee v. Pain*, 4 Hare, 251. So by "my nephew, J. G.," testator's wife's nephew may be shown to be meant, though the testator also had a nephew J. G. *Grant v. Grant*, L. R., 2 P. & M. 8; *Id. v. Id.* L. R., 5 C. P. 380; *Id.* 727, Ex. Ch.; *Sherratt v. Mountford*, post, p. 31. See *Wells v. Wells*, L. R., 18 Eq. 504, cor. Jessel, M. R., contra, and *In re Taylor*, 34 Ch. D. 255, C. A. See further *In re Ashton*, (1892) P. 83. Where the devise was to John A., grandson of T. A., with a charge in favour of "each of the brothers and sisters" of the said John A., and it appeared there were two grandsons of T. A., both named J. A.; held, that oral declarations of the testator were admissible to show which was meant, although it also appeared that only one of the grandsons had several brothers and sisters. *Doe d. Allen v. Allen*, 12 Ad. & E. 451. In the case of a devise to testator's niece, remainder to her three daughters M., E., and A., the niece at the time of making the will had two legitimate daughters, M. and A., and one illegitimate, E.: held, that the claim of the latter might be rebutted by showing that the niece formerly had a legitimate daughter, E., and that the testator knew nothing of the death of the legitimate, or the birth of the illegitimate, E. *Doe d. Thomas v. Beynon*, *Id.* 431. See also *Hill v. Crook*, post, p. 31, and *In re Ashton*, supra.

Evidence of the testator's declaration of *intention* is only admissible where the language is clear and unambiguous, but the ambiguity arises from some of the circumstances admitted in proof, as to which of two or more persons the testator intended to express. *Doe d. Hiscocks v. Hiscocks*, 5 M. & W. 363, 369; *Charter v. Charter*, L. R., 7 H. L. 364. Where a devise was to John H., the eldest son of John H., and it appeared that John H., the father, had an eldest son named Simon, and a son by a second marriage named

John; held, that the declarations of the testator were not admissible to show which was meant. *Doe d. Hiscocks v. Hiscocks*, ante, p. 30. Where the devise was to the testator's "nephews," and evidence had been adduced to show that he had no nephews, but that his wife's nephews were meant, it was held that evidence that these could not have been intended by the testator was not admissible, without also showing some other class who were intended to take. *Sherratt v. Mountford*, L. R., 8 Ch. 928. See further *In re Mayo*, (1901) 1 Ch. 404.

A devise to "my dear wife, C." cannot be defeated by showing that the devisor had a lawful wife, M., alive when he went through a form of marriage with C. *Doe d. Gains v. Rouse*, 5 C. B. 422. But where B. makes a devise to his wife A., the devise may be defeated by showing that A. fraudulently concealed from B. that she had a husband living when she went through a form of marriage with B. *Wilkinson v. Jonghin*, L. R., 2 Eq. 319, following *Kennell v. Abbott*, 4 Ves. 802. Where a fine was levied of 12 messuages in Chelsea, and it appeared that the cognisor had more than 12 messuages in Chelsea, oral evidence was admitted to show which messuages in particular the cognisor intended to pass. *Doe d. Bulkeley v. Wilford*, Ry. & M. 88; S. C., 8 D. & Ry. 549.

It may be laid down as a general rule, that all facts relating to the subject of the devise, such as that it was not in the possession of the testator, the mode of acquiring it, the local situation, and the distribution, of the property, are admissible to aid in ascertaining what is meant by the words used in a will. Parke, J., in *Doe d. Templeman v. Martin*, 3 B. & Ad. 785; *Webber v. Stanley*, 16 C. B., N. S. 698, 751, 752; 33 L. J., C. P. 217, 220, *per Cur.*; *McLeod v. McNab*, (1891) A. C. 471, 474, J. C.; Wigram on Interp. Wills, 51. Even the value of the property and the charges upon it in the will may be shown in explanation of it. *Semb. Nightingall v. Smith*, 1 Exch. 879. See also *Allgood v. Blake*, L. R., 8 Ex. 160, 162, Ex. Ch. and *In re Glassington*, (1906) 2 Ch. 305. In construing a will the court should place itself as fully as possible in the situation of the testator, and guide its construction of his intention in some degree by the light of the knowledge thus acquired. *Hill v. Crook*, L. R., 6 H. L. 265, 277; *Charter v. Charter*, L. R., 7 H. L. 364, *per Lds. Cairns, C., and Selborne*; *In re Taylor*, 34 Ch. D. 255, C. A. See further, ante, p. 20. As to the admissibility of evidence to show in what sense the testator used the word "securities," see *In re Rayner*, (1904) 1 Ch. 176, C. A.

Where a subject-matter exists which satisfies the terms of the will, and to which they are perfectly applicable, there is no latent ambiguity, and no evidence can be admitted for the purpose of applying the terms to a different object. Thus, where a testator devised his "estate at Ashton," it was held that oral evidence was inadmissible to show that he was accustomed to call all his maternal estate "his Ashton estate," there being an estate in the parish of Ashton which was sufficient to satisfy the devise. *Doe d. Chichester v. Oxenden*, 3 Taunt. 147; S. C., 4 Dow, 65; *Webber v. Stanley*, supra; *Pedley v. Dodds*, L. R., 2 Eq. 819. See also *Carruthers v. Shaddon*, 6 Taunt. 14. But a devise of lands "in parish D." will pass lands of which part only is in D., if it be shown by oral evidence that all was reputed to be in it. *Austee v. Nelms*, 1 H. & N. 225; 26 L. J., Ex. 5; *Whitfield v. Langdale*, 1 Ch. D. 61. Where words have acquired a precise and technical meaning, no other meaning can be applied to them. *Per Ld. Kenyon, Lane v. Stanhope*, *El.*, 6. T. R. 352. In the case of a legacy to the testator's "heir," it cannot be shown that a testator was in the habit of calling a person his heir who was not so. *Mounsey v. Blamire*, 4 Russ. 384. If a will name the devisee and it be shown orally that there are several to whom the name applies; yet this is not enough to let in oral

evidence of intention, where it can be collected from the will itself who was intended. *Doe d. Westlake v. Westlake*, 4 B. & A. 57; *Webber v. Corbett*, L. R., 16 Eq. 515.

Where the ambiguity is not latent, or raised by extrinsic evidence, but patent or apparent on the face of the instrument, oral evidence is not admissible to explain such ambiguity. Thus, where a blank is left for the devisee's name, in a will, oral evidence cannot be admitted to show whose name was intended to be inserted. *Baylis v. A.-G.*, 2 Atk. 239. Where the names of the devisees in a will of real property were all indicated only by single letters, a card kept by the testator separate from his will, containing "a key" to the letters, and showing the person meant by each, was held inadmissible to explain it, though referred to in the will. *Clayton v. Nugent, Ltd.*, 13 M. & W. 200. But where a blank was left for the Christian name only, oral evidence was admitted to prove the individual intended. *Price v. Page*, 4 Ves. 680. But see *Doe d. Gord v. Needs*, 2 M. & W. 139. So in case of a devise to "Mrs. G.," the person intended may be shown, by proving that the testator invariably called a Mrs. Gregg by the name of "Mrs. G." *Abbott v. Massie*, 3 Ves. 148. Where a will mentioned George, the son of George Gord, and also George the son of John Gord, a bequest to "George the son of Gord," was explained by proof of the declarations of the testator to mean George the son of George Gord. *Doe d. Gord v. Needs*, 2 M. & W. 129. In reply to the argument that this was a patent ambiguity, it was said that it could only appear ambiguous by showing *aliunde* the non-existence of a George the son of Gord, different from the other two Georges; and that the mention of another George in the same will had no other effect than extrinsic proof of the same fact would have had. So where a will contained a bequest to "my granddaughter," on it appearing that the testator had several granddaughters, evidence was admitted as to which of them was meant. *In re Hubback*, (1905) P. 129. If an agreement, unambiguous on the face of it, is shown by extrinsic evidence to have a different meaning from that which it imports, and the extrinsic facts are undisputed, the construction of it is for the judge, who ought not to leave it to the jury as a question of the intention of the parties. *Semb. Hitchin v. Groom*, 5 C. B. 515. Where it is doubtful on the face of a document whether it is testamentary or not, evidence of the intention of the deceased is admissible. *Robertson v. Smith*, L. R., 2 P. & M. 43; *In re Slinn*, 15 P. D. 157.

Where a blank is left in a written agreement which need not have been reduced into writing, and would have been equally binding if written or unwritten (as if the agreement be to deliver goods to the value of less than 10*l.*, and a blank be left for the quantity of goods to be delivered), in such a case it would seem that in an action for the non-performance of the contract, oral evidence may be admitted to supply the defect. 1 Phillips Ev. 7th ed. 540. An instrument so imperfect on the face of it is no perfect contract at all so as to exclude oral evidence. As to the effect of omissions in a contract required by statute to be in writing, *vide post*, pp. 531 *et seq.* Where, in the entry of an appointment to a curacy in the bishop's register, a blank was left for the patron's name, it was held that this might be supplied by oral evidence. *Meath, Bp. of v. Ld. Belfield*, 1 Wils. 215. A demise offered in evidence was a printed blank form filled up and altered for use; held, that the court might look at the parts struck out in order to ascertain the intent of the parties in what remained. *Strickland v. Maxwell*, 2 Cr. & M. 539.

*Oral evidence admissible on questions of parcel or no parcel.*] Where the question is "parcel or no parcel," oral evidence is admissible to explain a



writing. Thus, where a testator devised "all his farm called Trogues Farm," it was held that it might be shown of what parcels the farm consisted. *Goodtitle d. Radford v. Southern*, 1 M. & S. 299. But where a deed professes to convey a farm as described on a schedule and map annexed, a field not included in the map or schedule, though always treated as part of the farm, will not pass. *Barton v. Dawes*, 10 C. B. 261; 19 L. J., C. P. 302. Where the testator devised two cottages, one described as being in the occupation of A., and the other of B.; and it appeared that the testator had two cottages which had been internally divided, so that part only of one was occupied by A., and part of the other occupied by B.; it was held (*Erle, J., dissent.*) that only the portions of the cottages so occupied passed by the devise, and oral evidence was not admissible to show that he meant the entire cottages to pass. *Doe d. Hubbard v. Hubbard*, 15 Q. B. 227; 20 L. J., Q. B. 61. Where a lease professed to demise premises and a yard, extrinsic evidence was admitted to rebut the presumption that a cellar under the yard was also intended to pass. *Doe d. Freeland v. Burt*, 1 T. R. 701. So in case of a written agreement to convey "all those brick-works in the possession of A. B.," oral evidence of what passed on making the agreement was admitted to show what brick-works were intended to pass. *Paddock v. Fradley*, 1 C. & J. 90. Although the question of parcel or no parcel is for the jury, the judge must tell the jury what is the proper construction of any documents necessary to be considered in the decision of that question. *Lyle v. Richards*, L. R., 1 H. L. 222. Conditions of sale, shown to a purchaser at the time of sale, are evidence against him of what was then reputed parcel of the premises conveyed to him by deed. *Murly v. M'Dermott*, 8 Ad. & E. 138. But they will not narrow the language of the conveyance. *Doe d. Norton v. Webster*, 12 Ad. & E. 442. See also *Glave v. Harding*, 27 L. J., Ex. 286.

## PRESUMPTIVE EVIDENCE.

Presumptive evidence is usually so called in contradistinction to direct or positive proof, whether written or oral; though all moral proof is, in strictness, founded on probability and presumption. Thus, a fact attested by the direct evidence of an ocular witness can only be admitted to be true on the presumption that the witness neither deceives nor is deceived. Perhaps the principal distinction is, that what is usually called a presumption may be rebutted without necessarily impugning the testimony upon which it rests; but direct testimony cannot be impeached without attacking its credibility. Presumptive evidence is not, in its nature, secondary to direct evidence. Thus, payment of rent may be proved by the positive evidence of a person who saw it paid; yet it may also be proved by the production of a receipt for later arrears, which affords a presumption that the earlier arrears are satisfied, without laying any ground for the introduction of such evidence by showing that positive evidence cannot be procured. See observations in *Doe d. Welsh v. Langfield*, 16 M. & W. 513, and *post*, p. 36.

Some presumptions are artificial, and legally admit of no contradiction by contrary evidence; of this kind was the presumed revocation of a will by a subsequent alteration of the property. *Goodtitle d. Holford v. Otway*, 2 H. Bl. 522. So some damage is conclusively presumed to result from an unlawful act done by the defendant and actionable *per se*.

Another class of presumptions includes those cases in which a jury will be directed by the court to presume a fact, of which no evidence has been given. Thus a bill of exchange is always presumed to be given for a good consideration. *Philliskirk v. Pluckwell*, 2 M. & S. 395. So the law

always presumes innocence; *vide post*, p. 94. So the jury ought to be told to presume legitimacy; *Banbury Peerage case*, 1 Sim. & St. 153; and marriage from cohabitation, except in prosecutions for bigamy, and formerly in actions for adultery; *Doe d. Fleming v. Fleming*, 4 Bing. 266; *Campbell v. Campbell*, L. R., 1 H. L. Sc. 182; *Neo v. Neo*, L. R., 6 P. C. 382, 386.

The law presumes in favour of possession, see *Lee v. Johnstone*, L. R., 1 H. L. Sc. 426; and, in the case of land, presumes the highest estate in it, viz., a seisin in fee. See *post*, p. 38. A good tenant to the præcipe is presumed in support of an old recovery. *Gilb. Ev.* 6th ed. 22. A deed 30 years old, and in unsuspected custody, is presumed to have been duly executed, see *Proof of deeds, &c., post*, p. 142. Long possession is a presumption of the regular endowment of a vicarage. *Crimes v. Smith*, 12 Rep. 4. So the continuance of things *in statu quo* will be generally presumed; as where the plaintiff being slandered in his official character, proves his appointment to the office just before the libel, his continuance in office at the time of the libel need not be proved, though averred, if such continuance be consistent with the nature of the office. *R. v. Budd*, 5 Esp. 230; *Steward v. Dunn*, 12 M. & W. 655. So proof of official character at a certain time may in some cases be evidence that the party had that character within a reasonable time before. *Doe d. Hopley v. Young*, 8 Q. B. 63. Every place is presumably within some parish. *R. v. S. Margaret's*, 7 Q. B. 569. But a place named generally, is itself presumed to be a vill; at least such was the old law; for there may be extra-parochial places, but all places in England are either vills or within a vill. *Adeson v. Otway*, *Freem.* 228, 240. So the law presumes that a party intended that which is the immediate or probable consequence of his act. *R. v. Dixon*, 3 M. & S. 11, 15. In such cases, in the absence of contrary proof, the jury are, it should seem, as much bound to find agreeably to the legal presumption, as they are to find according to the law as explained by the judge.

A third class of presumptions is exclusively within the province of the jury, and they occur when direct proof of a fact is offered to the jury as probable evidence from which they may infer another fact. As where a witness says that he lent a certain printed book to A. B., who afterwards returned to him a *book* exactly like it, which he believes to be the same, but cannot swear to its identity, this is proof of identity; for it is more probable that it was the same than another. *Fryer v. Gathercole*, 4 Exch. 262.

There is a species of presumption not uncommonly urged in the addresses of a counsel to a jury, viz., the presumption that the testimony of a witness who might be, but is not, called, is unfavourable to the party who omits to call him. So it is sometimes treated as a legitimate inference that a document, tendered in evidence by A. and objected to by B., is unfavourable to the case of B. Thus, where a document was offered in evidence to confirm the statement of a witness, but was rejected by the judge, it was held to be no misdirection for the judge to tell the jury that the document might be assumed, against the objecting party, to be one which confirmed the testimony of the witness. *Sutton v. Davenport*, 27 L. J., C. P. 54. Such presumptions are of no value as evidence *per se*, and are not worth much except under special circumstances. If the witness, not called, be present at the trial, he may be called by the opposite party. If not present, his absence may be owing to other causes than that of wilful suppression. Where the document is excluded by the ruling of the judge, it is because the law presumes that the ends of justice will not be advanced by the reading of it, and it seems a strong thing for the court to invite inferences

against the objecting party, though counsel cannot be restrained from addressing any arguments, however fallacious, to the jury. But, generally, there is a fair presumption against a party who keeps back a document in his own possession. *A.-G. v. Windsor, Dean of*, 24 Beav. 679. See also the observations hereafter on not calling a party as a witness, *Proof by witnesses, post*, p. 165. We have seen that the refusal of a party to produce a document after notice to produce is not evidence *per se*; *ante*, p. 12; *accord. Chaplin v. Reid*, 1 F. & F. 315; but it is matter of observation to the jury. S. C.

The following are a few of the most useful and usual cases of presumption:—

The existence of an immemorial custom may be presumed from an uncontradicted usage of 20 years, and it ought to be so presumed by the jury if there be nothing in evidence to negative such presumption. *R. v. Jolliffe*, 2 B. & C. 54; *Jenkins v. Harvey*, 1 C., M. & R. 877; *Brocklebank v. Thompson, post*, p. 827. The flowing of the tide is presumptive evidence of a public navigable river; *Miles v. Rose*, 5 Taunt. 705; but the strength of this *primâ facie* evidence depends upon the situation and nature of the channel; *R. v. Montague*, 4 B. & C. 602; and long obstruction of the right of navigation is presumptive evidence of its legal extinction by natural or legal means. S. C. Land lying between high and low water-marks on the sea shore, or the banks of a navigable river is, *primâ facie*, extra-parochial. *R. v. Musson*, 8 E. & B. 900; 27 L. J., M. C. 100; *Bridgwater Trustees v. Bootle-cum-Linacre*, L. R., 2 Q. B. 4. But for civil parochial purposes such land is now, by 31 & 32 V. c. 122, s. 27, no longer extra-parochial.

*Cujus est solum ejus est usque ad cælum et ad inferos*, is a maxim juries are directed to observe.

A letter is presumed to have been written on the day on which it is dated, as against the writer. *Hunt v. Massey*, 5 B. & Ad. 902. And it may be evidence of the date as against a third person; thus, where indorsee sued the acceptor, who pleaded that plaintiff's indorser took the bill with notice that the defendant was not liable upon it, and indorsed it with like notice to plaintiff, it was held that defendant might prove that the indorser had such notice by producing letters written by him to defendant; and that the date on them was evidence that the letters had been written before the indorsement. *Potez v. Glossop*, 2 Exch. 191. The last decision was accompanied with some expression of doubt by the court; it was, however, followed in *Malpas v. Clements*, 19 L. J., Q. B. 435, where in an action by indorsee against acceptor, a paper signed by the drawer and purporting to be of even date with the bill, was received in evidence against the plaintiff to prove the terms on which the bill was drawn.

An act done with the knowledge of a person who would have a right to object to it may be presumed to be done by his licence. Thus, where an inclosure had been made from a waste 12 or 14 years, and seen by the steward of the lord from time to time, without objection, it was left to the jury to say whether the inclosure was made by the lord's licence. *Doe v. Foley v. Wilson*, 11 East, 56. An entry in a merchant's book, purporting to be a copy of a letter addressed by him to his partner abroad, is evidence, as against the writer, that it was also *sent*. *Sturge v. Buchanan*, 10 Ad. & E. 598. So indorsement on a promissory note admitting the receipt of interest, are presumed (except for the purpose of rebutting the Statute of Limitations, *vide post*, pp. 37, 38) to have been made at the time they bear date. *Smith v. Battens*, 1 M. & Rob. 341. And a bill is presumed to be made on the day of its date; *Owen v. Waters*, 2 M. & W. 91; *Laws v. Rand*, 3 C. B., N. S. 442; 27 L. J., C. P. 76; except when used to prove a petitioning creditor's debt at the date specified; *Anderson v. Weston*, 6 N. C. 296, 301; but the

soundness of this exception was questioned in *Potez v. Glossop*, ante, p. 35. When the *bona fides* of a sale to the plaintiff by a bankrupt was disputed by the assignees, the plaintiff was allowed to use a receipt and delivery order for the goods, dated at the time of the alleged sale, but not delivered to the witness who produced them till after the sale and bankruptcy, as confirmatory evidence of the date of the sale. *Morgan v. Whitmore*, 6 Exch. 716; 20 L. J., Ex. 289. On the ground of danger of collusion, it was considered necessary to give extrinsic evidence of the date of letters put in to show the terms on which husband and wife were living, in an action for adultery. *Treclawney v. Colman*, 2 Stark. 193.

In many cases, though the fact of actual knowledge cannot be proved, it will be presumed. Thus, where the rules of a club are contained in a book openly kept by the proper officer or servant of the club, every member of the club must be presumed to be acquainted with them. *Raggett v. Musgrave*, 2 C. & P. 556; *Alderson v. Clay*, 1 Stark. 405; *Wiltzie v. Adamson*, 1 Phill. & Arn. Ev. 339, 10th ed. A person dealing with a registered company is presumed to know the registered constitution of the company. *Balfour v. Ernest*, 5 C. B., N. S. 600; 28 L. J., C. P. 170.

It is not very easy to distinguish those presumptions which are obligatory on a jury from those which they are at liberty to disregard and to negative, even when not rebutted. Judges have entertained different opinions on this head as regards the effect of long user in proof of prescriptions and customs. On the one hand, the title to important rights can hardly be considered as secure, if no antiquity of enjoyment can prevent them from being exposed to the casualties of a verdict; on the other hand, it seems to be a contradiction in terms to leave to the jury presumptive evidence of a fact with no alternative but to find it. See the remarks in *Newcastle, Pilots of, v. Bradley*, 2 E. & B. 430-1, n.

It is not permitted to the parties to prove every fact which would lead to a presumption in some measure bearing on the question in issue. If there were no limits to this, it is obvious that a trial might be unduly lengthened; and it is clear that a judge may refuse to receive evidence which only leads to a very weak presumption. See *Proof of Collateral facts*, post, pp. 84, 85.

[*Presumption of payment.*] If a landlord give a receipt for the rent last due, it is presumable that all former rent has been paid. Gilb. Ev. 6th ed. 142. And payment from 1864 to 1877 by a tenant in common to his cotenant of a moiety of the rent of the lands is said to be evidence of such payment prior to 1864. *Sanders v. Sanders*, 19 Ch. D. 373, C. A. Where a bill of exchange, negotiated after acceptance, is produced from the hands of the acceptor after it is due, the presumption is, that the acceptor has paid it; *Gibbon v. Featherstonhaugh*, 1 Stark. 225; but not without proof of circulation after acceptance. *Pfiel v. Vanbutenberg*, 2 Camp. 439. Proof that the plaintiff and other workmen employed by the defendant came to him regularly every week to receive their wages from him, and that the plaintiff had not been heard to complain of non-payment, is presumptive evidence of payment of his past wages. *Lucas v. Novosilieski*, 1 Esp. 296; *Sellen v. Norman*, 4 C. & P. 80. So where the demand was for the proceeds of milk sold daily to customers by the defendant as agent to the plaintiff, and it appeared that the course of dealing was for the defendant to pay the plaintiff every day the money which she had received without any written voucher passing, it was ruled that it was to be presumed that the defendant had in fact accounted, and that the *onus* of proving the contrary lay on the plaintiff. *Evans v. Birch*, 3 Camp. 10. So where goods have been consigned to a factor to sell on commission, it may be presumed, after a reasonable time [*e.g.* 14 years], that he has accounted. *Topham v. Braddick*, 1 Taunt. 572.

A debt, whether by simple contract or specialty, may be presumed to be satisfied from mere lapse of time. Thus, a simple loan 13 years ago may be presumed to be repaid, where no evidence to the contrary is offered. *Cooper v. Turner*, 2 Stark. 497. A similar presumption was held to arise in the case of a promissory note; *Duffield v. Creed*, 5 Esp. 52; see also *In re Rutherford*, 14 Ch. D. 687, C. A.; this was, however, doubted by Abbott, C.J., in *Du Belloix v. Waterpark*, 1 D. & Ry. 16. The production of a cheque drawn by the defendant on his banker, and payable to the plaintiff, with proof that plaintiff indorsed his name upon it, and that it had been paid, affords *prima facie* evidence of payment to him. *Egg v. Barnett*, 3 Esp. 196; *Boswell v. Smith*, 6 C. & P. 60. So the drawing of a cheque by A. in favour of B., and payment of it to B., was held proof of payment by A. to B., without showing that A. gave it to B. *Mountford v. Harper*, 16 M. & W. 825; correcting the decision in *Lloyd v. Sandilands*, Gow, 16. The strength of evidence such as that in the cases last cited must necessarily vary with the character of the debt, the mode in which it has been contracted, the position of the parties, and other similar circumstances. As if the party producing the instrument were fellow-lodger or clerk to the original holder, or his near relation, or in any position where he might easily possess himself of the document. Where S. proved that he lent B. a cheque on his bankers for 100*l.*, and produced the cheque crossed with the names of B.'s bankers, and showed that 100*l.* had been paid to the account of B. the day after the cheque became due; but it appeared that the papers of B., after he became bankrupt, fell into the hands of S.: it was held that there was no presumption that the amount of the cheque had been paid to B. *Bleasby v. Crossley*, 3 Bing. 430. In an action by indorsee against acceptor, to which defendant pleaded payment, the plaintiff produced the bill on which a receipt was indorsed; proof was given that an unknown person had, after dishonour by the defendant, paid the amount to a holder, and taken it away with the receipt indorsed: held, that this was no evidence of payment by the defendant. *Phillips v. Warren*, 14 M. & W. 379.

Although a limitation of actions on bonds, &c., is now provided for by stat. 3 & 4 W. 4, c. 42, yet a reference to the cases under the former law will still be occasionally necessary or convenient. Payment of a bond is presumed after 20 years without demand made: *Oswald v. Legh*, 1 T. R. 270; *Bostock v. Hume*, 7 M. & G. 893; and even after the lapse of a less time, if other circumstances concur to fortify the presumption, as a settlement of accounts in the meantime. S. C. *Colell v. Budd*, 1 Camp. 27. The presumption may be rebutted by circumstances, as by the defendant's admission of the debt, or by proof of payment of interest within 20 years. So by proof that the defendant has resided abroad during the whole of the time; *Newman v. Newman*, 1 Stark. 101; *Elliott v. Elliott*, 1 M. & Rob. 44; or was insolvent; *Fladoug v. Winter*, 19 Ves. 196; see *Hull, Mayor of, v. Horner*, Cowp. 109, and 3 Man. & Ry. 118, n., where the origin of the doctrine of 20 years' presumption is discussed. But see *Willoume v. Gorges*, 1 Camp. 217, *contra*.

On the ground that they are against the obligee's interest, indorsements on a bond made by the deceased obligee, acknowledging the receipt of interest within 20 years, have been admitted to rebut the presumption of payment of principal, provided there be evidence that such indorsements existed before the presumption of payment arose. *Scarle v. Barrington, Ltd.*, 2 Stra. 826; *Rose v. Bryant*, 2 Camp. 322; *Gleadow v. Atkin*, 1 Cr. & M. 421. But where the indorsement was made after the lapse of 20 years it was not admissible in evidence; *Turner v. Crisp*, cited Stra. 827. Since *Ld. Tenterden's Act* (9 G. 4, c. 14), s. 3, indorsements of this kind are no longer sufficient to prevent the operation of the Statute of Limitations in the case

of bills, notes, and other simple contracts within the provisions of that statute; but they may still be admissible for other purposes, as to rebut the presumption of payment of principal; and as the Act of 9 G. 4 seems to contemplate only "writings" within the old Statute of Limitations, and no similar provision is contained in the stat. 3 & 4 W. 4, c. 42, indorsements on *bonds* and *specialties* may still be available to exempt the debt from the operation of the statute, by constituting evidence of part payment under sect. 5 of the last Act. If so, it may be a question whether, notwithstanding the decisions mentioned under the last head respecting the presumption in favour of the dates which instruments *purport* to bear, some extrinsic evidence ought not to be given that the indorsements were really made at the date thereof, or at least *before* the time of limitation had lapsed. See the observations in 1 Taylor, Evid., 10th ed. §§ 690-696A. The preponderance of authority is at present against the admission of such indorsements without extrinsic proof of the date. An indorsement, made within 20 years, of the payment of interest within 20 years, is sufficient to rebut the presumption, though the interest accrued beyond 20 years. *Sanders v. Meredith*, 3 M. & Ry. 116. An indorsement on a note, payable after demand, of the payment of interest, is evidence of the note having become payable by a demand having been made. *In re Rutherford*, 14 Ch. D. 687, C. A.

*Presumption of property.*] Proof of the possession of land, or of the receipt of rent from the person in possession, is *prima facie* evidence of seisin in fee. See tit. *Action for recovery of land*, *post*, p. 1037. The owner of the fee simple is presumed to have a right to the minerals; but that presumption may be rebutted by non-enjoyment, and by the user of persons not the owners of the soil. *Rowe v. Grenfel*, Ry. & M. 396; *Rowe v. Brenton*, 8 B. & C. 737. Payment of a small unvaried rent for a long series of years [*e.g.* 38] to the lord of a manor, raises the presumption that the rent is a quit rent, and not rent service. *Doe d. Whittick v. Johnson*, Gow, 173. *Sed qu.* see *Hardon v. Hesketh*, 4 H. & N. 175; 28 L. J., Ex. 137. But long-continued payment by one lord of a manor to another lord is not presumptive evidence that one manor was originally part of the other. *Anglesey, Mys. of, v. Hatherton, Ltd.*, 10 M. & W. 218. In ejectment for a mine, a former recovery in trover for lead dug out of it, does not *per se* afford evidence of the plaintiff's then possession of the mine. B. N. P. 102. The owners of contiguous houses have no presumed right of mutual support. It must be claimed by actual or implied grant or reservation. 2 Roll. Ab. 564, l. 50; *Partridge v. Scott*, 3 M. & W. 220; and see *Angus v. Dalton*, 6 Ap. Ca. 740, D. P. But it is otherwise in the case of the ownership of adjoining land in its natural state. Roll. Ab. *supra*, and cases cited in *Humphries v. Brogden*, *infra*. So where the surface and the subsoil are vested in different owners, the presumption is that the owner of the surface has a right to the support of the subsoil. *Humphries v. Brogden*, 12 Q. B. 739, and judgment, *Id.* See further, tit. *Action for disturbance of right of support*, *post*, pp. 812, *et seq.* In all these cases the presumption may be displaced or reversed by proof of express covenants between the parties, or by implied obligations arising out of the original circumstances under which the property became divided. See *Richards v. Rose*, 9 Exch. 218; 23 L. J., Ex. 3.

For other cases of presumed ownership, or property, see further, the heads *Action for nuisance*, *post*, p. 759, and *Trespass to land*, *post*, p. 928.

*Presumption of grants, &c.*] It is a rule of prescription that "antiquity of time justifies all titles and supposeth the best beginning the law can give them." So that if evidence be given, after long enjoyment of property to the

exclusion of others, of such a character as to establish that it was dealt with as of right as a distinct and separate property in a manner referable to a possible legal origin, it is presumed that the enjoyment in the manner long used was in pursuance of such an origin, which, in the absence of proof that it was modern, is deemed to have taken place beyond legal memory." *Johnson v. Barnes*, L. R., 7 C. P. 592, 604, *per Cur.*; L. R., 8 C. P. 527, Ex. Ch. Thus, independently of the statute 2 & 3 W. 4, c. 71, for shortening the time of prescription, evidence of the adverse enjoyment of an easement (as of lights or a way) for 20 years or upwards, unexplained, is held to afford a presumption of a grant or other lawful title to enjoy it. *Lewis v. Price*, 2 Wms. Saund. 175 a; *Campbell v. Wilson*, 3 East, 294; *Livett v. Wilson*, 2 Bing. 115; and see *Action for disturbance of way, post*, pp. 826, 827. But the presumption "only applies where the enjoyment cannot otherwise be reasonably accounted for." *Gardner v. Hodgsons, &c., Brewery Co.*, (1903) A. C. 229, 240, *per Ld. Lindley*. The uninterrupted possession of a pew for 36 years has been held to afford a presumption of title by faculty or otherwise. *Rogers v. Brooks*, cited 1 T. R. 431, n. See also *Halliday v. Phillips*, (1891) A. C. 228, D. P. So the use for over 40 years of a sign board attached to an adjacent house is evidence of a grant of the easement to keep it there. *Moody v. Steggles*, 12 Ch. D. 261. Exclusive possession of a stream of water in any particular manner for 20 years is presumptive evidence of right in the party enjoying it, derived from a grant, or, if need be, an Act of Parliament. *Bealey v. Shaw*, 6 East, 215. See *Mason v. Hill*, 5 B. & Ad. 1; *Magor v. Chadwick*, 11 Ad. & E. 571; *Ivimey v. Stocker*, L. R., 1 Ch. 396. So from 20 years' enjoyment the jury may presume a grant of the right of landing nets on another's ground to the owners of a fishery. *Gray v. Bond*, 2 B. & B. 667. When rights of common and estovers have been enjoyed for many years by the freehold tenants of a manor, and also by the inhabitants, the latter will be presumed to claim through the former, so as to have acquired a legal origin for the right. *Warrick v. Queen's Coll., Oxford*, L. R. 6 Ch. 716. So where a borough corporation had by prescription a several oyster fishery in an estuary, and the free inhabitants of ancient tenements in the borough from time immemorial, without interruption and claiming as of right, exercised the privilege of dredging for oysters without stint during a portion of the year, it was held that the right of the corporation must be presumed to have been granted to them, subject to a trust or condition in favour of such inhabitants, in accordance with the usage. *Saltash, Mayor of, v. Goodman*, 7 Ap. Ca. 633, D. P.; *Haigh v. West*, (1893) 2 Q. B. 19. See *Tilbury v. Silva*, 45 Ch. D. 98, C. A. In order, however, to establish the presumption of a grant of an easement, it must appear that the enjoyment was with the acquiescence of him who was seised of an estate of inheritance; for a tenant for life or years has no power to grant such right, except as against himself. *Barker v. Richardson*, 4 B. & A. 579; *Daniel v. North*, 11 East, 372. And in order to make the enjoyment evidence as against a reversioner, there must be evidence against him of acquiescence distinct from the mere enjoyment of the easement. S. C. But, if the easement existed previously to the commencement of the tenancy, the fact of the premises having been for a long time in the possession of a tenant will not defeat the presumption of a grant. *Cross v. Lewis*, 2 B. & C. 686; see *Action for disturbance of way; Proof of public way, post*, p. 831. As to presumption of a grant of support of land from, subjacent strata, see *Clippens Oil Co. v. Edinburgh, &c., Water Trustees* (1904) A. C. 64, D. P. As to that of lateral support for a building, see *Angus v. Dalton*, 6 Ap. Ca. 740, D. P., *post*, p. 813. So of access of air thereto, see *Bass v. Gregory*, 25 Q. B. D. 481. As to presumed grants and reservations of easements, see further, *sub. tit. Actions for disturbance of support of land*,

*post*, p. 812; for obstruction of light and air, *post*, p. 816, and for disturbance of watercourse, *post*, p. 837.

As a jury will be at liberty to negative a grant, unless some probable evidence of one is laid before them, the title by lost grant cannot always be relied on. See *Norfolk, Dk. of, v. Arbutnot*, 5 C. P. D. 390, 392. Such grant cannot be presumed where it would have been in contravention of a statute. *Neaverson v. Peterborough, &c., Council*, (1902) 1 Ch. 557, C. A. The stat. 2 & 3 W. 4, c. 71, while on the one hand it confers a new title by uninterrupted enjoyments, and so dispenses with the necessity of presuming grants, on the other hand enacts (sect. 6), that in the cases therein provided for (that is, cases of easements and profits *à prendre*) no presumption shall be made in support of a claim on proof of enjoyment for a less period than the number of years specified in the Act.

Charters and grants from the Crown may be presumed from length of possession (as, for instance, 100 years) not merely in suits between private parties, but even against the Crown itself, if the Crown be capable of making the grant. *Hull, Mayor of, v. Horner*, Cowp. 102; *Jenkins v. Harvey*, 1 C. M. & R. 877. Even where there is no person competent to make an indefeasible grant, an Act of Parliament may be presumed in favour of very long user. *Lopez v. Andrew*, 3 M. & Ry. 329, n. But it has been said that "no judge would venture to direct a jury that they could affirm the passing of an Act of Parliament within the last 250 years, on an important subject of general interest, of which no vestige can be found on the parliament rolls or other records, or in the history of the country:" and the court accordingly refused to presume any Act sanctioning a mode of nominating by the Crown to a deanery, which was shown to have begun in the 16th century, and to have continued, without interruption, for the last 250 years. *R. v. S. Peter's, Exeter*, 12 Ad. & E. 512; and see a like opinion expressed in *A.-G. v. Ewelme Hospital*, 17 Beav. 366; 22 L. J., Ch. 846. See also *Chilton v. London Cor.*, 7 Ch. D. 735, and *Neaverson v. Peterborough, &c., Council*, *supra*. See also cases of presumption arising from long possession mentioned *arguendo*, in *Tenny v. Jones*, 10 Bing. 78; *Doe d. Millett v. Millett*, 11 Q. B. 1036; *Lyon v. Reed*, 13 M. & W. 285. The circumstances may negative the presumption of the grant notwithstanding long user, *e.g.*, where the enjoyment has been under a void charter. *A.-G. v. Horner*, 14 Q. B. D. 245, C. A. Where by an Act of Will. 3, certain corporation land was set apart for a burial ground, which was afterwards consecrated, it was held that a conveyance of the land from the corporation might be presumed. *Campbell v. Liverpool, Mayor of*, L. R., 9 Eq. 579. And where a grant is presumed from long enjoyment, enrolment of the grant may, if necessary, also be presumed. *Haigh v. West*, *ante*, p. 38.

Where the origin of the possession is accounted for without the aid of a grant or conveyance, and it is consistent with the fact of there having been no conveyance, it requires stronger evidence than mere possession to warrant a jury in saying that any conveyance has been executed. *Doe d. Fenwick v. Reed*, 5 B. & A. 232. And user of land is evidence of a grant thereof, only where the user would otherwise be illegal; where the user is referable to an existing easement, there is no presumption of such grant. *Lee Con-servancy Board v. Button*, 12 Ch. D. 383, 406, 409, C. A.; 6 Ap. Ca. 685, D. P. Where there is no evidence of the right to an easement, except *mere user*, without any trace of the commencement of it, it is evidence of a title by prescription rather than by grant. *Blewett v. Tregonning*, 3 Ad. & E. 554. A Crown grant of a *profit à prendre* to the inhabitants of a parish, thereby incorporating them, will not be presumed if the presumption is inconsistent with the past and existing state of things, and there is no trace of such a corporation having existed. *Rivers, Ld. v. Adams*, 3 Ex. D. 361;



*Saltash, Mayor of, v. Goodman*, 7 Ap. Ca. 633, 637. And it seems that a jury ought not to be encouraged to presume a Crown grant from mere user in favour of a party, who might, if he pleased, have produced an authentic enrolment of it, which was shown by his own witnesses to be in existence at the Tower. *Brune v. Thompson*, 4 Q. B. 543. Where the plaintiff claimed, on an *indebitatus* count, a toll by prescription, and proved constant perception of a fixed amount, which the jury found to be unreasonable; held, that the plaintiff was not entitled to recover at all, although the jury found what amount would have been reasonable. S. C. As to presumption of fees, tolls, &c., being payable from long-continued payment of them, see the following cases—*Shephard v. Payne*, 12 C. B., N. S. 433; 31 L. J., C. P. 297; 16 C. B., N. S. 132; 33 L. J., C. P. 158; *Bryant v. Foot*, L. R., 3 Q. B. 497, Ex. Ch.; *Lawrence v. Hitch*, *Id.* 521, Ex. Ch.; *Mills v. Mayor of Colchester*, L. R., 2 C. P. 476; L. R., 3 C. P. 575; *Ganu v. Free Fishers of Whitstable*, 11 H. L. C. 192; 32 L. J., C. P. 29; *Free Fishers of Whitstable v. Foreman*, L. R., 4 H. L. 266.

Mere possession of a lease by the lessor, with the seals cut off, affords no presumption of a surrender in writing under the Stat. of Frauds. *Doe d. Courtail v. Thomas*, 9 B. & C. 288.

[*Presumption of the duration of life and survivorship.*] The presumption of the duration of life of persons of whom no account can be given, generally ends at the expiration of 7 years from the time when they were last known to be living. *Per* Ld. Ellenborough, C.J., *Doe d. George v. Jesson*, 6 East, 84; *Doe d. Lloyd v. Deakin*, 4 B. & A. 433. By stat. 19 C. 2, c. 11, s. 1, in action by lessor or reversioner for the recovery of lands granted or leased for lives, or for years determinable on lives, the *cestuis que vie* shall be accounted to be naturally dead if they shall remain beyond the seas, or elsewhere absent themselves within the realm, by the space of 7 years together, and no sufficient or evident proof be made of the lives of such persons: sect. 4 provides for the recovery of the land and mesne profits where the *cestuis que vie* are afterwards shown to have been living. At common law, proof by one of a family, that, many years before, a younger brother of the person last seised had gone abroad, that the reputation in the family was that he had died there, and that the witness had never heard in the family of his having been married, is presumptive evidence of his death without issue. *Doe d. Bunning v. Griffin*, 15 East, 293. So where a person is shown to have been in existence a long time ago, as 100 years, his death unmarried and without issue will be presumed in the absence of any evidence to the contrary. *Doe d. Oldham v. Wolley*, 8 B. & C. 22; *Greaves v. Greenwood*, 2 Ex. D. 289, C. A. But in shorter periods (as 50 years), inquiry must be made in proper quarters, and from persons likely to know, whether the missing party, A., has been heard of. *Doe d. France v. Andrews*, 15 Q. B. 756. If those persons say that they have heard of A., the *onus* of proof is shifted, but the party seeking to prove A.'s death may then give evidence to show that their only information is erroneous. *Edmonds v. Prudential Assur. Co.*, 2 Ap. Ca. 487, 511, 514, *per* Ld. Blackburn. Proof that a person sailed in a ship bound for the West Indies, two or three years ago, and that the ship has not since been heard of, is presumptive that the person is dead; but the precise time of the death, if material, must depend upon the circumstances of the case. *Watson v. King*, 1 Stark. 121. See also *Doe d. Ld. Ashburnham v. Michael*, 17 Q. B. 276; 20 L. J., Q. B. 480, cited *post*, p. 58.

The fact of the party being alive or dead at any particular period within, or at the end of, the seven years, must be proved by the party asserting that fact. *Doe d. Knight v. Nepean*, 5 B. & Ad. 86; 2 M. & W. 891, Ex. Ch.; *In re Phené's Trusts, infra*; *In re Aldersey*, (1905) 2 Ch. 181. In a case

where a girl of 16 ran away from her father, a small farmer, and was never heard of after 1814, when she left England, Shadwell, V.-C., refused to presume, in 1844, that she had died in 1821; the mere fact of her not having been heard of since 1814 afforded no inference of her death; for the circumstances of her case made it probable that she would never be heard of by her relations. *Watson v. England*, 14 Sim. 28; *Dowley v. Winfield*, *Id.* 277; *Bowden v. Henderson*, 2 Sm. & Giff. 360. In the cases of *In re Beasley's Trusts*, L. R., 7 Eq. 498, and *In re Henderson's Trusts*, cited *Id.* 499, it was held that where a person had not applied for the payment of an annuity which he had previously received, and on which he was dependent for his support, there was evidence of his death before the payment became due. See also *Hickman v. Upsall*, L. R., 20 Eq. 136; 4 Ch. D. 144.

Presumptions as to the continuance of life are not legal presumptions, but presumptions of fact only, depending on the circumstances of each case. *Lapsley v. Grierson*, 1 H. L. C. 498; *R. v. Lumley*, L. R., 1 C. C. 196; *R. v. Willshire*, 6 Q. B. D. 366. Where N., born in 1829, went to America in 1853, and frequently wrote home till August, 1858, when he wrote from on board an American war-ship, but from that time nothing was heard about him except that he was entered in the books of the American navy as having deserted on the 16th June, 1860, while on leave, Giffard, L.J., refused to presume that N. was alive on the 6th Jan. 1861. *In re Phene's Trusts*, L. R., 5 Ch. 139; accord. *In re Lewes' Trusts*, L. R., 6 Ch. 356. See also *In re Walker*, L. R., 7 Ch. 120; and *In re Benjamin*, (1902) 1 Ch. 723.

Where a husband and wife had been carried off the deck of a vessel by the same wave, it was held that there was no inference of law as to survivorship from the different sex, age, and state of health of the husband and wife; that the question was, from beginning to end, one of fact; and the difference in strength, age, and in other respects was merely matter of evidence for the jury. *Underwood v. Wing*, 23 L. J., Ch. 982; 4 D. M. & G. 633; 24 L. J., Ch. 293; affirm. in *Wing v. Angrave*, 8 H. L. C. 183; 30 L. J., Ch. 65; *Re Green's Settlement*, L. R., 1 Eq. 289.

See further, 1 Dart's Vendors and Purchasers, 7th ed., pp. 380 *et seq.*, where all the cases on these subjects are collected.

A presumption which juries ought to make is, that males under 14 are incapable of sexual intercourse. See *R. v. Waite*, (1892), 2 Q. B. 600. The period of gestation is also presumed to be about 9 calendar months. The exact limits of variation of this period are not very clearly settled; so that if there were any circumstances from which an unusually short or long period of gestation might be inferred, or if it were necessary to ascertain the period with nicety, special medical testimony would be required. The subject was elaborately discussed in the *Gardiner Peerage case*, which is reported separately by Le Marchant. See also *Bosville v. A.-G.*, 12 P. D. 177. In ordinary cases juries would be directed that fruitful intercourse and parturition are separated by a period not varying more than a week either way from that above mentioned.

[*Presumption in favour of the regularity of acts, appointments, &c.*] The legal maxim here applicable is *omnia præsumuntur rite et solenniter esse acta*. Where a feoffment has been proved, livery of seisin may be presumed after 20 years, if possession has gone along with the feoffment; *Biden v. Loveday*, cited 1 Vern. 196; *Rees v. Lloyd*, Wightw. 123; but a less time than 20 years is not sufficient; *Doe d. Wilkins v. Cleveland, Ms. of*, 9 B. & C. 864; except as against one who claims under it. *Doe d. Rowlandson v. Wainwright*, 5 Ad. & E. 520. As to a presumption of the regularity of acts done after a lapse of time without impeachment of them, see the observations of the court in *Williams v. Eyton*, 2 H. & N.

771; 27 L. J., Ex. 176; S. C. in Ex. Ch., 4 H. & N. 357; 28 L. J., Ex. 146. A person will not be presumed to have committed an unlawful act; therefore, when performances appeared to have taken place at a theatre, a licence was presumed in an action against a performer for not acting. *Rodwell v. Redge*, 1 C. & P. 220. But where the Act requiring the licence directs that a notice of it shall be painted on the outside of the house, and there is no such notice, it will be presumed, in an action for the penalty, that there is no licence. *Gregory v. Tuffs*, 6 C. & P. 271. Generally it may be laid down that illegality is not presumed. *Gleadow v. Atkin*, 1 Cr. & M. 418, *per* Bayley, B.; *Hire Purchase Furnishing Co. v. Richens*, 20 Q. B. D. 389, *per* Bowen, L.J. See *Onus Probandi*, *post*, pp. 94, 95. So a fact may be presumed from the regular course of a public office; thus, where it was proved that the custom-house would not permit an entry to be made, unless there had been indorsement on a licence, it was held (the licence being lost) that from this entry the indorsement might be presumed. *Butler v. Allnutt*, 1 Stark. 222. So when a statute enjoins a public officer to make an entry of registration of a deed when brought to him with an affidavit of certain particulars, it must be presumed from such entry being made that the affidavit was left with the deed, as required by the statute; *Waddington v. Roberts*, L. R., 3 Q. B. 579; the deed in this case was a composition deed under the Bankruptcy Act, 1861, s. 192, and the court followed *Grindell v. Brendon*, 6 C. B., N. S. 698; 28 L. J., C. P. 333, where the deed was a bill of sale; *Gugen v. Sampson*, 4 F. & F. 974, 976, *cor.* Channell, B., is to the like effect. In *Mason v. Wood*, 1 C. P. D. 63, the court declined to follow these cases, on the ground, apparently, that the statute did not direct the officer not to file the bill of sale without the affidavit. In the case of the post-office, there is a presumption that a letter properly directed and posted will be delivered in due course. See *British & American Telegraph Co. v. Colson*, L. R., 6 Ex. 122, *per* Bramwell, B.; and *Stocken v. Collin*, 7 M. & W. 515. This presumption is, it would seem, to be extended to postal telegrams, now that the inland telegraphs form part of the Government postal system.

The most common application of this presumption is in favour of the regular appointment of an officer in the execution of his duty. Thus, the fact of a person acting in an official capacity as a surrogate, is *prima facie* evidence that he is duly appointed, and has competent authority. *R. v. Verelst*, 3 Camp. 432. So of other public officers; though the appointment must be in writing; as in the case of justices of the peace, constables, &c. *Berryman v. Wise*, 4 T. R. 366; *Doe d. Davy v. Haddon*, 3 Dougl. 310; *Marshall v. Lamb*, 5 Q. B. 115. So, where a soldier is employed in recruiting, it will be presumed that he is a duly "attested soldier" within the Mutiny Act. *Wotton v. Gavin*, 16 Q. B. 48; 20 L. J., Q. B. 73. See also *R. v. Hawkins*, 10 East, 211. So in the case of a constable appointed by commissioners under a local Act. *Butler v. Ford*, 1 Cr. & M. 662. And the fact is evidence even in his own favour. S. C. So, where it is necessary to prove the swearing of an affidavit before a commissioner of one of the superior courts, evidence of his acting as such is sufficient. *R. v. Howard*, 1 M. & Rob. 187. Similar proof of a party's appointment as vestry clerk, *McGahey v. Alston*, 2 M. & W. 206; as solicitor, *Berryman v. Wise*, *supra*; as overseer, *Cannell v. Curtis*, 2 N. C. 228; *Doe d. Bowley v. Baines*, 8 Q. B. 1037; or as incumbent of a living, *Radford v. McIntosh*, 3 T. R. 635—has been held sufficient. So the regularity of the constitution of a commission issued by a Bishop under stats. 1 & 2 V. c. 106, s. 77, & 48 & 49 V. c. 54, s. 3 will be presumed. *Barratt v. Kearns*, (1905) 1 K. B. 504, C. A., cited *post*, p. 865. But in all these cases the evidence is only presumptive, and may be rebutted, when the regularity of the appointment is a pertinent inquiry.

As to presumption that an instrument lost, or not produced on notice, is or is not duly stamped, see tit. *Stamps—Effect of want of stamp; Stamp, when presumed, post*, p. 222.

## HEARSAY.

It is a general rule of evidence that declarations of persons not made upon oath are inadmissible evidence of the fact declared; *Spargo v. Brown*, 9 B. & C. 938; unless it be by way of *admission* by a party to the suit. Therefore, hearsay evidence, which is the mere repetition of such declarations upon the oath of a witness who heard them, is excluded. There are, however, certain classes of cases in which hearsay is on various grounds admissible. See *Sturla v. Freccia*, 5 Ap. Ca. 640 *et seq.*, per Ld. Blackburn.

[*Hearsay admissible in questions of pedigree.*] In questions of pedigree, the oral or written declarations of deceased members of the family are admissible to prove a pedigree. And this exception is founded on the obvious difficulty of tracing descent and the relationship of deceased members of families by any other evidence. Thus, declarations of deceased parents are admissible to prove the legitimacy of their children. So, hearsay is good evidence to prove who is a person's grandfather; when he married; what children he had; or the death of a relation beyond sea, &c. B. N. P. 294-5; *Bridger v. Huett*, 2 F. & F. 35. The declarations of a deceased parent and another relation were admitted to show which of several children born at a birth was the eldest. *Per Reynolds, C.B.*, 12 Vin. Abr. 247; cited 4 Camp. 410. Declarations in a family, descriptions in wills, inscriptions upon monuments, in bibles or other books, and in registry books, are all admitted, upon the principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion where the mind stands in an even position, without any temptation to exceed or fall short of it. *Per Ld. Eldon, Whitlocke v. Baker*, 13 Ves. 514; *Higham v. Ridgway*, 10 East, 109; *Berkeley Peerage case*, 4 Camp. 418. And see the *Slane Peerage case*, 5 Cl. & Fin. 23; and the *Vaux Peerage, Ib.* 526. Entries in a family Bible are admissible in evidence, on the ground that, being in that place, they are to be taken as assented to by those having the custody of the book; proof of the handwriting of the entries is therefore immaterial. *Hubbard v. Lees*, L. R., 1 Ex. 255. See also *Berkeley Peerage case*, 4 Camp. 421; per Lds. Ellenborough and Redesdale. It seems, however, that in the case of any other book the entries must be proved to have been made by a member of the family; *Tracy Peerage*, Hubback, Evid. of Succession, 673; or that they have been treated by a relative as a correct family memorial. *Hood v. Beauchamp*, 8 Sim. 26. A pedigree which has long hung up in a family mansion is good evidence in such cases; *Goodright d. Stevens v. Moss*, 2 Cowp. 594; or a marriage certificate kept by the family. *Doe d. Jenkins v. Davies*, 10 Q. B. 314. A minutebook of a visitation, signed by the heads of the family, has been admitted, though produced from a private library. *Pitton v. Walter*, 1 Stra. 162. A signed pedigree delivered to the Herald's College by virtue of a commission under which the college was authorised to receive and enrol such pedigrees, was admitted. *Shrewsbury Peerage case*, 7 H. L. C. 19. So a paper in the handwriting of a deceased member of the family, purporting to give a genealogical account of the family, was held admissible, though never made public by the writer, erroneous in many particulars, and professing to be founded partly on hearsay. *Monkton v. A.-G.*, 2 Russ. & Myl. 147. So a ring, worn publicly, stating the date of the person's death whose name is engraved upon it. S. C., *Id.* 162. So a description of a party as "daughter and heir" in a deed signed by the party

so described. *Doe d. Jenkins v. Davies*, ante, p. 44; *Smith v. Tebbitt*, L. R., P. & M. 354. But an old pedigree, professing on the face of it to be compiled from "registers, wills, monumental inscriptions, family records, and history," and going back to a fabulous date, is not evidence, though proved to be signed by members of the family, except so far as it relates to persons presumably known to them, or respecting whom they may have obtained information from other members of the family; whether the mere recognition of a pedigree by a deceased ancestor will make it legitimate evidence (except against claimants under him) is doubtful. *Davies v. Lowndes*, 5 N. C. 161; 6 M. & Gr. 471, 512, 525, &c., Ex. Ch. The ground upon which the inscription on a tombstone, or a tablet in a church, is admitted, is that it is presumed to have been put there by a member of the family cognizant of the facts, and whose declaration would be evidence. *Id.* 512, per Parke, B.

The memoranda of a parent have been held good evidence to prove the time of the birth of a child. *Herbert v. Tuckal*, T. Raym. 84, cited by Ld. Ellenborough in *Roe d. Brune v. Rawlings*, 7 East, 290. So the statement of a parent, though written long after the time of birth. *In re Turner*, 29 Ch. D. 985. But only in a case of pedigree. *Haines v. Guthrie*, 13 Q. B. D. 818, C. A. So the declaration of a father as to the place of birth of a son was considered inadmissible, as being a mere question of locality, and not of pedigree, in *R. v. Erith*, 8 East, 542. So, in *Shields v. Boucher*, 1 De G. & Sm. 40, Wilde, C.J., rejected, upon the trial of an issue, declarations of a relation as to the part of England from which he had originally come; but on moving for a new trial, Knight-Bruce, V.-C., expressed a strong opinion in favour of their admissibility in a case of mere genealogy, and with a view to identify ancestors, and distinguished *R. v. Erith*, supra. Accord. per Kindersley, V.-C., in *Bauer v. Mitford*, 7 W. R. 570, June, 1859; and declarations of a party, showing that he has or had relations living at A., have been admitted to identify persons whose existence is proved aliunde. *Rishton v. Nesbitt*, 2 M. & Rob. 554; *Hood v. Beauchamp*, Hubback, Evid. of Succession, 468, cited 1 Taylor, Evid., 10th ed., § 647. The declarations of a party as to his own illegitimacy, or place of birth, seem inadmissible except against himself, or those claiming under him by title posterior to the declaration. *R. v. Rishworth*, 2 Q. B. 476.

Where statements contained in monumental inscriptions, and declarations made by a deceased relation, were offered in evidence upon the trial of an issue out of Chancery to prove the ages of the parties referred to, Tindal, C.J., rejected the evidence; but Ld. Brougham, C., after argument, expressed a very strong opinion in favour of it; and afterwards stated that he had the concurring opinions of Littledale, J., and Parke J., but, the suit being compromised, no further opinion was delivered. *Kidney v. Cockburn*, 2 Russ. & Myl. 167. An inscription on a tombstone, stating the death of a party at the age of 90, was admitted as evidence of the age. *Rider v. Malbone*, cor. Littledale, J., cited *Id.* pp. 169, 170. For other cases in which inscriptions on monuments have been admitted in proof of pedigree, see 1 Taylor, Ev., 9th ed., § 652, and *Shrewsbury Peerage*, 7 H. L. C. 1. So, an old tracing from an effaced monument has been admitted. *Staney v. Wade*, 7 Sim. 595. A bill in Chancery by a father, stating his pedigree, was admitted in *Taylor v. Cole*, 7 T. R. 3, n.; but this is contrary to the resolution of the judges in the *Banbury Peerage case*, 2 Selw. N. P., 2nd ed. 773, and to *Boileau v. Rutlin*, 2 Exch. 678. An answer in Chancery, sworn ante litem motam, seems unexceptionable as evidence of pedigree incidentally set forth in it; but in the *Wharton Peerage case*, 12 Cl. & F. 295, an answer, sworn but not filed, was rejected as evidence of pedigree. Proceedings in the sheriff's court in Scotland are admissible, when the pedigree is incidentally stated, *Lyell v. Kennedy*, 14 Ap. Ca. 437, D. P. The recital in a family

conveyance by a trustee is evidence of parentage. *Slaney v. Wade, supra*. So an old and cancelled will has been allowed as evidence of the existence and relative ages of certain deceased members of the family from whom both parties derived title. *Doe d. Johnson v. Pembroke, Earl of, 11 East, 504*. The probate of a will is not *primary* evidence for this purpose. *Doe d. Wild v. Ormerod, 1 M. & Rob. 466; Dike v. Polhill, 1 Ld. Raym. 744*. The will itself and signature of the testator must be proved, unless the age of the document or other circumstance dispense with such proof: it is said, however, that the "ledger book" or "original rolls" of the Ecclesiastical Court, containing an enrolment of the will, are admissible evidence to prove relationship. B. N. P. 246.

It is not necessary that the declarations should be contemporaneous with the facts declared; thus, a person's declaration, that his grandmother's maiden name was A. B. is admissible. *Per Ld. Brougham, C., Monkton v. A.-G., 2 Russ. & Myl. 158*. Nor is it necessary that the fact declared should be in the personal knowledge of the declarant; thus, the declaration of A. as to what he heard from B. is admissible, if both be relations. S. C. *Id.* 165.

Declarations of the kind above described are strictly admissible only in inquiries relating to descent or relationship, or in tracing the devolution of property. In proving recent events, such as the place of birth, age, death, &c., of a person, where that fact is directly in issue, stricter proof is required. Thus the declaration of a parent as to the time of a child's birth is not admissible to prove a defence of infancy. *Haines v. Guthrie, 13 Q. B. D. 818, C. A.* In peerage cases, also, unusually strict evidence is exacted.

General reputation is good evidence in pedigree cases, *e.g.*, of heirship; *Bridger v. Huett, 2 F. & F. 35*; of marriage, *Evans v. Morgan, 2 C. & J. 453; Shedden v. Patrick, 2 Sw. & Tr. 170; 30 L. J., P. M. & A. 217; Campbell v. Campbell, L. R., 1 H. L. Sc. 201, per Ld. Cranworth*; but if it appear on cross-examination or otherwise that the witness is speaking of evidence given him by some individual, even as to the general reputation, the evidence ceases to be admissible. *Shedden v. Patrick, supra*.

*Hearsay, of what persons, admissible in questions of pedigree.*] The hearsay must be from persons having such a connection by blood or marriage with the party to whom it relates, that it is natural and likely, from their domestic habits and connections, that they are speaking the truth and are not mistaken. *Per Ld. Eldon, C., Whitelocke v. Baker, 13 Ves. 514*. Declarations by a deceased person as to her own legitimacy are evidence. *Procur.-Gen. v. Williams, 31 L. J., P. M. & A. 157*. So by a deceased husband as to the legitimacy of his wife, and as to the pedigree of her family, are evidence. *Vowles v. Young, 13 Ves. 148; Doe d. Northey v. Harvey, Ry. & M. 297*. So the declaration of a wife as to her husband's family. *Shrewsbury Peerage, 7 H. L. C. 1*. But not the declarations of her father. S. C. Nor the declarations of illegitimate relations. *Doe d. Bamford v. Barton, 2 M. & Rob. 28; Crispin v. Dogliani, 3 Sw. & Tr. 44; 42 L. J., P. M. & A. 109*. The declarations of servants and intimate acquaintance are not admissible. *Johnson v. Lawson, 2 Bing. 86; S. C., 9 B. Moore, 183*. The declarations of a deceased person, as to the fact of his own marriage, are evidence. B. N. P. 112; *R. v. Bramley, 6 T. R. 330*. The declarations of a deceased mother as to the non-access of her husband, are not evidence, on grounds of policy. *R. v. Luffe, 8 East, 193; Goodright d. Stevens v. Moss, Cowp. 594*. Nor are her declarations, or those of her husband, that her son is the son of another man. *Cope v. Cope, 1 M. & Rob. 269*. But where the non-access is admitted or established, the mother's declarations may be proof

of paternity. *Legge v. Edmonds*, 25 L. J., Ch. 125. And her declarations that her child is a bastard, are admissible as evidence of her conduct; *Aylesford Peerage*, 11 Ap. Ca. 1, D. P.; and so are those of the putative father; *Burnaby v. Baillie*, 42 Ch. D. 282; although the declarants are alive. And although the declarations of the parents are not admissible to bastardize a child born after marriage, they are admissible to prove that the child was born before marriage. *Goodright d. Stevens v. Moss*, Cowp. 591; *Murray v. Milner*, 12 Ch. D. 845. Before any such declaration can be admitted in evidence the relationship of the declarant by blood or marriage must be established by some proof independent of the declaration itself; it is the duty of the judge to decide whether this relationship is proved; slight evidence will, however, be sufficient. *Plant v. Taylor*, 7 H. & N. 237; 31 L. J., Ex. 289; *Smith v. Tebbitt*, L. R., 1 P. & M. 354.

Old depositions in a suit, purporting on the face of them to be made by relations, but not proved *aliunde* to have been so made, were not held evidence in the *Banbury Peerage case*, 2 Selw. N. P., 2nd ed. 773: *Accord. Davies v. Morgan*, 1 C. & J. 591; but see *Freeman v. Phillipps*, 4 M. & S. 486, cited *post*, p. 51, where the antiquity of the depositions was held to dispense with such extrinsic proof. Although it is necessary to give evidence *dehors* to connect the persons making them with the family, yet where the question is whether A. be related to C., the declarations of B., who is proved to have been related to A., are evidence to prove C. related to A., without evidence *dehors* to show B. related to C. *Monkton v. A.-G.*, 2 Russ. & Myl. 156. When the judge has decided that the evidence is sufficient, he may receive the declaration, although the fact of relationship is the very point in issue in the cause; *Doe d. Jenkins v. Davies*, 10 Q. B. 314; and he is not bound to hear evidence on the *voir dire* to rebut the evidence of relationship. *Hitchins v. Eardley*, L. R., 2 P. & M. 248. It is no objection that the person who made the declaration stood *in pari casu* with the person tendering it in evidence. *Monkton v. A.-G.*, 2 Russ. & Myl. 159. In a claim of peerage a widow was admitted to prove declarations of her deceased husband in support of her son's title, though the husband, if living, would have had the right which the declarations went to establish. Cited by Abbott, C.J., in *Doe d. Tilman v. Tarver*, Ry. & M. 141. So declarations are admissible, though they tend to show the declarant's own title at the time, provided there was no *lis mota*; S. C.; *Doe d. Jenkins v. Davies*, *supra*; but in *Plant v. T aylor*, *supra*, it was doubted whether a declaration by a person obviously in his own interest ought to be received. A deposition of a deceased relative taken on a commission of inquiry as to the next of kin of a lunatic, is admissible to establish the title of the lunatic's heir-at-law. *Gee v. Ward*, 7 E. & B. 509.

The relative, whose declarations are offered, must be proved to be dead before they can be admitted in evidence. *Butler v. Mountgarret*, *Vt.*, 7 H. L. C. 633. Unless, indeed, from the circumstances, his death may be presumed; *vide ante*, p. 41.

[*Hearsay in questions of pedigree post litem motam.*] If the declarations were made after a controversy has arisen with regard to the point in question, they are inadmissible. *Berkeley Peerage*, 4 Camp. 401. It is not necessary, in order to exclude the evidence, to show that the controversy was known to the person making the declaration. *Id.* 417; *Reilly v. Fitzgerald*, 6 Ir. Eq. Rep. 348; *Shedden v. Patrick*, 2 Sw. & Tr. 170; 30 L. J., P. M. & A. 217. The declaration may be admissible though made from interested motives, and in order to prevent *future* controversy. *Berkeley Peerage*, 4 Camp. 418. The term *controversy* must not be understood as necessarily signifying an *existing suit*. *Monkton v. A.-G.*, 2 Russ. & Myl. 161; *Butler v.*

*Mountgarret, Yt., ante*, p. 47; *Frederick v. A.-G.*, L. R., 3 P. & M. 270. Nor a suit for the same purpose as the suit or proceeding in which the evidence is offered. *Berkeley Peerage, ante*, p. 47; *Sussex Peerage*, 11 Cl. & F. 85; see *Shrewsbury Peerage*, 7 H. L. C. 1; and *Davies v. Lowndes*, 6 M. & Gr. 471, Ex. Ch.

[*Hearsay admissible to prove public rights.*] Another exception to the rule which excludes hearsay evidence is where the question relates to matters of public or general interest. The term "interest" here means pecuniary interest, or some interests by which the legal rights or liabilities of a class of the community are affected; and the grounds of admissibility are,—because the origin of such rights is generally ancient and obscure, and consequently incapable of direct proof;—because in local matters all persons living in the neighbourhood, and interested in them, are likely to be conversant with them;—because common rights are naturally the subject of common and public conversation, in the course of which, statements are made, which, uncontradicted, are likely to be true; and thus a trustworthy reputation may arise from the concurrence of many unconnected with each other, and interested in investigating the truth. *Per* Ld. Campbell, in *R. v. Bedfordshire*, 4 E. & B. 541-2; 24 L. J., Q. B. 81. It will be seen from the following illustrations of the rule that all the grounds above enumerated need not exist in order to justify the reception of hearsay; and that, in some instances, other grounds may be adduced in favour of it.

Common reputation is admissible to prove not only public or general rights (*Berkeley Peerage*, 4 Camp. 415; *Weeks v. Sparke*, 1 M. & S. 686; *Morewood v. Wood*, 14 East, 329), but also rights affecting a number of persons, and therefore in the nature of public rights, as a manorial custom; *Denn d. Goodwin v. Spray*, 1 T. R. 466; or the extent of a manor; *Doe d. Padwick v. Skinner*, 3 Exch. 84; or a reputed manor which once existed; *Doe d. Molesworth v. Sleeman*, 9 Q. B. 298; or common by cause of vicinage; *Pritchard v. Powell*, 10 Q. B. 589; or otherwise; *Evans v. Merthyr Tydfil Council*, (1899) 1 Ch. 241, C. A.; or a custom in a borough to exclude foreigners; *semb. Davies v. Morgan*, 1 C. & J. 587; or the boundaries between parishes or manors; *Nicholls v. Parker*, 14 East, 331, n.; a parish modus; *Weeks v. Sparke*, 1 M. & S. 691; *White v. Lisle*, 4 Madd. 215; or parochial chapelry; *Carr v. Mostyn*, 5 Exch. 69; a toll traverse; *Brett v. Beales*, M. & M. 416; a ferry; *Pim v. Currell*, 6 M. & W. 234; a county bridge; *R. v. Bedfordshire*, 4 E. & B. 535; 24 L. J., Q. B. 81; a several fishery; *Neill v. Devonshire, Dk. of*, 8 Ap. Ca. 135, D. P.; or a right of freewarren by prescription over an entire manor, including demesne and tenemental lands; *Carnarvon, El. of, v. Villebois*, 13 M. & W. 313. Therefore the declaration of deceased copyholders; or a saving of the right in a private Act for inclosure, *inter alia*, of copyholders' common rights; or a verdict and judgment against a copyholder, are all evidence of such a right of freewarren. S. C., *Id.* A deed between the lord and certain copyholders, ratifying customs claimed by the latter in consideration of a payment to the lord, is evidence as against other copyholders where they set up a general custom negated by the deed. *Semb. Anglesey, Mqs. of, v. Atherton, Ld.*, 10 M. & W. 218. A customary heriot payable by a freeholder of a manor, may be proved by presentments and payments of heriots by other freeholders of the manor. *Damerell v. Protheroe*, 10 Q. B. 20. Reputation is admissible to prove the prescriptive liability of certain landowners to repair a county bridge; for it is a matter of public interest, though private interests are also involved. *R. v. Bedfordshire, supra*; overruling *R. v. Waverree*, 2 M. & Rob. 353.

But to prove a prescriptive right, strictly private, such evidence is not



admissible; *Morewood v. Wood*, 14 East, 327; *Richards v. Bassett*, 10 B. & C. 663; and *Weeks v. Sparke*, 1 M. & S. 687; where it was allowed in support of a claim of a prescriptive right for the plaintiff, owner of a certain estate, to abridge by tillage the rights of common appurtenant claimed by the defendant and many others is overruled by *Dunraven, El. of, v. Llewellyn*, 15 Q. B. 791; 19 L. J., Q. B. 388, Ex. Ch. (this last case is explained in *Warrick v. Queen's College, Oxford*, L. R., 6 Ch. 716, 729). So, reputation as to the exemption of the sheriff of a county from the performance of a public duty, viz., the execution of criminals, was rejected in *R. v. Antrobus*, 2 Ad. & E. 793. But where the boundary of a tenement and a hamlet are proved to coincide, then evidence of reputation as to the bounds of the latter is legitimate evidence of the former. *Thomas v. Jenkins*, 6 Ad. & E. 525.

On a question whether a certain road was a highway, a copperplate map was produced, in which it was so described; it purported to have been taken by the direction of the churchwardens, and proof was offered that it was generally received in the parish as an authentic map; but *Ld. Kenyon* rejected the evidence. *Pollard v. Scott, Peake*, 18. So the production of an old printed map of a county from the custody of a county magistrate, who had it some years in his possession, does not make it admissible to prove the bounds of the county. *Hammond v. Bradstreet*, 10 Exch. 390; 23 L. J., Ex. 332, Ex. Ch. It should seem, however, that if such a map had been supported by proof of its compilation by persons having particular means of knowledge of the bounds, or had been in some way sanctioned publicly as authentic, it might have been admissible as reputation; otherwise there is no reason for attaching more value to an engraved map than to a printed book as evidence of its contents; nor does the current use of it by those who reside in the district delineated in it imply an assent to all its details. The title commission maps are not, under 6 & 7 W. 4, c. 71, s. 64, evidence as to the boundary of land in the case of disputed title. *Wilberforce v. Hearfield*, 5 Ch. D. 709. But they are evidence as to the existence of a public road across the land. *A.-G. v. Antrobus*, (1905) 2 Ch. 188, 193; so are deposited plans for a light railway across it; *Id.*, 194. The maps of the Ordinance survey are evidence of the existence of a visible track across the land. *Id.*, 203. An old map commonly used at a manor court to define the limits of copyholds, is not evidence of a highway, though ways may be indicated upon it; especially if it does not purport to describe them as public ways. *Pipe v. Fulcher*, 1 E. & E. 111; 28 L. J., Q. B. 12. See further, *R. v. Berger, infra*.

A public meeting called for the purpose of considering about repairing a way, at which several present signed a paper stating that it was not a public way, is evidence, though slight, against the right. *Barraclough v. Johnson*, 8 Ad. & E. 99. Even where general reputation is evidence, yet the tradition of a particular fact is not; as that a house once stood in a particular spot. *Ireland v. Powell, Peake*, Evid. 15; *Mercer v. Denne*, (1904) 2 Ch. 534, 543; (1905) 2 Ch. 538, C. A. Nor is reputation admissible evidence of a farm modus. *Prichett v. Honeyborne*, 1 Y. & J. 135. Where a question of public way was in issue, the declarations of a deceased occupier of land made whilst planting a tree, stated that he planted it to show the boundary of the road, are not evidence of the public right, for it is not a statement of general reputation but of a particular fact. *R. v. Bliss*, 7 Ad. & E. 550; *R. v. Berger*, (1894) 1 Q. B. 823. The declarations of a deceased lord of the manor as to the extent of the waste are not evidence in extension of it. *Crease v. Barrett*, 1 C. M. & R. 919. Where the question was whether a place was within the limits of a hundred, ancient entries of orders of justices in sessions stating the place to be within such limits, were held to be evidence of reputation,

though the justices were not proved to have been resident within the hundred or county. *Newcastle, Dk. of, v. Broxtowe*, 4 B. & Ad. 273. So the question being whether certain land is in the parish of A. or B., ancient leases, in which they are described as lying in parish B., are evidence that the land is in that parish. *Plaxton v. Dare*, 10 B. & C. 17. In assumption for tolls by a lessee of the corporation of Cambridge, an old deed of composition between it and the University, recognising the right, was admitted in behalf of the plaintiff, though not proved to have been acted upon. *Brett v. Beales*, M. & M. 416. *Miter* of a mere award, not proved to have been acquiesced in. S. C. So an award *inter alios* is not evidence, as reputation, of the boundary of a parish and county. *Evans v. Rees*, 10 Ad. & E. 151; *Wenman v. Mackenzie*, 5 E. & B. 447. The finding of a jury under a commission duly issued out of the duchy court of Lancaster on the petition of the parties to ascertain the bounds of adjoining manors, is evidence of such bounds. *Brisco v. Lomax*, 8 Ad. & E. 198. But an interlocutory order of the same court, containing only a provisional arrangement between the parties, is not evidence of reputation. *Pim v. Curell*, 6 M. & W. 234. Generally, a verdict, and judgment thereon, in a matter in which reputation is admissible evidence, is also admissible; so of a decree, or inquest of office lawfully authorised. See *Effect of documentary evidence*, *post*, pp. 192, 196, 200. Reputation alone is said to be evidence of the existence of a manor; *Steel v. Prickett*, 2 Stark. 463; but it seems that some foundation should be laid by proof of acts done, as holding courts, &c.; and the production of a deputation to kill game is not of itself sufficient proof even of a colourable title to a real manor; *Rushworth v. Craven*, M'Cl. & Y. 417; for the lord of a mere reputed manor may grant one.

The rule with regard to the parties from whom the declarations proceed has been thus laid down: In cases of rights or customs which are not, strictly speaking, public, but are of a general nature and concern a multitude of persons (as in questions with respect to boundaries and customs of particular districts), it seems that hearsay evidence is not admissible, unless it be derived from persons conversant with the neighbourhood. On the other hand, actual inhabitancy in the place, the boundaries of which are in dispute, is unnecessary. But where the right is strictly public (a claim of highway, for instance), in which all the king's subjects are interested, it is difficult to say that there ought to be any such limitation. In a matter in which all are concerned, reputation from any one appears to be receivable, but almost worthless unless it came from persons who are shown to have some means of knowledge, as by living in the neighbourhood, or frequently using the road in dispute. *Per Parke, B.*, in *Crease v. Barrett*, 1 C. M. & R. 919; *Doe d. Molesworth v. Sleeman*, 9 Q. B. 301, *per Cur.* Thus a document purporting to be a decree of certain persons, the Lord Treasurer and Chancellor of the Exchequer, &c., who had no authority as a court, was held to be inadmissible evidence as reputation on a question whether the city of Chester, before it was made a county itself, formed a part of the county palatinate, because those personages had from their situations no peculiar knowledge of the facts. *Rogers v. Wood*, 2 B. & Ad. 245. So the answers of the tenants of a manor to an old commission of survey issued by the lord, finding the bounds of a manor and his right to *wreck*, are evidence of the former, but not of the latter, they having no peculiar means of knowledge, and the lord's title to such a franchise not being a matter of public concern. *Talbot v. Lewis*, 1 C. M. & R. 495. Such a claim of wreck is one affecting only the interests of the Crown, and not the tenants; and the case differs in that respect from a right of freewarren in *Carnarvon, El. of, v. Villebois*, 13 M. & W. 313.

Ancient answers of the customary tenants of a manor, stating the rights

of the lord of the manor to *all* mines within it, are evidence even against the freeholders, for this claim affects all the tenants. *Crease v. Barrett*, *ante*, p. 51. As to the admissibility of inquisitions and surveys, as evidence of reputation, see *Effect of inquisitions, &c., post*, p. 196. Declarations of old persons concerning the boundaries of parishes and manors have been admitted in evidence, though they were parishioners and claimed right of common on the wastes which their declarations had a tendency to enlarge. *Nicholls v. Parker*, 14 East, 331; *Plaxton v. Dare*, 10 B. & C. 19. See also *R. v. Mytton*, 2 E. & E. 557; S. C. *sub nom.* *Mytton v. Thorubury*, 29 L. J., M. C. 109, *post*, p. 102. So declarations on a question of parochial modus were received, though the deceased was a parishioner, and liable to pay tithes. *Harwood v. Sims*, Wightw. 112; *Deacle v. Hancock*, M'Cl. 85; S. C., 13 Price, 226. So, a written declaration of a deceased corporator was considered to be evidence in support of a custom to exclude foreigners. *Davies v. Morgan*, 1 C. & J. 587.

In order to the admission of evidence of reputation, it is not necessary that the fact of user should be shown; *Crease v. Barrett, supra*; although there are cases in which it has been so considered; see *Weeks v. Sparke*, 1 M. & S. 686; *Rushworth v. Craven*, M'Cl. & Y. 417; and it is obvious that such evidence without user will be of little weight.

Such declarations, as in questions of pedigree (*vide ante*, p. 47), must not have been made *post litem motam*. *R. v. Cotton*, 3 Camp. 444. But where, in a suit as to the custom of a manor, depositions in a former suit relative to a custom of the same manor were offered in evidence, it was held no objection that the depositions taken in the former suit were *post litem motam*, if the two suits were not upon the same custom; and where the former suit was very ancient, it was held unnecessary to prove by intrinsic evidence that the witnesses who made the depositions were in the situation in which they professed to stand, or that they had the means of becoming acquainted with the customs of the manor. *Freeman v. Phillipps*, 4 M. & S. 486; but see *Banbury Peerage case*, 2 Selw. N. P., 2nd ed. 773, *ante*, p. 47.

The declarations of old persons *still alive* cannot be admitted as proof of reputation. *Woolway v. Rowe*, 1 Ad. & E. 117.

[*Hearsay admissible when part of the transaction.*] When hearsay is introduced, not as a medium of proof in order to establish a distinct fact, but as being in itself a part of the transaction in question, and explanatory of it, it is admissible. Words and declarations are admissible when they accompany some act, the nature, object, or motive of which are the subject of the inquiry. 1 Phill. & Arn. Ev., 10th ed. 152, cited by Blackburn, J., *Hyde v. Palmer*, 3 B. & S. 657; 32 L. J., Q. B. 126; and see *Bennison v. Cartwright*, 5 B. & S. 1. In the case of an equivocal act, the accompanying declarations are often absolutely necessary to show the animus of the actor. Thus, if a debtor leaves home, the intent to avoid his creditors may be shown by his declarations at the time. *Bateman v. Bailey*, 5 T. R. 512. So a payment by a debtor may be explained by an accompanying request to apply it to a certain debt. In a suit for a false representation of the solvency of A. B., whereby the plaintiffs trusted him with goods, their declarations at the time that they trusted him in consequence of the representation are admissible in evidence for them. *Felloves v. Williamson*, M. & M. 306. So in an action against the drawer of a bill of exchange, what was said by the drawee, on the bill being presented, is evidence for the plaintiff as to want of assets; but not what passed between the drawee and the holder afterwards. *Prideaux v. Collier*, 2 Stark. 57. A letter sent by plaintiff to his indorser with the promissory note on which the maker is sued, may be read for the plaintiff to show why it was sent. *Bruce v. Hurlly*,

1 Stark. 24; and see *Kent v. Lowen*, 1 Camp. 177. To prove that there was a good consideration for a conveyance, the verbal instructions of the alienor to his solicitor to prepare it are good evidence. *Tull v. Parlett*, M. & M. 472. In an action to recover money paid by a bankrupt in contemplation of a bankruptcy, his declarations as to the state of his affairs, made about the time of the transaction, are admissible for the plaintiffs. *Vacher v. Cocks*, M. & M. 353; *Herbert v. Wilcocks*, *Id.* 355, n. So in an action to recover fraudulent payments, answers to letters written by a bankrupt, requesting assistance, may be read to prove the refusal to give assistance, and his consequent knowledge of the state of his affairs. *Vacher v. Cocks*, *supra*. A trader being in embarrassed circumstances, executed an assignment of all his "effects, stock, books, and book-debts," for the benefit of his creditors: in an action after his death against the assignee, as executor *de son tort*, it was held that a list of creditors, made out by the direction of the assignor about the time of the execution of the assignment, was evidence for defendant for the purpose of rebutting fraud. *Lewis v. Rogers*, 1 C. M. & R. 48. Where felling timber is offered as an assertion of ownership, the declarations of the party so employed, showing ownership in another, are evidence to rebut it. *Per Parke, B., Doe d. Stansbury v. Arkwright*, 5 C. & P. 575.

Declarations are admissible as evidence of feelings, or of suffering: thus, in an action of assault on plaintiff's wife, evidence of what she said immediately on receiving the hurt is admissible for him. *Thompson v. Trewanion*, Skin. 402. The declarations of a wife at the time of her elopement that she fled from terror of personal violence from her husband, seem to be evidence against him. See *Aveson v. Kinnaird, Ltd.*, 6 East, 193. And there are other cases on the like principle decided in actions for adultery. See *Willis v. Bernard*, 8 Bing. 376. See also *Aylesford Peerage*, 11 Ap. Ca. 1, D. P., cited *ante*, p. 47.

In the *Gardiner Peerage case*, medical men were examined as to their experience of cases of protracted gestation. The commencement of the period of gestation was known to them only through the answers by women to questions relating to their sexual intercourse, menstruation, quickening, and other similar facts. Those answers were held inadmissible. *Le Marchant's Rep.*, 174-6. See however *Bosville v. A.-G.*, 12 P. D. 177, 178, where medical men gave, without objection, evidence which was in effect, the result of such enquiries. In *R. v. Johnson*, 2 Car. & K. 354, to ascertain the state of a woman's health a few days before her death, a witness (not medical) was allowed to state the answers of the deceased woman to inquiries made by him.

Statements by a deceased vendor, made at the time of the sale to indicate the land sold, are admissible to identify it. *Parrott v. Watts*, 47 L. J., C. P. 79.

The declarations of a plaintiff made in a conversation with the defendant, if part of the *res gestæ*, are admissible for the plaintiff as part of his evidence. *Hayslep v. Gymer*, 1 Ad. & E. 162. See *post*, p. 64. But an act done cannot, in general, be qualified by isolated declarations made afterwards, *alio intuitu*. Thus the schedule of an insolvent, delivered four months after execution of a deed, was not admissible on behalf of the assignees to show that it was executed with intent to petition. *Peacock v. Harris*, 5 Ad. & E. 449. And a declaration by the obligee, as to the application of past payments made to him by the obligor, is not evidence as between the sureties. *Dunn v. Slee*, Holt, N. P. 401. Where general character is in issue, evidence of reputation is admitted. *Foulkes v. Sellway*, 3 Esp. 236. See *Evidence of character, post*, p. 86, and *Examination of witnesses; Evidence of character, post*, p. 183.

It is not every declaration that is receivable in evidence, merely because it accompanies an act done by the speaker. The admissibility of the declaration depends not *merely* on its accompanying an act, but on the light which it throws upon an act which is, in itself, relevant and admissible evidence. See, generally, *R. v. Bliss*, *ante*, p. 49, and the opinions of the judges in *Wright v. Doe d. Tatham*, 7 Ad. & E. 313, 361, &c.; S. C., 4 N. C. 489, 498, 530, 544, 554, Ex. Ch. A declaration is sometimes receivable *per se*, as a claim. Thus, where the plaintiff asserts a right to goods under a sale to him by C., and the defence is that the alleged sale was collusive, defendant's witness may be asked, "Whether he had not heard C. claim the goods after the sale?" Under such circumstances, a claim is as much an act done as if C. had taken the goods saying they were his. *Ford v. Elliott*, 4 Exch. 78. Where the object is merely to show that inquiries had been made for A. B. without success, the oral statement of his absence by a person at his residence is admissible evidence. *Crosby v. Percy*, 1 Taunt. 364; see further, *R. v. Kenilworth*, 7 Q. B. 642. But if it be necessary to show that A. B. is actually out of the realm, such oral statement is not evidence of it. *Robinson v. Markis*, 2 M. & Rob. 375.

It has been justly remarked that many of the above cases are not strictly instances of hearsay (*i.e.* second-hand) evidence, though commonly so classed. The *res gesta* in each case is original evidence; and the accompanying declaration being part of it, is also original.

[*Acts or assertions of ownership.*] Under the head of hearsay are usually classed those cases in which expired leases, grants, or other documents of a similar kind actively asserting a right on the part of the maker, have been admitted as evidence of that right in favour of persons claiming under him; they are, in fact, *acts of ownership*, and, as such, evidence of property. Thus, old leases of fishing places by the lord of an adjacent manor are evidence of a right to the bed of the river in favour of those who claim under him. Hale, *De Jure Maris*, p. 35; *Neill v. Dk. of Devonshire*, 8 Ap. Ca. 135, D. P. Where the question was, whether certain lands within a manor were subject to a right of common, counterparts of old leases, produced from among the muniments of the lord of the manor, from which it might be inferred that the land was demised by the lord free from such charge, were allowed to be evidence for the plaintiff claiming under him, though possession under the lease was not shown. *Clarkson v. Woodhouse*, 3 Doug. 189; 5 T. R. 412, n.; *Bristow v. Cornican*, 3 Ap. Ca. 641, D. P. And such counterparts are evidence of seisin, though only executed by the lessees. *Doe d. El. of Egremont v. Pulman*, 3 Q. B. 622; *Magdalen Hospital v. Knotts*, 8 Ch. D. 709, C. A. So old entries of licences on the court rolls of a manor, stating that the lords of the manor had the several fishery in a navigable river, and for certain rents had granted liberty of fishing, were held admissible to prove a prescriptive right in the lords of the manor without proof of payment under the licences; but such evidence is not entitled to much weight unless it be shown that in later times payments have been made under similar licences, or that the lords of the manor have exercised other more recent acts of ownership. *Rogers v. Allen*, 1 Camp. 309; see *Musgrave v. Incl. Comrs.*, L. R., 9 Q. B. 162, 178; *A.-G. v. Emerson*, (1891) A. C. 649, 658-9, D. P. So an old table of tolls, kept by the town clerk of a corporation, by which the lessees of the tolls had always been guided in their collection, is admissible in favour of the claim of toll by the corporation. *Brett v. Beales*, M. & M. 419; *R. v. Carpenter*, 2 Show. 48. An ancient corporation book containing entries, showing what rents were due to the corporation, was held admissible as showing the exercise of acts of ownership. *Malcolmson v. O'Dea*, 10 H. L. C. 593. See also

*Blandy-Jenkins v. Dunraven, El. of*, (1899) 2 Ch. 121, C. A. But mere entries in the corporation books of *orders to grant* leases, appointments of commissioners to manage them, &c., have been rejected as evidence. *Brett v. Beales*, M. & M. 429, and S. C., 5 M. & Ry. 433, 436. So an old entry of a resolution in the books of an eleemosynary corporation, being lay impropriators of tithes, that the tithe should, on default of payment of the accustomed payment in lieu of tithe, be taken in kind, is not evidence for them against a claim of modus, without proof that tithe in kind had in fact been taken in pursuance of such order. *A.-G. v. Cleve*, Somerset Sum. Ass. 1841, *per Rolfe*, B. And generally, what any one writes or says in his own favour cannot be evidence for himself or his representative. *Glyn v. Bank of England*, 2 Ves. Sen. 43; *R. v. Debenham*, 2 B. & A. 185. Therefore, entries made by a deceased person, under whom the defendant claims, acknowledging the receipt of his rent for the premises in question, are not admissible for the defendant in proof of his title to them. *Outram v. Morewood*, 5 T. R. 121. So on a question whether the appointment of a curate belongs to the vicar or to a corporation, entries in old books belonging to the corporation are not evidence for them. *A.-G. v. Warwick Cor.*, 4 Russ. 222. So, a survey of a manor, made by the owner, is not evidence against a stranger in favour of a succeeding owner. *Anon.*, Stra. 95. But where A., seised of the manors of B. and C., causes a survey to be taken of the manor of B., which is afterwards conveyed away, and, after a time, there are disputes between the lords of the manors of B. and C. about their boundaries, this old survey may be given in evidence between them. *Bridgman v. Jennings*, 1 Ld. Raym. 734. So, property may be identified by the books of the deceased steward of a person from whom both plaintiff and defendant derive title. *Doc d. Strode v. Scuton*, 2 Ad. & E. 171.

Hence it appears that *mere* declarations of right, coupled with no other act, or actual exercise of it proved or presumable, are inadmissible as evidence in favour of the right asserted, except as against those who claim under the declarant. As to acts of ownership, see further, *Action for trespass to land*, *post*, p. 335.

[*Declarations of persons having no interest to misrepresent.*] On this ground entries by a deceased rector, or vicar, as to the receipt of ecclesiastical dues are admissible for his successor. *Legross v. Levemoor*, 2 Gwill. 529; *Armstrong v. Hewitt*, 4 Price, 218; *Young v. Clare Hall*, 17 Q. B. 529. And even where the entries have been made by deceased impropriate rectors, they have been admitted as evidence for their successors, though objected to as coming from the owners of the inheritance. *Anon.*, Bunb. 46; *Illingworth v. Leigh*, 4 Gwill. 1618. So they are admissible though the impropriator be a corporation aggregate; therefore, old receipts of tithe by the college of vicars-choral, Exeter, were admitted as evidence for them against a claim of modus. *Short v. Lee*, 2 J. & W. 478. Declarations of a deceased rector are admissible as evidence of the custom of appointing churchwardens in his parish. *Bremner v. Hull*, L. R., 1 C. P. 748. The reception of this evidence has given rise to much observation, and is to be regarded as an exceptional case. And it is certain that, as a general rule, the mere *absence of interest* will not make the declarations of a deceased party evidence; *Sussex Peerage*, 11 Cl. & F. 85, 103, 112, 113; *Berkeley Peerage case*, *Id.* 109, n., in which cases, the declarations made by deceased clergymen were rejected as evidence of marriage, and the ruling of Ld. Kenyon, in *Standen v. Standen*, Peake, 45, was denied.

On a somewhat similar principle the declarations of a testator, before the execution of his will, as to his intentions are admissible to support his will, *vide Proof of wills*, *post*, p. 145.

*Hearsay of persons against their own interest admissible.*] In a variety of cases, the declarations of deceased persons (not parties) made against their own interest have been admitted. See the cases collected, *Barker v. Ray*, 2 Russ. 67, n. And they are admissible as evidence of all the facts therein stated, though some of them may not have been within the party's own knowledge; for the whole declaration must be taken together. *Crease v. Barrett*, 1 C. M. & R. 919; *Percival v. Nanson*, 7 Exch. 1; 21 L. J., Ex. 1; and see *R. v. Birmingham*, 1 B. & S. 763; 31 L. J., M. C. 63. Thus the time of a child's birth was proved by production of the book of the deceased man-midwife referring to the ledger, in which ledger his charge for attendance was marked as paid, there being also evidence adduced that the work was done. *Higham v. Ridgway*, 10 East, 109. It seems that such an entry was admissible, though the party, if living, could not have been examined as being an interested party; *Gleadow v. Atkin*, 1 Cr. & M. 424, *per* Bayley, B. *Accord. Short v. Lee*, 2 J. & W. 489. So the book of a deceased mason, containing charges for repair of a bridge, marked as paid, was admitted to prove repairs, and so to fix a parish with an obligation. *R. v. Lower Heyford*, 2 Smith's L. C., 11th ed. 339; *cor.* Parke, B. So an entry by a deceased person, J., "J. W. paid me 3 months' interest," followed by other entries indicating a loan to J. W., is *primâ facie* against J.'s interest, and admissible in evidence. *Taylor v. Witham*, 3 Ch. D. 605. The cases on the subject are collected in the notes to *Higham v. Ridgway*, 2 Smith's L. Cases.

The statement, in order to fall within the above rule, must be against the interest of the person making it, at the time he makes it. *Ex parte Edwards*, 14 Q. B. D. 415, C. A. Thus an admission by a bankrupt in his statement of affairs, made after the commencement of the bankruptcy, is not after his death evidence against his creditors. S. C.

A letter from a deceased manager of the plaintiff's business, stating that the defendant had sent three cases to the office, and giving details of the transaction under which they were sent, is not admissible, the possibility of pecuniary loss to the manager, in the event of the loss of the cases, being too remote. *Smith v. Blakey*, L. R., 2 Q. B. 326. The day-book and ledger of a deceased broker, debiting himself with the price of shares bought, is not evidence of the purchase, as an entry made against interest, for it might have been to the advantage of the deceased. *Mussey v. Allen*, 13 Ch. D. 558.

The admissibility of the book in *Higham v. Ridgway*, *supra*, depended on the *pecuniary* interest of the deceased, and it is settled that an interest arising from the liability of the party to a prosecution, if his statement were true, is not such an interest as will make his declarations evidence; and for this reason the statement of a clergyman that he had celebrated an irregular marriage was held not to be evidence of the marriage. *Susscx Peerage*, 11 Cl. & F. 85, 107. Nor is the declaration of a party admissible merely because he would, if alive, have been excused from answering questions on the subject. S. C., *Id.* 110.

Entries by a deceased bailiff or steward, charging himself to the amount of money received by him from different persons for the rent of fixed nets on the foreshore called "kiddells," are admissible to prove that the foreshore was in his master. *A.-G. v. Emerson*, (1891) A. C. 657-8, D. P. So similar entries made by him of money received by him from different persons in satisfaction of trespasses committed on the waste, are admissible to prove that the right to the soil of the waste was in his master. *Barry v. Bebbington*, 4 T. R. 514. And if the entries be old and the document come from the proper custody, the handwriting need not be proved. *Wyane v. Tyrwhitt*, 4 B. & A. 376. So a receiver's entry of a receipt of separate rents from A., due from himself and two others, B. and C., is a proof of payment

not only by A., but also by B. and C., although the rents of B. and C. do not appear to have been paid directly to the receiver; *Percival v. Nanson*, 7 Exch. 1; 21 L. J., Ex. 1; and it is enough if a steward's account be signed by a third person for the real steward, where the authority to sign for him appears, on the books containing the arrears, to have been recognised, and the person so signing debits himself with the balance. *Doe d. Ashburnham v. Michael*, 17 Q. B. 276; 20 L. J., Q. B. 480. A bill of lading, signed by a deceased master of a vessel, for goods deliverable to a named consignee, is evidence of property in the consignee, even in trover for the goods against a third person. *Per Lawrence, J., Huddow v. Parry*, 3 Taunt. 305. Receipts of rent by a steward, specifying the tenure of the land in respect of which it is paid, have been held evidence of the tenure. *Doe d. Harpur v. Dodd*, 3 Wooddeson Comm. 332. So where the deceased agent of the owner A., of the servient tenement, paid 6*l.* to A., stating that it was for the lights of the dominant tenement, this was held to be evidence, against a subsequent owner of the latter, of payment of the rent. *Bewley v. Atkinson*, 13 Ch. D. 283, C. A. The same point was raised but not decided in *Furston v. Clogg*, 10 M. & W. 572. In an action against a co-surety for contribution, a receipt given by the deceased creditor, professing to acknowledge a payment by the plaintiff of a sum of money, "originally advanced to E. H.," is evidence not only of the payment, but also of the original advance to E. H. as principal debtor. *Davies v. Humphreys*, 6 M. & W. 153.

A declaration by a deceased occupier of land, that he rents it under a certain person, is evidence of that person's seisin. *Peaceable d. Uncle v. Watson*, 4 Taunt. 16; see also *Carne v. Nicholl*, 1 N. C. 430. The principle is, that occupation being presumptive evidence of a seisin in fee, any declaration claiming a less estate is against the party's presumed proprietary interest; *Crease v. Burrett*, 1 C. M. & R. 931; and, therefore, a declaration by a deceased copyholder, that he held only for his life, is evidence of such limited interest; *Doe d. Welsh v. Langfield*, 16 M. & W. 497; and such declaration may be proved by production of the official books of an inclosure commission kept under an Act of Parliament, and containing an entry of a claim made by the declarant. S. C. Or, by the recital in a deed to which deceased was a party. *Sly v. Sly*, 2 P. D. 91. But the declaration of a party in possession as to what he heard a third person say, is not evidence to cut down his estate, unless he has himself expressed his own belief of the statement. *Trimlestown v. Kemmis*, 9 Cl. & Fin. 780. A declaration by a person in the management of an estate that he managed for his son is evidence of the son's interest. *De Bode's case*, 8 Q. B. 208. A deed by a deceased party, shown to be in the receipt of the rents and profits, in which S. is stated to be the legal owner in fee, is evidence of such ownership for a party claiming under S. *Doe d. Daniel v. Coulthred*, 7 Ad. & E. 235. So, a written attornment to L. by a tenant in possession is evidence of L.'s seisin. *Doe d. Lindsey v. Edwards*, 5 Ad. & E. 95. Acceptance by A. of an allotment under an inclosure award is evidence that previously the allotment was not A.'s land. *Gery v. Redman*, 1 Q. B. D. 161.

Land was held by A., B., C., &c., as successive tenants for life, with power to lease for 21 years, reserving the ancient rent. A paper in which the rent of the land was stated, indorsed by A., "a particular of my estate," was held admissible to show what the ancient rent was, for A. had an interest to make the rent as low as possible, and so increase the fine upon renewal. *Roe d. Brunc v. Rawlings*, 7 East, 279. A declaration by a deceased person, that he held certain land as tenant at a rent of 20*l.* a year, was held to be evidence, in a question of settlement of a pauper, that the rent was over 10*l.* a year. *R. v. Birmingham*, 1 B. & S. 763; 31 L. J., M. C. 63; *R. v. Exeter Union*, L. R., 4 Q. B. 341.



An oral declaration is as admissible as a written one. S. C. C. ; *Bewley v. Atkinson*, 13 Ch. D. 283, C. A.

Entries by a deceased collector of rates, charging himself with the receipt of money, and made by him in the books of his office, are admissible against his surety to prove the receipt. *Goss v. Wallington*, 3 B. & B. 132. And the same has been held with regard to the entries of a clerk as against his surety. *Whitnash v. George*, 8 B. & C. 556. So, entries in the land-tax collector's book stating A. B. to be rated for a particular house, and his payment of the sum rated, are evidence to show that A. B. was occupier of the premises at the time. *Doe d. Smith v. Cartwright*, Ry. & M. 62. See also *Doe d. Strode v. Seaton*, 2 Ad. & E. 171. So, entries made by a deceased collector of taxes in a private book, charging himself with the receipt of money, are evidence against a surety of the receipt of the money, though the parties who paid it are alive, and might be called. *Middleton v. Melton*, 10 B. & C. 317.

It seems that the entries of receipts by a deceased accountant are admissible, though the balance may be discharged or be in his own favour. *Rowe v. Brenton*, 3 M. & Ry. 268 ; *Acc. per Patteson, J., Williams v. Geaves*, 8 C. & P. 593. And ancient ministers' accounts, rendered to the lord of the manor, and debiting themselves with the issues and profits of the manor, are admissible evidence in favour of a successor to show the possession of port dues, though the roll shows the account balanced and a quietus at the end of it ; per *Ld. Denman, C.J.*, in *Brune v. Thompson*, London Sittings after M. T. 1841 ; *Acc. Erskine, J., S. C., Bodmin Sp. Ass.* 1842. So, ancient receivers' accounts of a city, though unsigned, and in the third person, are admissible on behalf of the city, to prove the receipt of port dues. *Exeter, Mayor of, v. Warren*, 5 Q. B. 773. So, old accounts rendered to the corporation of vicars-choral, Exeter, by their officers, showing receipt of tithe, and balanced by payment, and a quietus, are evidence for them, against a modus. *Short v. Lee*, 2 Jac. & W. 464. In *Beaufort, Dk. of, v. Smith*, 4 Exch. 450, accounts rendered to the plaintiff's ancestors, lords of Gower, by his receivers, showing the receipt of a manorial toll on coal exported out of the manor, formed the principal evidence upon which the plaintiff's right to it was established. So, in *Waddington v. Newton*, Wint. Sum. Ass. 1850, Coleridge, J., admitted the ministers', or receivers', accounts of the bishopric of Winchester, extending from the reign of John to Hen. 8, to show a right of fishery in the lord, by continual receipt of the issues of the fishery, value of fish sold, &c. In *Doe d. Kinglake v. Beviss*, 7 C. B. 456, the same series of accounts was tendered, to show the lord's ownership of a certain wood, as against the copyholder, who claimed it ; for this purpose, the lord relied upon entries of receipts on the sale of timber, and also entries in the same roll in which the accountant discharged himself by payment of wages to the woodward of the same wood : the court held the receipt admissible, but not the discharge ; and they cited *Knight v. Waterford*, 4 Y. & Coll. 293, in which the accounts of a deceased receiver were admitted to prove the receipt of rent for tithes by the lord of the manor, but not to prove his liability to pay land-tax and poor-rate on them, by showing that the account had always allowed the amount to the person paying the rent, the two entries being separate and unconnected. *Accord. Watley v. Carlisle*, 15 W. R. 1183, July, 1867, Ir. Ex. Ch. In *Bullen v. Michel*, 2 Price, 399, certain account rolls of the Abbey of Glaston were tendered, to prove payment of tithe by certain lands of the abbey ; the account showed receipts by the reeve, and payments out of the moneys received, which accounts were allowed at the foot by the bailiff of the abbey ; among the payments were payments in respect of the tithe in question ; they were put in evidence by the vicar to disprove a modus set up by the defendant, and other landowners who did

not claim under the abbey, but whose claim was shown to be inconsistent with the above payments by the abbey; they were held admissible both as to charge and discharge, because the two were part of one account, and because the discharge had been allowed by the bailiff of the abbey. Whether this case can be reconciled with *Doe d. Kinglake v. Bevis*, and *Knight v. Waterford*, *ante*, p. 57, by any sound distinction, may be questionable. It is observable on this class of documents, that old *computi*, *i.e.*, accountants' rolls, are almost invariably written in the third person, and name the accountant only at the head of the roll, and sometimes refer to *particulars* of the account elsewhere. It is further observable, that a distinction has been taken between the public accounts of Crown officers and the accounts of private persons in favour of the superior credit due to the former, as public records.

In order to show title to a quit rent, a party put in evidence a signed rental 100 years old, charging the party signing it, found in the same box with contemporaneous unsigned accounts, the amount of the sum received being the same in both papers; held, that the accounts and rental together were admissible. *Musgrave v. Emmerson*, 10 Q. B. 326; 16 L. J., Q. B. 174. These two reports differ materially.

If the party who made the entry be alive, though out of the jurisdiction of the court, so that he cannot be called, the proof or the entry is generally inadmissible. *Stephen v. Gwenap*, 1 M. & Rob. 121. Where plaintiff showed payment of rent to A. B. in order to prove a tenancy under him, and not under defendant, defendant was not allowed to rebut the evidence by producing written accounts rendered by A. B. to him of these very rents, A. B. being alive and not called. *Spargo v. Brown*, 9 B. & C. 935. After the lapse of a long time, the death of the party accounting will be presumed; and in one case the lapse of 55 years was considered enough to dispense with proof of death, although, if alive, he would not have been of an age beyond the ordinary term of human life. *Doe d. Ld. Ashbitrnam v. Michael*, 17 Q. B. 276; 20 L. J., Q. B. 480.

Generally the question of admitting statements against interest made by deceased persons occurs where the suit is *inter alios*, and the declarant is a stranger to it; and it has therefore been doubted whether, in a suit by an executor to recover the balance due on an alleged contract for work done, the plaintiff could put in evidence a declaration of the testator to a third person respecting a payment made by the defendant to the testator, in order to prove the liability of the defendant for certain extra work. *Per* Jervis, C.J., in *Eddie v. Kingsford*, 14 C. B. 759; 23 L. J., C. P. 123. But in *Bradley v. James*, 13 C. B. 822; 22 L. J., C. P. 193, where the plaintiff sued as executor of the payee of a note, he was allowed to rebut the Statute of Limitations by proof of a written acknowledgment made in a book by the testator, of payment of interest on the note by defendant within six years. So, entries on the debtor side of testator's account-book of the receipt of interest on a sum of money for which the executors were suing, were held admissible to prove that the money was lent, and not given, to the defendant, the testator's son. *Peck v. Peck*, 21 L. T. 670; H. T. 1870, C. P. The cases decided on *Searle v. Barrington, Ld.*, mentioned *ante*, p. 37, also favour the reception of such declarations. In such cases it must distinctly appear to what the entries refer. *Newbould v. Smith*, 14 Ap. Ca. 423, D. P.

The declarations against interest, of persons who at the time of making them stood in the same situation and interest as the party to the suit, are evidence against that party; thus, the declaration of a former owner of plaintiff's land, that he had not the right claimed by plaintiff in respect of it, is admissible. *Woolway v. Rowe*, 1 Ad. & E. 114. Such declarations are admissible, though the maker is alive and not produced. S. C. So,

the landlord's description of property in a former lease is evidence for a third person against a subsequent lessee of the same landlord, but not against a prior lessee. *Crease v. Barrett*, 1 C. M. & R. 919. A declaration in an answer in Chancery by one who has sold property, is not evidence against a person claiming under him by a conveyance anterior to the bill filed. *Gully v. Exeter*, *Bp. of*, 5 Bing. 171. The declarations of tenants are not evidence against reversioners, though their acts are. *Per Pattenon, J., Tickle v. Brown*, 4 Ad. & E. 378; *Papendick v. Bridgwater*, 5 E. & B. 166; 24 L. J., Q. B. 289; *Blandy-Jenkins v. Dunraven*, *Et. of*, (1899) 2 Ch. 121, C. A.

The declarations of parties identified in interest with those against whom they are offered are in the nature of admissions, and as such belong rather to another head of evidence. See tit. *Admissions, post*, p. 61.

*Hearsay of persons making entries, &c., in the regular discharge of their ordinary business or office.*] Where an entry or declaration is made by a disinterested person in the course of discharging a professional or official duty, it is, in general, admissible after the death of the party making it. Thus a notice, indorsed or served by a deceased clerk in a solicitor's office, whose duty it was to serve notices, is evidence of service. *Doe d. Patteshall v. Turford*, 3 B. & Ad. 890; *Doe d. Padwick v. Skinner*, 3 Exch. 84; *R. v. Dukinfield*, 11 Q. B. 678. So, the entries in the books of a deceased solicitor in his handwriting relating to a deed prepared by him and executed by a deceased client were good evidence of the execution of the deed. *Rawlins v. Rickards*, 28 Beav. 370. See *Waldy v. Gray*, L. R., 20 Eq. 238; *Sly v. Sly*, 2 P. D. 91. But this seems to have been doubted by the C. A. in *Hope v. Hope*, (1893) W. N. 20, C. A., where the entries were not made in pursuance of duty. And it must first be shown *aliunde* that the solicitor was authorised to act for the person on whose behalf he purported to act. *Bright v. Legerton*, 2 D. F. & J. 606. A receipt signed by a clerk employed by a collector to collect for him, proves a payment to the collector himself. *R. v. S. Mary, Warwick*, 1 E. & B. 816; 22 L. J., M. C. 109. It should seem on principle that contemporary oral declarations so made in course of business may also be admissible. *Per* Ld. Campbell, *Sussex Peerage case*, 11 Cl. & Fin. 113; *Semb. acc. per Cur.* in *Stapylton v. Clough*, 2 E. & B. 933; 23 L. J., Q. B. 5. Whether an oral statement made by a receiver on paying over money is evidence not only of the receipt, but also of the very party from whom it was received, was discussed, but not decided, in *Furston v. Clogg*, 10 M. & W. 572. An attorney's bill, with an indorsement upon it, "March 4, 1815, delivered a copy to C. D.," which is proved to be in the handwriting of a deceased clerk, whose duty it was to deliver a copy of the bill, and proved to have existed at the date, has been held to be evidence to prove the delivery of the bill. *Champneys v. Peck*, 1 Stark. 404. It has been held that a banker's ledger was receivable in evidence in an action between the assignees in bankruptcy of a customer, and a third party, to show that the customer at a certain time had *no funds* in the banker's hands, without calling the clerks who made the entries therein. *Furness v. Cope*, 5 Bing. 114. *Semble*, such evidence would not be admissible to *prove assets*. S. C. But now see the Bankers' Books Evidence Act, 1879, *post*, p. 125. An entry of dishonour of a bill, made by a notary's clerk in the usual course of business, is evidence of the fact of dishonour, after the clerk's decease. *Poole v. Dicus*, 1 N. C. 649. In *Marks v. Lahèè*, 3 N. C. 408, an entry by a deceased clerk of the plaintiff's attorney, in a daybook, stating a tender by him and refusal by the defendant, was held evidence of a replication to that effect; but there was a previous entry of a receipt by him of the money for the purposes of such tender. Field book entries

made by a deceased surveyor for the purpose of a survey, on which he was professionally employed, are admissible. *Mellor v. Walmesley*, (1905) 2 Ch. 164, C. A.

Upon the same principle, *contemporaneous* entries by a deceased shopman or servant in his master's books in the ordinary course of business, stating the delivery of goods, are evidence for his master of such delivery. *Price v. Torrington, Ltd.*, 1 Salk. 285; and cases cited by Parke, J., *Doe d. Patteshall v. Turford*, 3 B. & Ad. 898.

In order to render such entries evidence, it must appear that the shopman is dead; that he is abroad, and not likely to return, is not sufficient. *Cooper v. Marsden*, 1 Esp. 1. The entry, too, must be by the person who actually did the act recorded by it. *Polini v. Gray*, 12 Ch. D. 411, C. A. Thus, an entry of goods sold made by a witness on the dictation of A., who had received information of the sale from B., a servant of the vendor, whose duty it was to report the sale to A., was rejected as evidence of the sale, though A. and B. were both dead. *Brain v. Preece*, 11 M. & W. 773. Where a person employed to serve a notice on R. brought back the duplicate notice indorsed as so served, but stated orally that he had delivered it to W., it was held that, after the death of the person serving, it was not competent to give in evidence his oral statement of service on W. *Stapylton v. Clough*, 2 E. & B. 933; 23 L. J., Q. B. 5. The entry must relate to something actually done. *Roulands v. De Vecchi*, 1 Cab. & Ell. 10, *cor.* Day, J. As to proof of notice of calls made by a public company from the memorandum of a deceased clerk, see *E. Union Ry. Co. v. Symonds*, 5 Exch. 237, cited, *post*, Part III., *Actions by companies*. An entry in a letter-book kept by a deceased clerk in the course of duty is secondary proof of the contents of the letter sent, and of the posting of it, if that were the course of business. *Pritt v. Fairclough*, 3 Camp. 305; *Hagedorn v. Reid*, *ib.* 379.

By stat. 7 J. 1, c. 12, s. 1, the shop-book of a tradesman shall not be evidence in any action for wares delivered, or work done, above one year before the bringing of the action, except the tradesman or his executor shall have obtained a bill of debt or obligation of the debtor for his said debt, or shall have brought against him, or his executors, some action for the said debt within a year next after the delivery of the wares, or the work done. By sect. 2, the Act is not to extend to traffic, or dealing between merchant and merchant, merchant and tradesman, or tradesman and tradesman, for anything within the compass of their mutual trades and merchandise. This statute seems to recognise the previous admissibility of shop-books; it has been continued by subsequent Acts; but it is of little practical importance, and the admissibility of such books at common law in favour of the tradesman must generally depend on the principles already referred to. See *Symonds v. Gas Light Co.*, 11 Beav. 283.

Entries made by deceased persons in the course of their business, or in discharge of their duty, are admissible only where it is the duty of the deceased both to do the act and to make an entry or record of having done it. *Smith v. Blakey*, L. R., 2 Q. B. 326; *Massev v. Allen*, 13 Ch. D. 558; *Mercer v. Denne*, (1905) 2 Ch. 538, C. A. Thus an entry of a hiring at certain wages in the deceased master's private book, with a memorandum of payment, is inadmissible evidence, *inter alios*: *R. v. Worth*, 4 Q. B. 132; for it was neither his duty to make it, nor was he interested in making it in the proper sense of "interest." An entry purporting to be the substance of a lease made by the lord of a manor, contained in a book of his steward 200 years old, is not evidence of the lease either as secondary evidence or as an entry made in the course of duty or business. *Doe d. Padwick v. Skinner*, 3 Exch. 84. See also *Doe d. Padwick v. Wittcomb*, 6 Exch. 601; 20 L. J., Ex. 297; 4 H. L. C. 425.

Entries made in the log of a ship by a deceased mate cannot be used as evidence for her owners in an action brought against them for collision. *The Henry Coxon*, 3 P. D. 156.

A book in which a deceased chief rabbi had made an entry of circumcisions performed by him, was held inadmissible to prove the age of a Jew, although it was proved that a Jew was ordinarily circumcised on the eighth day after his birth. *Davis v. Lloyd*, 1 Car. & K. 275, *cor. Denman*, C.J., after consulting Patteson, J.

In *Eddie v. Kingsford*, 14 C. B. 759; 23 L. J., C P. 123, Jervis, C.J., stated that declarations "in the course of *business*" were, while declarations "in the course of *duty*" were not, receivable in evidence, but the cases, *supra*, recognise no such distinction.

Though a contemporaneous entry made in the course of office, reporting facts necessary to the performance of a duty, may be admissible, yet the statement in it of other extraneous circumstances, however naturally they may find a place in the narrative, is no proof of these circumstances. *Chambers v. Bernasconi*, 1 C. M. & R. 347; 4 Tyrw. 531, Ex. Ch.; *Polini v. Gray*, *ante*, p. 60. Thus, a return by a sheriff's officer of an arrest at a specified place is not evidence, *inter alios*, of the place of arrest. *Chambers v. Bernasconi*, *supra*. There are some important distinctions between the effect of declarations against interest and declarations made in the course of office or business. The former declarations are evidence of all the facts stated and whensoever made; the latter are evidence only of the facts which it was the business of the officer or writer to state, and they must generally be contemporaneous with the act done. *Smith v. Blakey*, *ante*, p. 60, *per Cur.*

The cases on this subject are collected in Smith's L. Cases, notes to *Price v. Torrington*, *Ld.*

As to entries in public books, registers, &c., see *post*, *Effect of documentary evidence*.

#### ADMISSIONS.

Admissions by a party to the record out of court are evidence, and primary evidence, of the facts so admitted. In an action by M. and his wife, for injuries caused to the wife by defendants' negligence, the defendants were allowed to prove that M. and C., his attorney's clerk, had conspired to suborn false witnesses, as this was an admission, by conduct, of M., that he had a bad case. *Moriarty v. L. Chatham, & Dover Ry. Co.*, L. R. 5 Q. B. 314. The letters of a party may be proved against him without producing the rest of the correspondence on either side. *Barrymore, Ld., v. Taylor*, 1 Esp. 326. But though the express admissions of a party to the suit, or admissions implied from his conduct, are evidence against him, he is at liberty to prove that such admissions were mistaken or untrue, except in the case of estoppel. *Per Bayley, J., Heane v. Rogers*, 9 B. & C. 586. And it matters not whether the mistake arose from misapprehension of law or of fact. Thus, it may be shown that the admission was made under an erroneous view of the party's own legal liability; *Newton v. Liddiard*, 12 Q. B. 925; as where defendant made admissions under an impression that provisional committee-men were liable for work done for a company. S. C., *Id.* See also *Bailey v. Macaulay*, 13 Q. B. 815. Such a mistaken impression, however, will not *exclude* his admission, though it will impair its weight as evidence against him. *Newton v. Belcher*, 9 Q. B. 612. The value of an admission depends on the circumstances under which it was made; where it is a mere inference drawn from facts, the admission goes no further than the facts prove. See *Bulley v. Bulley*, L. R., 9 Ch. 739. A letter may be used as an admission, though if taken as a whole it negatives

the inference sought to be drawn therefrom. *Brown v. Wren*, (1895) 1 Q. B. 390. An admission that his trade is a nuisance is evidence, though not conclusive, against a defendant. *R. v. Neville*, 1 Peake, 91.

By Rules, 1883, O. xxxii. r. 1, "any party to a cause or matter may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party."

Admissions made with a view to a compromise, and in order "to buy peace," are not evidence against the maker. B. N. P. 236. But an acknowledgment of a party's handwriting, though made pending a treaty of compromise, is evidence against him. *Waldridge v. Kennison*, 1 Esp. 143. So an admission of facts before arbitrators. *Gregory v. Howard*, 3 Esp. 113. An offer of a specific sum by way of compromise is evidence, unless accompanied with a caution that the offer is confidential, or without prejudice. *Wallace v. Small*, M. & M. 446; *Nicholson v. Smith*, 3 Stark. 128. But generally, neither letters written "without prejudice," nor replies to such letters, though not similarly guarded, can be used as evidence. *Paddock v. Forrester*, 3 M. & Gr. 903; *Hoghton v. Hoghton*, 15 Beav. 278, 321; 21 L. J., Ch. 482, 493; *Walker v. Wilsher*, 23 Q. B. D. 335; and see *Mitchell's Claim*, L. R., 6 Ch. 822. So, where a correspondence has begun with a letter written "without prejudice," that covers the whole correspondence. *Ex pte. Harris*, 44 L. J. Bky. 33. The fact that offers have been made, though "without prejudice," may, however, sometimes be given in evidence for the person making the offer, to show that an attempt has been made to settle the dispute, in order to rebut the suggestion of laches, &c. *Jones v. Foxall*, 15 Beav. 388; 21 L. J., Ch. 725; *Walker v. Wilsher*, 23 Q. B. D. 338, 339, per Lindley and Bowen, L.J.J., dissenting from *Williams v. Thomas*, 2 Dr. & S. 29; 31 L. J., Ch. 674, where the rule as to admission of the evidence was much more widely stated by Kindersley, V.-C. The principle of excluding offers made without prejudice does not apply "unless some person is in dispute or negotiation with another and terms are offered for the settlement of the dispute or negotiation." *Ex pte. Holt*, (1893) 2 Q. B. 116, 119. Thus it does not apply to a notice by a debtor to his creditor that he is about to suspend payment, when relied on as an act of bankruptcy. S. C. It is the duty of the judge to examine the document and decide whether from its nature it is admissible or not. S. C.

[*Admissions on compulsory process.*] It is no objection to the proof of an admission that it was made under compulsory process; thus, as answer to a bill in Chancery, filed against the defendant by a stranger, may be read against him, to show the admission of a particular fact. *Grant v. Jackson*, Peake, 203. So, the defendant's answer to interrogatories administered by the plaintiff to him in another suit is admissible against him. *Fleet v. Perrins*, L. R., 3 Q. B. 536, Ex. Ch.; L. R., 4 Q. B. 500. But *semb.* the compulsion must not be illegal. *R. v. Garbett*, 1 Den. C. C. 236. See *R. v. Coote*, L. R., 4 P. C. 599. The examination of a party before commissioners of bankrupt is evidence against him; *Robson v. Alexander*, 1 Moore & P. 448; *R. v. Wheeler*, 2 Moo. C. C. 45; although there was an irregularity in the proceedings which had been waived by the appearance of the bankrupt for examination; *R. v. Widdop*, L. R., 2 C. C. 3; or though part only of his deposition was noted down; *Milward v. Forbes*, 4 Esp. 172; or though the compulsory power was exercised on irrelevant matters. *Stockfleth v. De Tastet*, 4 Camp. 10. So testimony given in court may be used in an action against the witness, though he was prevented from entering into an explanation of the circumstances under which the fact took place, it being irrelevant. *Collett v. Keith, Ltd.*, 4 Esp. 212. So testimony on process to compel attendance before the House of Commons. *R. v. Merceron*, 2 Stark. 366.

See observation in *R. v. Gilham*, 1 Moo. C. C. 203. But such compulsory admission is no evidence of an account stated. *Tucker v. Barrow*, 7 B. & C. 623.

*Admission of the contents of documents.*] Though the contents of a written instrument cannot in general be proved by a witness without production of it (see *ante*, p. 1), yet what a party to the record says is *primary* evidence against himself as an admission, though it relates to the contents of a written instrument, and though the contents be directly in issue in the cause. This was first deliberately ruled in *Slatterie v. Pooley*, 6 M. & W. 664; followed by *King v. Cole*, 2 Exch. 628; *Fox v. Waters*, 12 Ad. & E. 43. The doctrine has been impugned and regarded as objectionable; see *Lawless v. Queale*, 8 Ir. L. Rep. 382; it is, however, established by subsequent cases. There can be no doubt, however, that such an admission ought in some cases to have no weight; as where the party relying upon it is manifestly withholding more satisfactory evidence in his own power; or where the admission assumes a degree of knowledge, whether of law or of fact, which the party admitting is not likely to possess; as the construction of a deed of settlement; the contents of a fine or recovery, &c. "If the plaintiff is himself in the box, you may ask him as to the contents of a document, and his answer will be good evidence. . . . Perhaps the judge might say that the document ought to be produced. I should do so myself in some cases." *Per Pollock, C. B.*, in *Farrow v. Blomfield*, 1 F. & F. 653. See also the observations in *Boulter v. Peplow*, 9 C. B. 493; 19 L. J., C. P. 190. To make such oral admission of any value when it relates to a written document, it ought to be clear and distinct; thus where the defendant, in order to show that an expired lease had been renewed by the ancestor of the plaintiff, proved a statement by the ancestor many years ago, that the land had been "new-lived" by him, without more, it was held insufficient. *Doe d. Lord v. Crago*, 6 C. B. 90.

A statement made by the plaintiff that his demand for work done had been referred to an arbitrator, who awarded that nothing was due, was admitted as evidence against him. *Murray v. Gregory*, 5 Exch. 468. The registered copy of a deed, signed and certified by the plaintiff, was held to be primary evidence of the contents against him. *Boulter v. Peplow*, *supra*. A copy of a document sent by a party is primary evidence against him. See *Stowe v. Querner*, L. R., 5 Ex. 155, 159. A machine copy of a letter written by the plaintiff to a third person may be used as an admission on the part of the plaintiff, though not admissible as a letter. *Nathan v. Jacob*, 1 F. & F. 452. So an abstract of title containing recitals, which had been relied upon by the defendant in a suit in Chancery, was admitted as evidence against him, in a subsequent action of the matters so recited, without producing the original deeds. *Pritchard v. Bugshaw*, 11 C. B. 459; 20 L. J., C. P. 161. See also *R. v. Basingstoke*, 14 Q. B. 611.

The following are some of the earlier cases bearing on the same doctrine:—The terms of a lease may be proved by oral admissions. *Howard v. Smith*, 3 M. & Gr. 254. An oral admission of a debt is evidence on an account stated, though it refers to a written instrument not produced. *Newhall v. Holt*, 6 M. & W. 662. A defendant in an action for the recovery of land may prove an admission of the plaintiff that he had sold and assigned his lease to a third person, though such assignment must be in writing. *Doe d. Lowden v. Watson*, 2 Stark. 230. A notice signed by partners, stating that the partnership "has been dissolved," is evidence against them of the dissolution, though the partnership was by deed. *Doe d. Waithman v. Miles*, 1 Stark. 181; 4 Camp. 373. It was formerly held, that an admission in an answer in Chancery of the execution of a deed was only secondary evidence,

and did not supersede the necessity of proving it in the regular way. *Call v. Dunning*, 4 East, 53; *Cunliffe v. Sefton*, 2 East, 187, 188. So with regard to matters of record and judicial proceedings, as the insolvency and discharge of the plaintiff, oral evidence of admissions has been held insufficient. *Scott v. Clare*, 3 Camp. 236. But since the case of *Slatterie v. Pooley*, *ante*, p. 63, the cases of *Scott v. Clare*, *Call v. Dunning*, *supra*, and other earlier cases are open to question.

*Admissions by acquiescence.*] Admissions may sometimes be presumed from the silence or conduct of a party when certain statements are made. On this ground it is that the uncontradicted statements of any one, made in the presence and hearing of the party against whom they are offered, are evidence. *Bessela v. Stern*, 2 C. P. D. 265, C. A., *post*, p. 495. But of course no inference against him can be reasonably drawn, if the fact stated before him be one which is plainly not within his own knowledge; for he may be unable either to admit or contradict it. So the deposition of a witness, taken in a judicial proceeding against a party, is not evidence in another proceeding against that party merely on the ground that he was present, and did not cross-examine or contradict the witness; *Melen v. Andrews*, M. & M. 336; for the nature of a judicial proceeding prevents a party from interposing to contradict or comment on the statement of a witness, as he would in common conversation. *Accord. per Alderson, B.*, in *Short v. Stoy*, Winton Sum. Ass. 1836. Cases, however, may occur, in which the refusal of a person to contradict or cross-examine a witness, even in a judicial proceeding, may be admissible. See *Simpson v. Robinson*, 12 Q. B. 511, cited *post*, p. 860.

It should be observed, that although silence has been considered to be evidence of assent to a statement made orally in the presence of the party, no such inference can be fairly drawn from the mere omission of a party to reply to a letter; *Felthouse v. Bindley*, 11 C. B., N. S. 869, 875; 31 L. J., C. P. 204, *per Willes, J.*; *Richards v. Gellatly*, L. R., 7 C. P. 131, *per Id.*; *Wiedemann v. Walpole*, (1891) 2 Q. B. 534, C. A.; unless sent under circumstances which entitle the writer to an answer. See S. CC.; *Edwards v. Towels*, 5 M. & Gr. 624; *Richardson v. Dunn*, 2 Q. B. 218. A statement which may be, but is not, immediately contradicted without further trouble than an oral denial, may be presumed to be true; but no one is, or ought to be, expected to answer every officious letter that is written to him. It has been held, however, that such a letter may sometimes be used as evidence of a demand, and of so much as may explain the demand. Thus, where the plaintiff discovered that he had inadvertently paid a debt to the defendant twice over, and his accountant wrote repeatedly to the defendant, explaining how the mistake arose, and requesting repayment, but the defendant took no notice of the letters, it was held that the letters were all admissible in evidence against him in an action to recover back the payment. *Gaskill v. Skene*, 14 Q. B. 664; and see *Fairlie v. Denton*, 3 C. & P. 103. So in the case of a letter written by A. to B., to which the position of the parties justifies A. in expecting an answer,—as where the subject of it is a contract or negotiation before pending between them,—the silence of B. may be important evidence against him. See *Lucy v. Mouflet*, 5 H. & N. 229; 29 L. J., Ex. 110, cited *sub. tit. Action for goods sold, post*, p. 569. Where the plaintiff puts in, the letter written in his behalf by a third person to the defendant, the defendant is entitled to put in his answer to it, although it states, as a fact, a circumstance which, if true, is a defence to the action, for it shows that that circumstance has been brought under the plaintiff's notice. *Carne v. Steer*, 5 H. & N. 628; 29 L. J., Ex. 281.

The following are also examples of admissions implied from negative



conduct or acquiescence:—If A. having title to premises in the possession of B., suffers B. to make alterations inconsistent with such title, it is evidence to go to the jury that A. has recognised the right of B., and has done such acts as are necessary to confirm it. *Doe d. Winckley v. Pye*, 1 Esp. 364. So where, upon a building lease of 59 feet, more or less, the lessee took 62½ feet, but the ground taken agreed with the abutments in the lease, and the lessor marked out the ground, and saw the progress of the defendant's building without objection, this is evidence of the lessee's title. *Neale d. Peroux v. Parkin*, *Id.* 229. And in action for a debt, evidence that the plaintiff was an insolvent debtor, and had not inserted the debt in question in his schedule, was an admission, as against him, of its not being due. *Nicholls v. Downes*, 1 M. & Rob. 13. But it was held that the attesting witness of the schedule must be called to prove it. *Streeter v. Bartlett*, 5 C. B. 562. As to which see, however, *Bailey v. Bidwell*, 13 M. & W. 73, *post*, p. 134.

To this head may also be referred the case in which the depositions or statements of third persons have been held to be evidence against a party who has, on a former occasion, caused them to be made and used them as true for his own purposes. *Brickell v. Hulse*, 7 Ad. & E. 455; *Gardner v. Mould*, 10 Ad. & E. 464; *Richards v. Morgan*, 4 B. & S. 641; 33 L. J., Q. B. 114, cited *Effect of depositions*, *post*, pp. 201, 202; and the comments *per curiam*, in *Boileau v. Rutlin*, 2 Exch. 679, 680. But in an action by a bankrupt against his assignees to try the validity of his commission, depositions of deceased persons taken under the commission, and enrolled by the assignees, were not evidence against them as admissions by reason of such enrolment. *Chambers v. Bernasconi*, 1 C. M. & R. 347.

As to admissions by parties identified in interest, see *ante*, tit. *Hearsay*, p. 50; and see *post*, pp. 66 *et seq.*; *Admissions by Trustees, &c.*

[*Receipts.*] At common law the acknowledgment in a deed of the receipt of money was conclusive evidence as between the parties to it of such receipt. *Baker v. Dewey*, 1 B. & C. 704; *Rountree v. Jacob*, 2 Taunt. 141. But not where the recital of the deed showed only an "agreement to pay," and the receipt was of money "so paid as above-mentioned," as usual in purchase deeds. *Bottrell v. Summers*, 2 Y. & J. 507; *Lampon v. Corke*, 5 B. & A. 606. Nor was the receipt indorsed on the back of the deed conclusive. *Straton v. Rastall*, 2 T. R. 366. In equity the absence of a receipt at the back of the deed would put a subsequent purchaser on inquiry as to whether the purchase-money had been paid; see *Kennedy v. Green*, 3 Myl. & K. 699; for the land in the hands of a purchaser with notice that the prior purchase-money remained unpaid, or of a volunteer, would be liable to lien for it notwithstanding the conveyance expressed the consideration to have been paid, and there is an indorsed receipt. S. C.; *Winter v. Anson*, *Id.*, 3 Russ. 488. See notes to *Mackreth v. Symmons*, 1 White & T. Lead. Cases. But now in case of deeds executed after Dec. 31st, 1881, the Conveyancing and Law of Property Act, 1881 (44 & 45 V. c. 41), s. 55, provides that "a receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof." This section requires, as was necessary at common law (*vide supra*), that there should be an express acknowledgment by the vendor of the receipt of the money. *Renner v. Tolley*, 68 L. T. 815, E. S. (1893), Stirling, J. In general, a receipt not under seal is only a *prima facie* acknowledgment that

the money has been paid; and therefore may be contradicted or explained. *Graves v. Key*, 3 B. & Ad. 318. Even though expressed to be "in full of all demands." *Fitch v. Sutton*, 5 East, 230; *Lee v. Lancashire and Yorkshire Ry. Co.*, L. R. 6 Ch. 527, 534; see also *Bowes v. Foster*, 2 H. & N. 779; 27 L. J., Ex. 262. These two last cases overrule *Alner v. George*, 1 Camp. 392, *cor. Ld. Ellenborough*. See further notes to *Cumber v. Wane*, 1 Smith's L. C. as to the effect of a receipt "without prejudice," see *Oliver v. Nautilus S. S. Co.*, (1903) 2 K. B. 639, C. A. A receipt being given in the settlement of an account may be evidence of sums being allowed on the settlement, and such allowance being equivalent to the payment of money, cannot be afterwards recovered by the person making the allowance. *Bramston v. Robins*, 4 Bing. 11. As between the underwriter and the assured, the acknowledgment in the policy of the receipt of the premium by the broker is conclusive; *Dalzell v. Mair*, 1 Camp. 532; and see *Xenos v. Wickham*, L. R., 2 H. L. 296, 319; unless there was a fraud practised by the assured to induce the broker to give credit to him. *Foy v. Bell*, 3 Taunt. 493. If an agent employed to receive money, and bound by his duty to his principal to communicate to him whether the money is received or not, renders an account from time to time which contains an intentional misstatement that the money has been received, he is so far bound by that account that he cannot make his principal refund moneys paid to him on it. *Shaw v. Picton*, 4 B. & C. 729; *Skyring v. Greenwood*, *Id.* 281. A receipt may operate as an estoppel in favour of third persons, as where a transferee of a mortgage takes the security with an indorsed receipt, without notice that the sum purporting to be secured has not in fact been advanced. *Bickerton v. Walker*, 31 Ch. D. 151, C. A.; *accord. Bateman v. Hunt*, (1904) 2 K. B. 530, C. A. As proof of receipts for legacies, *vide Stamps; Receipt, post*, p. 272.

*Admissions implied from the acts of the party.*] The plaintiff's title to sue, or the character in which the plaintiff sues, or in which the defendant is sued, is frequently admitted by the acts and conduct of the opposite party; and in some cases the admission, though not strictly an estoppel, is conclusive. Thus, if B. has dealt with A. as farmer of the post-horse duties, it is evidence in an action by A. against B. to prove that he is such farmer. *Radford v. McIntosh*, 3 T. R. 632. And see *Peacock v. Harris*, 10 East, 104. So in an action for slandering the plaintiff in his profession of an attorney, the words themselves, importing that the defendant would have the plaintiff struck off the roll of attorneys, were held to be an admission of the plaintiff's character of attorney. *Berryman v. Wise*, 4 T. R. 366; *Pearee v. Whale*, 5 B. & C. 38. So in the case of a libel on the plaintiff as envoy of a foreign state. *Irisarri v. Clement*, 3 Bing. 432. In an action for penalties against a collector of taxes, proof of the defendant having collected the taxes is sufficient proof of his being collector, though the appointment is by warrant. *Lister v. Priestley*, Wightw. 67. So payment of tithes by a parishioner to the plaintiff, is evidence against the former of the plaintiff's title to the living. *Chapman v. Beard*, 3 Anstr. 942. Where an auctioneer has advertised for sale the "property of J. S., a bankrupt," this is evidence of the bankruptcy in an action brought by the assignee against the auctioneer for the proceeds. *Maltby v. Christie*, 1 Esp. 340.

Where A. brings an action against B. to recover possession of land, he thereby admits B.'s possession of the land. *Stanford v. Hurlstone*, L. R., 9 Ch. 116.

Mere subscription of a paper, as witness, is not in itself a proof of his knowledge of its contents. *Harding v. Crethorn*, 1 Esp. 58.

As to estoppel arising from the acts of a party, *vide post*, p. 76.

*Admission by trustees; or of persons not entitled to the suit, but interested in it.*] An admission is evidence whether made by a trustee, or nominal party, who sues for the benefit of another; *Bauerman v. Radenius*, 7 T. R. 664; *Gibson v. Winter*, 5 B. & Ad. 96; or by husband in action by him and his wife; *Moriarty v. L., Chatham, and Dover Ry. Co.*, L. R., 5 Q. B. 314; cited *ante*, p. 61; or by the person really interested in the suit, but not named on the record. Thus, in action on a bond conditioned for the payment of money to L. D., the declaration of L. D. that the defendant owes nothing is evidence against the plaintiff. *Hanson v. Parker*, 1 Wils. 257. So in an action by the master of a ship for freight, brought for the benefit of the owner, the admissions of the latter are evidence. *Smith v. Lyon*, 3 Camp. 465. So in actions on policies, the declarations of the party really interested are admissible. *Per* Ld. Ellenborough, *Bell v. Ansley*, 16 East, 143. But the statement of a *cestui que trust* is either wholly inadmissible against his trustee, or admissible only as to his own interest, where the trustee holds in trust, not for him only, but for others. Thus, where an action of ejectment was brought by a trustee having the legal estate in fee, and the defendant offered evidence of admissions made by the *cestui que trust* of a particular estate, it was considered doubtful whether such evidence could be received, inasmuch as the interest of the *cestui que trust* was not co-extensive with that of the lessor of the plaintiff, and the declarations were prejudicial to the remainderman. *Doe d. Rowlandson v. Wainwright*, 8 Ad. & E. 691. And according to *May v. Taylor*, 6 M. & Gr. 261, in order to make the statements of the *cestui que trust* admissible against the trustee, the interest of the *cestui que trust* ought to be identical with that of the trustee, and it is not enough to prove a subsisting trust without showing the nature and extent of it, or that the *cestui que trust* is the real party to the action, and the nominal party a mere agent. It is said in B. N. P. 237, that an "answer" by a trustee can in no case be used as evidence against *cestui que trust*. It is, however, probable that this passage related to evidence in equity; for it was there only that a *cestui que trust* could be a party to the suit, and the trustee would be a co-defendant.

Admissions by tenants of the existence of rights or easements are not evidence against their landlords. *Papendick v. Bridgwater*, 5 E. & B. 166; 24 L. J., Q. B. 289. But where, in an action of ejectment, one of the defendants defended, in the character of landlord to the other defendants, their admissions were evidence against him. *Doe d. Mee v. Litherland*, 4 Ad. & E. 784.

On an appeal against an order of removal, the admissions of rated inhabitants of a parish are evidence against that parish, for they are the parties really interested. *R. v. Whitley*, 1 M. & S. 636. So, in an action against the sheriff, the declarations of a party, who has indemnified the sheriff, are evidence against the defendant. *Dyke v. Aldridge*, cited 7 T. R. 665. So in trover for a deed, which the defendant detained at the request of W., and in the detainer of which W. was substantially interested, the declarations of W. in favour of the plaintiff's claim were held admissible. *Harrison v. Vallance*, 1 Bing. 45; and see *Robson v. Andrade*, 1 Stark. 372. So the declarations of the party for whose benefit the plaintiff sues on a bill; *Welstead v. Levy*, 1 M. & Rob. 138; or of a party from whom he received the bill or note when overdue, are evidence against the plaintiff. *Beauchamp v. Parry*, 1 B. & Ad. 89. Admissions by one of several trustees will not affect his co-trustees where they are not all personally liable. *Davies v. Ridge*, 3 Esp. 101.

The declarations of a party proved to be a joint contractor with the defendant, though not joined in the action, or though *nol-prossed* on a plea of bankruptcy, were admissible. *Grant v. Jackson, Peake*, 203; *Wood v.*

*Braddick*, 1 Taunt. 101. But admissions by co-trespassers, or joint defendants, in actions for *tort*, are not generally evidence except against themselves, unless there be proof of common motive and object, and the declarations relate to them. *Daniels v. Potter*, M. & M. 501; and see the observations in *R. v. Hardwick*, 11 East, 578. Nor are they evidence in actions *ex contractu*, unless they relate to a matter in which there is an identity of interest: thus where the plaintiff in covenant alleged an eviction by two defendants under a prior lawful title, an admission by *one* of the defendants after eviction was held no evidence of such title, although the defendants were co-executors of the covenant, and had joined in the eviction. *Fox v. Waters*, 12 Ad. & E. 43.

An admission by a private individual of a corporation is not evidence against the corporate body. *London, Mayor of, v. Long*, 1 Camp. 23. But where a corporation sues for a disturbance in exercising a corporate office, what is said by the officer respecting the exercise of it is evidence against the corporation. *Id.* 25, *per* Ld. Ellenborough. As to admissions by the agents of corporations and companies, see *Admissions by agents, post*, pp. 69, 70.

Where plaintiff sued as administrator *durante absentia* of the executor, the admissions of the executor were held inadmissible against the plaintiff. *Rush v. Peacock*, 2 M. & Rob. 162. In a suit by assignees of bankrupt, admissions by them before their appointment were received in evidence against them by Tindal, C.J., in *Smith v. Morgan*, *Id.* 257; but they were rejected, by Abbott, C.J., in a previous case of *Fenwick v. Thornton*, M. & M. 51. In *Legge v. Edmonds*, 25 L. J., Ch. 125, letters written by a defendant, sued as administratrix, containing admissions made by her before letters of administration had been taken out, were rejected as evidence against her. Perhaps the admissibility of statements made by executors, assignees, and others filling an official character, but before they were invested with that character, will be found to depend on the nature of the facts stated by them. So an admission, before probate, by an executor may perhaps be entitled to more consideration than the admission of a mere stranger who has afterwards obtained letters of administration, for the executor takes his title from the will. When an official manager of a company, appointed under the Winding-up Act, 11 & 12 V. c. 45, was substituted as defendant by order in Chancery, instead of a shareholder D., who had been sued by a creditor of the company "as *nominal defendant*," it was held that the declarations of D., while defendant, were not evidence against the official manager. *Armstrong v. Normandy*, 5 Exch. 409. The decision here turned on the misnaming of D. on the record as "*nominal defendant only*."

*Admissions by guardian and prochein amy.*] The admissions of a guardian are not evidence against an infant who sues by his guardian. *Cowling v. Ely*, 2 Stark. 366; *Eggleston v. Speke*, 3 Mod. 258. Nor the admission of *prochein amy*. *Webb v. Smith*, Ry. & M. 106.

*Admissions by agents and servants.*] Where a party to the suit directly or impliedly constitutes a third person his agent for the purpose of an admission, the admission so made is evidence. Thus, if a person agree to admit a claim, provided J. S. will make an affidavit in support of it, such affidavit is proof against him. *Lloyd v. Willan*, 1 Esp. 178; *Stevens v. Thacker*, Peake, 187. And it is conclusive in an action founded on the special agreement. *Amy v. Andrews*, Freem. 133. But see *Garnet v. Ball*, 3 Stark. 160. So if the vendee of goods deny having received them, but add, "If the carrier's servant says he delivered the goods, I will pay you," the answer of the servant when applied to on the subject may be given in evidence. *Daniel v. Pitt*, 1 Camp. 366, n.; *Williams v. Innes*, *Id.* 364. In an

action for the loss of a horse through the defendant's negligence in not fencing a shaft, defendant consented to pay compensation if a miners' jury should say the shaft was his; held, that the finding of such jury was evidence against him of negligence, though not conclusive. *Sybray v. White*, 1 M. & W. 435.

With regard to the admissions of agents in general, the rule is this: When it is proved that A. is agent of B., whatever A. does, or says, or writes, in the making of a contract as agent of B., is admissible in evidence against B., because it is part of the contract which he makes for B., and which therefore binds B.; but it is not admissible merely as the agent's account of what has passed. *Per Gibbs, J., Langhorn v. Allnutt*, 4 Taunt. 519. Thus the declaration of a servant employed to sell a horse is evidence to charge the master with a warranty, if made at the time of sale; but statements made at any other time are not admissible against him. *Helyear v. Hawke*, 5 Esp. 72. So where the servant of a horsedealer, who was employed to take a horse to the stables of the purchaser, had signed a receipt containing a warranty, this receipt without proof of the servant's authority to give a warranty was rejected in an action against his master. *Woodin v. Burford*, 2 Cr. & M. 391. An admission by a servant, in a transaction not relating to the business in which he is employed, is not evidence against his master. Thus where a pawnbroker's shopman was heard to state that his master had lent 200*l.* at 5 per cent. on the security of certain plate, this was held inadmissible as against the master. *Garth v. Howard*, 8 Bing. 451. But if the statement had been made by him in the course of a transaction in the ordinary course of a pawnbroker's business, it would have been different. *Id.* 543; *Schumack v. Lock*, 10 B. Moo. 39. The letters of an agent to his principal, containing a narrative of past transactions in which he had been employed, are not admissible in evidence against the principal. *Kahl v. Jansen*, 4 Taunt. 565; *Fairlie v. Hastings*, 10 Ves. 128; *Betham v. Benson*, Gow, 45. An admission by a person who has generally managed A.'s landed property, and received his rents, is not evidence against A. as to his employer's title, there being no other proof of his agency *ad hoc*. *Ley v. Peter*, 3 H. & N. 101; 27 L. J., Ex. 239. So in an action against a surety, the admissions or declarations of the principal, to whom goods have been sent by the plaintiff at the defendant's request, are not evidence against the defendant either as to the receipt of the goods, or as to other facts respecting them. *Evans v. Beattie*, 5 Esp. 26; *Bacon v. Chesney*, 1 Stark. 192.

But a letter from an agent abroad stating the receipt of money, coupled with the answer of the principal directing the disposition of the money, will be evidence of the receipt by the principal. *Coates v. Bainbridge*, 5 Bing. 58. And a letter from the master of a ship to her owners has been held admissible against them, with regard to the facts, but not to the opinions therein stated. *The Solway*, 10 P. D. 137. The admissions of an under-sheriff are evidence against a sheriff, for he is the general agent of the sheriff; *Drake v. Sykes*, 7 T. R. 117; but not unless they accompany an act done, or they tend to charge himself; he being the real party in the cause. *Snowball v. Goodricke*, 4 B. & Ad. 541. The admissions of a bailiff are evidence against the sheriff, like the statements of any other agent, only when they form part of the transaction. *North v. Miles*, 1 Camp. 389.

The admissions of a surveyor of a corporation respecting a house belonging to the corporation, are evidence against the latter in an action for an injury to the plaintiff's house by works done on the defendant's premises. *Peyton v. S. Thomas's Hospital*, 3 M. & Ry. 625, n.; 3 C. & P. 363; and see *London, Mayor of, v. Long*, 1 Camp. 25, cited *ante*, p. 68; and *R. v. Adderbury, East*, 5 Q. B. 187. Evidence may be given against companies, of

admissions made by their directors or agents relating to matters within the scope of their authority. In *Meux's Executors' Case*, 2 D. M. & G. 522, a letter written by the secretary of a company by order of the acting directors, stating the number of shares held by M., was admitted on behalf of his executors, in proceedings against them. See also *National Exchange Co. of Glasgow v. Drew*, 2 Macq. 103. But a statement made by the chairman of a company incorporated under the Companies Act, 1862, at a general meeting of the company, cannot be used as an admission against the company. In *re Devala Provident Gold Mining Co.*, 22 Ch. D. 593. And the secretary of a projected company has not, by virtue only of his office, any power to bind the members of the provisional committee by admissions. *Burnside v. Dayrell*, 3 Exch. 225. In *Bruff v. Gt. N. Ry. Co.*, 1 F. & F. 345, Willes, J., rejected an admission of the secretary of a company as to the receipt of a letter. And an admission by the board meeting of a company registered under 7 & 8 V. c. 110, consisting of a less number of directors than was required by the deed of settlement, was rejected in *Ridley v. Plymouth Baking Co.*, 2 Exch. 711. In an action against an incorporated company by one of its members on a bond, entries in a book kept by the clerk of the company, to which all members by the act of incorporation had access, cannot be used against the plaintiff as an admission. *Hill v. Manchester, &c., Waterworks Co.*, 5 B. & Ad. 866. Admissions by servants of a company as to the ferocious habits of a dog, were not allowed to bind the company, in the absence of evidence that these servants had the care of the animal. *Stiles v. Cardiff S. Navigation Co.*, 33 L. J., Q. B. 310. As to admissibility of statements by servants of a railway company with reference to delay in delivery or loss of goods, see *Gt. W. Ry. Co. v. Willis*, 18 C. B., N. S. 748; 34 L. J., C. P. 195; and *Kirkstall Brewery Co. v. Furness Ry. Co.*, L. R., 9 Q. B. 468, cited *post*, p. 648.

Before the admissions of an agent can be received, the fact of his agency must be proved. This can be done by proving that the agent has acquired credit by acting in that capacity, and that he has been recognised by the principal in other instances of a similar character to that in question. In *Watkins v. Vince*, 2 Stark. 368, a guarantee signed by a son for his father was admitted upon proof of the son having signed for his father upon three or four previous occasions. But in *Courteen v. Touse*, 1 Camp. 43, n., where, in an action upon a policy, a witness proved that he had often seen B. sign policies for the defendant, but was not acquainted with any instance in which the defendant had paid a loss upon a policy so subscribed, it was held that the agency was not sufficiently proved.

A receipt for debt and costs, indorsed by the plaintiff's solicitor's town agent on a writ of summons, is evidence of payment against the plaintiff, without further proof of agency. *Weary v. Alderson*, 2 M. & Rob. 127. Where the statements of a party's agent are admissible, the statements of the agent's interpreter, made while acting as such in the agent's presence, may be given in evidence, without calling the interpreter. *Reid v. Hoskins*, 5 E. & B. 729.

*Admissions by partner.*] By the Partnership Act, 1890, 53 & 54 V. c. 39, s. 15, "An admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm." After *primâ facie* evidence of partnership, as to which *vide post*, p. 556, the declaration of one partner is evidence against his co-partners as to partnership business; *Nicholls v. Dowding*, 1 Stark. 81; *Grant v. Jackson*, Peake, 203, *post*, p. 200; though the former is no party to the suit. *Wood v. Braddick*, 1 Taunt. 104; but see *Rooth v. Quin*, 7 Price, 198, *post*, p. 200. And it is evidence, though made after the dissolution of

partnership, if made as to a transaction which took place before the dissolution; *Wood v. Braddick*, ante, p. 70; but not so as to bind his co-partners as to a transaction which occurred previously to the partnership, unless a joint responsibility be proved as a foundation for the evidence. *Catt v. Howard*, 3 Stark. 3. Admissions made by one of several partners after the dissolution of the partnership, are admissible to prove payment, after the dissolution, of a debt due to the partnership. *Pritchard v. Draper*, 1 Russ. & Myl. 191. A declaration by one of several partners, joint plaintiffs, that goods, the subject-matter of the suit, were his separate property, is evidence against all the plaintiffs; *Lucas v. De la Cour*, 1 M. & S. 249; but an admission by a partner as to a subject, not of co-partnership, but of *joint ownership* of a vessel, is not admissible against his co-partner. *Juggers v. Binnings*, 1 Stark. 64. In an action against two partners on a deed purporting to be executed by one defendant "for self and partner," a subsequent acknowledgment of the deed by the other defendant was held not evidence to prove the actual execution by him, without producing the authority under seal. *Steiglitz v. Eggington*, Holt, N. P. 141. But see *Ball v. Dunsterville*, 4 T. R. 313, post, p. 136. And in *Harvey v. Kay*, 9 B. & C. 356, letters of a member of a joint stock company, admitting that he was a partner in it, were received as proof of that fact, without any evidence of his having executed the deed of settlement by which the company was formed. A statement by one who became partner after the cause of action arose, is not evidence against his co-partner who sues on it. *Tunley v. Evans*, 2 D. & L. 747, Wightman, J.

*Admissions by wife.*] In general, the admissions of a wife will not affect the husband. Thus, the wife's receipt for money, or admission of a trespass, is not evidence against the husband. *Hall v. Hill*, Stra. 1094; *Denn v. White*, 7 T. R. 112. But where the wife can be considered the agent of her husband, her admissions may be received as evidence against him. *Emerson v. Blonden*, 1 Esp. 142; *Anderson v. Sanderson*, 2 Stark. 204; S. C., Holt, N. P. 591. Thus, in an action for goods sold and delivered at the defendant's shop, an offer made by his wife to settle the demand is admissible in evidence, if she were accustomed to serve in the shop, and to transact the business in her husband's absence; *Clifford v. Burton*, 1 Bing. 199; and her admission, under such circumstances, will take a case out of the Statute of Limitations. *Paletthorp v. Furnish*, 2 Esp. 511, n. But her admissions are not evidence of the terms of her husband's tenancy of the shop, in a suit for the rent, although she is carrying on business in it by her husband's authority in his absence. *Meredith v. Footner*, 11 M. & W. 202. A wife's declaration that she agreed to pay 4s. a week for nursing a child will charge the husband, it being a matter usually transacted by women. *Anon.*, Stra. 527. In an action against defendant, as administrator of his wife, for money lent to her before marriage, admissions of the debt made by her during coverture are evidence. *Per* Ld. Tenterden, C.J., *Humphreys v. Boyce*, 1 M. & Rob. 140. But in an action by husband and wife for a loan by the wife *dum sola*, her admissions, after coverture, negating the debt, were refused by Ld. Kenyon, C.J. *Kelly v. Small*, 2 Esp. 716. So, where plaintiff sued, with his wife as executrix, her declarations were inadmissible. *Alban v. Pritchett*, 6 T. R. 680. A joint answer in Chancery by husband and wife was not evidence against her, being considered as the answer of the husband alone. *Elston v. Wood*, 2 My. & K. 678. In *Shelberry v. Briggs*, 2 Vern. 249, in a bill against husband and wife for payment of a legacy under a will, of which the wife was executrix, the answer was admitted against the wife after the death of her husband. See *Wrottesley v. Bendish*, 3 P. Wms. 238. In the case of a wife sued, with her husband, in respect of her separate estate, it would seem that her admissions, but not those of her husband, would be evidence

against her. Where the conduct of the wife is in question, her declarations have, in some cases, been held admissible for her husband, in an action against him. Thus, in an action for necessities supplied to the wife, the defence being that the husband had turned her out of doors for adultery, her declarations as to the adultery, made previously to her expulsion, were admitted by Abbott, C.J., *Walton v. Green*, 1 C. & P. 621; this decision, however, as reported, seems unsatisfactory. See 1 Taylor, Evid., 10th ed. § 767, n. In an action for seduction, declarations of defendant's wife, tending to show that she aided and colluded with the defendant in seducing the plaintiff's daughter, were admitted as evidence in aggravation. *Per Gurney, B., Knowles v. Compigne*, Winton Sum. Ass. 1835.

*Admissions by counsel or solicitor.*] In *Collidge v. Horn*, 3 Bing. 122, Burrough, J., expressed an opinion that if one of the parties to a cause were in court and had heard an admission made by his counsel in his opening statement, this was evidence against him. In *Haller v. Worman*, 2 F. & F. 165, where, in an action of detinue, it was proved that the defendant's counsel had stated, while attending a summons at chambers, that his client had the papers in his possession; this was admitted at the trial to negative the plea of "not possessed." When the counsel in a cause so conducts it as to lead to an inference that a certain fact is admitted by him, the jury may take it as proved; *Stracy v. Blake*, 1 M. & W. 168; and the judge is also warranted in acting upon such tacit admission. *Semle, Doe d. Child v. Roe*, 1 E. & B. 279. So, where a fact is assumed at Nisi Prius for the purpose of supporting one issue, it must be taken as admitted for the purpose of disproving another issue. *Semle, Bolton v. Sherman*, 2 M. & W. 403. And if counsel for the plaintiff open a fact from which his client's possession of a document may be presumed (as payment of a cheque), though he offers no proof of it, yet defendant may give secondary evidence of it after notice to produce, without further proof of the plaintiff's possession. *Duncombe v. Daniell*, 8 C. & P. 222. Where, after a verdict subject to a special case, a new trial has been directed, the special case, signed by counsel on both sides, is evidence of the facts there stated. *Van Wart v. Wolley*, Ry. & M. 4. In a case where the statement of counsel as to the limitations of a deed on a former trial was offered as secondary evidence of its contents, the admissibility of it was considered questionable, even if the parties had been the same; but it was rejected on the ground that the defendant, against whom it was offered, was different. *Doe d. Gilbert v. Ross*, 7 M. & W. 102.

An admission made by the solicitor of one of the parties to prevent the necessity of proving a fact on the trial is sufficient evidence of that fact; *Young v. Wright*, 1 Camp. 141: as where he admits the handwriting of an attesting witness. *Milward v. Temple*, *Id.* 375; and see *Trustore v. Burton*, 9 B. Moore, 64. See also Rules, O. xxxii. r. 1, cited *ante*, p. 62.

Admissions made by the defendant's solicitor, when making proposals on behalf of his client respecting the plaintiff's demand (the solicitor refusing to be examined), are evidence against the defendant; and proof that they were made by the solicitor on the record will be sufficient to establish his agency. *Gainsford v. Grammar*, 2 Camp. 9. But an admission made in a letter written by a solicitor (who was afterwards the solicitor in the cause) before the commencement of the action, is not evidence against the defendant, without some proof of his having authorized the communication. *Wagstaff v. Wilson*, 4 B. & Ad. 339; *Ley v. Peter*, 3 H. & N. 101, 111; 27 L. J., Ex. 239, 242, *per* Watson, B. See also *Blackstone v. Wilson*, 27 L. J., Ex. 229. And an admission made in the course of conversation between the two solicitors respecting the cause, but not with a view to dispense with proof, cannot be given in evidence. *Petch v. Lyon*, 9 Q. B. 147. See *Parkins v.*



*Hawkshaw*, 2 Stark. 239. An undertaking to appear for "Messrs. T. & M., joint owners of the sloop A.," given by the solicitor on the record, is evidence of the joint ownership. *Marshall v. Cliff*, 4 Camp. 133. An agreement by the solicitor "to admit on the trial of this cause," &c., may be used on a *new* trial; *Elton v. Larkins*, 1 M. & Rob. 196; even though the solicitor retract it before the new trial. *Doe d. Wetherell v. Bird*, 7 C. & P. 6.

*Admission under a notice to admit.*] By Rules, 1883, O. xxxii. r. 2, "Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the cause or matter may be, unless at the trial or hearing the court or a judge shall certify that the refusal to admit was reasonable, and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense." By rule 4, "Any party may, by notice in writing, at any time not later than nine days before the day for which notice of trial has been given, call on any other party to admit, for the purposes of the cause, matter, or issue only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the court or a judge, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the cause, matter, or issue may be, unless at the trial or hearing the court or a judge certify that the refusal to admit was reasonable, or unless the court or a judge shall at any time otherwise order or direct. Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular cause, matter, or issue, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice; provided also, that the court or a judge may at any time allow any party to amend or withdraw any admission so made on such terms as may be just." By rule 7, "An affidavit of the solicitor or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or facts shall be sufficient evidence of such admissions, if evidence thereof be required."

It would seem that "sufficient evidence," in rule 7, means *primâ facie* evidence only; see *Burraclough v. Greenhough*, L. R., 2 Q. B. 612, Ex. Ch. *post*, p. 151.

Forms of notice to admit facts and of admissions thereunder are given by rule 5, and App. B., Forms Nos. 12, 13. A form of notice to admit documents is given by rule 3, and App. B., Form No. 11; but this form is only applicable where the document is in the custody of the party giving the notice. See *Rutter v. Chapman*, 8 M. & W. 388. Prior to R. G. H. T. 1853, r. 29, which gave a form identical with the above, by rule H. T. 4 W. 4, a judge's order to admit was required. The judge is not now called upon to interfere except on application for a certificate by the refusing party at the trial, and only in such case need the notice to admit be proved.

The above provisions apply to every document a party means to adduce in evidence, and are not confined to documents in his custody or control; *Rutter v. Chapman*, *supra*, in which case the costs of proving signatures to a petition for a charter, under 1 V. c. 71, s. 49, were not allowed, no notice to admit having been given. It seems that "any document" includes a foreign judgment. *Smith v. Bird*, 3 Dowl. 641.

It was held under the old rules that a variation in the description of the instrument, if not of a nature to mislead, would not release the party from the obligation to admit it; as where the date of a bill, annexed to the order,

was misdescribed. *Field v. Flemming*, 5 Dowl. 450; *Bittleston v. Cooper*, 14 M. & W. 399. And where the order was to admit "the counterpart of a lease," and the instrument produced, and referred to in the order, was in fact an original lease stamped as a counterpart; held, that the party was bound to admit the lease, and could not object to the stamp. *Doe d. Wright v. Smith*, 8 Ad. & E. 255. An order to admit an acceptance "by B., for the defendants," was held to operate as an admission that B. had power to accept for defendants. *Wilkes v. Hopkins*, 1 C. B. 737. So an admission of letters written by A., "the agent of the defendant," is an admission of the agency. *Hunt v. Wise*, 1 F. & F. 445. The admission by judge's order was held to waive any objection to interlineations in the document. *Freeman v. Steggall*, 14 Q. B. 202. An admission of an acceptance of a bill, without a saving of all just exceptions, dispenses with the necessity of producing the bill on the trial. *Chaplin v. Levy*, 9 Exch. 531; 23 L. J., Ex. 117. But see *Sharpley v. Rickard*, 2 H. & N. 57; 26 L. J., Ex. 302. If that saving had not been omitted, the bill must have been produced, and the want of a stamp might have been objected to. *Vane v. Whittington*, 2 Dowl. N. S. 757. A saving of "just exceptions" does not allow exceptions to the authenticity of any part of letters admitted. *Hawk v. Freund*, 1 F. & F. 295, Byles, J.

The party must serve the proper notice, although the document may be alleged by the opposite party, in his pleadings or otherwise, to be a forgery, and although the opposite party may have notified his intention *not* to admit it. *Spencer v. Barrough*, 9 M. & W. 425. Admissions made under the above provision are, of course, conclusive at the trial; but facts incidentally stated in the description of the document as admitted, are not to be taken as also conclusively admitted, though the description may be *primâ facie* evidence against the party admitting. *Pilgrim v. Southampton & Dorchester Ry. Co.*, 18 L. J., C. P. 330. The description of a letter respecting a certain field, "then in the plaintiff's possession," was admitted as evidence, but not conclusive, of such possession. S. C. This decision seems to qualify some of those cited above.

The party called upon to make admissions should be cautious not to admit more than the mere document mentioned in the notice, and to guard against being inadvertently drawn into admissions of the kind referred to in *Wilkes v. Hopkins*, *Hunt v. Wise*, and *Pilgrim v. Southampton & Dorchester Ry. Co.*, *supra*.

An admission, under notice, of the accuracy of a copy, will not dispense with notice to produce the original, or with other pre-requisites for the reception of secondary evidence. See *Sharpe v. Lamb*, 11 Ad. & E. 805.

[*Admissions by payment of money into court.*] The practice as to payment of money into court is now regulated by Rules, 1883, O. xxii. By rule 1, the defendant may, in any action brought to recover a debt or damages, "pay into court a sum of money by way of satisfaction, which shall be taken to admit the claim or cause of action in respect of which the payment is made; or he may with a defence denying liability (except in actions or counter-claims for libel or slander) pay money into court, which shall be subject to the provisions of rule 6, provided that in an action on a bond under the statute, 8 & 9 W. 3, c. 11, payment into court shall be admissible to particular breaches only, and not to the whole action." By rule 2, "payment into court shall be signified in the defence, and the claim or cause of action in satisfaction of which such payment is made shall be specified therein." By rule 6, "when the liability of the defendant, in respect of the claim or cause of action in satisfaction of which the payment into court has been made, is denied in the defence, the following rules shall apply":— . . .

(c) If the plaintiff does not accept, in satisfaction of the claim or cause of action in respect of which the payment into court has been made, the sum so paid in, but proceeds with the action in respect of such claim or cause of action, or any part thereof, the money shall remain in court and be subject to the order of the court or a judge, and shall not be paid out of court except in pursuance of an order. If the plaintiff proceeds with the action in respect of such claim or cause of action, or any part thereof, and recovers less than the amount paid into court, the amount paid in shall be applied, so far as is necessary, in satisfaction of the plaintiff's claim, and the balance (if any) shall, under such order, be repaid to the defendant. If the defendant succeeds in respect of such claim or cause of action, the whole amount shall, under such order, be repaid to him." By rule 9, "a plaintiff may in answer to a counter-claim pay money into court in satisfaction thereof, subject to the like conditions as to costs and otherwise as upon payment into court by a defendant."

As to the question how far payment into court, *simpliciter*, under O. xxii. r. 1, *ante*, p. 74, operates as an admission of the plaintiff's entire claim, it must be observed that O. xxi. r. 4, provides that "no denial or defence shall be necessary as to damages claimed or their amount, but they shall be deemed to be put in issue in all cases unless expressly admitted," and O. xix. r. 17, which requires each party to "deal specifically with each allegation of fact of which he does not admit the truth," expressly excepts damages, hence it follows that payment into court does not admit the *quantum* of liability where the action sounds in damages. Thus it is no admission of a *total* loss on a policy. *Rucker v. Palsgrave*, 1 Camp. 557. The effect of such payment into court may, it seems, be thus summarised:—1. That where there is a general money claim, *Hennell v. Davies* (1893), 1 Q. B. 367; or a general and divisible allegation of wrong (as in case of trespass or trover for several articles taken or converted), *Schreger v. Carden*, 11 C. B. 851; 21 L. J., C. P. 135; payment into court does not dispense with proof of a cause of action upon the issue of damages, *ultra*. 2. That where the claim, whether in contract or tort, is special, and the breach single and indivisible, payment into court relieves the plaintiff from proof of any part of the cause of action, except so far as may happen to be necessarily incidental to the proof of damages, *ultra*. *Perren v. Monmouthshire Ry. Co.*, 11 C. B. 855; 22 L. J., C. P. 162; *Dumbleton v. Williams*, 76 L. T. 81, H. S. 1897, C. A. See further the cases collected in earlier editions of this work, *e.g.*, the 13th (1875), pp. 79–82. As to the effect of acceptance of money paid in with a denial of liability, see *Cote v. Ford*, (1899) 2 Ch. 93, C. A.

[*Admission by recital—Estoppel.*] A recital in a deed is evidence against him who executed the deed, or any person claiming under him. Com. Dig. Evid. (B. 5). And such recital operates as an estoppel in an action founded on the deed; *Carpenter v. Buller*, 8 M. & W. 212; unless the parties in their pleading voluntarily waive it, and instead of replying the estoppel, submit the fact recited to a jury. *Young v. Raincock*, 7 C. B. 310. Thus the recital of a lease in a release is evidence of the lease against the releasor, and those claiming under him. *Ford v. Grey*, 1 Salk. 286; *Crease v. Barrett*, 1 C. M. & R. 919. But in order to create an estoppel, the deed must contain a precise statement of the fact relied on; *e.g.*, in a grant of land by A., that A. was seised of the legal estate; a covenant that the grantor had power to grant is insufficient. *General Finance, &c., Co. v. Liberator, &c., Building Soc.*, 10 Ch. D. 15; *Onward Building Soc. v. Smithson*, (1893) 1 Ch. 1, C. A. Where the recital in a lease has ceased to be an estoppel in consequence of its dropping, it continues to be *prima facie* evidence against those who claim under the parties to it. *Bayley v. Bradley*, 5 C. B. 396.

In trespass against a sheriff, a bill of sale executed by him, reciting the writ, the taking, and the sale of the goods, is evidence against him of those facts. *Woodward v. Larking*, 3 Esp. 286. So the recital of an ancient royal charter in a modern charter is evidence. *Per Abbot, J., Gervis v. Gd. W. Canal Co.*, 5 M. & S. 78. The recitals in a deed may confine the effect of admissions in the same instrument. *Lampon v. Corke*, 5 B. & A. 607. But the recital in a bond, that the parties had agreed to execute a bond in the sum of 500*l.*, will not confine the bond to that sum, if actually executed in the penal sum of 1,000*l.* *Ingleby v. Swift*, 10 Bing. 84. A party claiming under a certain title does not necessarily admit statements in previous deeds which make up his title; thus, where a deed, reciting the bankruptcy of A., conveys an estate to B., and B. (being a party to, but not having executed that deed) conveys the estate to another by a deed making no such recital, the above deeds are no evidence of the bankruptcy as against B. in an action concerning other lands. *Doe d. Shelton v. Shelton*, 3 Ad. & E. 265. A recital is not necessarily an estoppel to both parties unless the mutuality appears; if it is the statement of one party only, it estops only that party. *Stroughill v. Buck*, 14 Q. B. 787. Where the recital in a deed is used as an admission, it must be proved strictly, although cancelled; *Breton v. Cope*, Peake, 44; and a recited instrument is only admitted for so much as is recited; if any other part of it is to be proved, it must be produced and proved in the usual way. *Gillett v. Abbott*, 7 Ad. & E. 783. See further as to estoppels by deed, notes to *Kingston's (Ds. of) case*, 2 Smith's L. C., 11th ed. 823 *et seq.*

[*Admission by estoppel in pais.*] There is a class of cases in which a party may be estopped or precluded by his wilful misstatement *in pais* from disputing a state of things upon the faith of which another party has been induced to act or to rely to his own prejudice. The case of *Shaw v. Picton*, 4 B. & C. 729, cited *ante*, p. 66, is an instance. So the cases of *Pickard v. Sears*, 6 Ad. & E. 469; *Gregg v. Wells*, 10 Ad. & E. 90; *Freeman v. Cooke*, 2 Exch. 654, established the doctrine that a voluntary misstatement of fact by A.,—such as a misrepresentation of the property in goods, whereby a party, B., is deceived,—precludes A. from denying such property in a suit between A. and B. See on the principle of these cases, *Foster v. Mentor Life Insur. Co.*, 3 E. & B. 48; 23 L. J., Q. B. 145; *Clarke v. Hart*, 6 H. L. C. 633, 655; 27 L. J., Ch. 615, 618. And this doctrine has been extended to the case of sale where the defendant has so conducted himself as unintentionally to induce a belief in the plaintiff that defendant had bought the goods. *Cornish v. Abington*, 4 H. & N. 549; 28 L. J., Ex. 262. So where a negotiable security is intrusted by the owner to an agent for a specific purpose, any innocent transferee for value from the agent acquires a good title against the owner. *Goodwin v. Robarts*, 1 Ap. Ca. 476, D. P.; *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194; *Webb v. Alexandria Water Co.*, 21 T. L. R. 572; June 1st, 1905, K. B. D., *post*, p. 963. The propositions on estoppel *in pais* are summed up in the judgment in *Carr v. L. & N. W. Ry. Co.*, L. R., 10 C. P. 307. See thereon *Dixon v. Kennaway*, (1900) 1 Ch. 833; *Whitechurch, George v. Cavanagh*, (1902) A. C. 117, 130. There must be a representation of a *fact*; a statement of intention is not sufficient. *Citizens' Bank of Louisiana v. First National Bank of New Orleans*, L. R., 6 H. L. 352. The misstatement or negligence whereby the other person is injured must be in the transaction itself and be the proximate cause of the injury; *In re United Service Co.*, L. R., 6 Ch. 212; *Buxendale v. Bennett*, 3 Q. B. D. 525, C. A.; *Swan v. N. British Australasian Co.*, 7 H. & N. 603; 31 L. J., Ex. 425; 2 H. & C. 175; 32 L. J., Ex. 273, Ex. Ch.; and the negligence must be of some duty owing to him. S. C.: *Johnson v. Crédit Lyonnais Co.*, 3 C. P. D. 32, C. A.; *Union Credit Bank v. Mersey*

*Docks, &c., Board*, (1899) 2 Q. B. 204. The estoppel may arise from an innocent misstatement. *Low v. Bouverie*, (1891) 3 Ch. 82, per C. A. See also *Arnold v. Cheque Bank*, 1 C. P. D. 578; *Coventry v. Gt. E. Ry. Co.*, 11 Q. B. D. 776; *Setou v. Lafone*, 18 Q. B. D. 139; 19 *Id.* 68, C. A.; and *Bank of England v. Vagliano*, (1891) A. C. 107, D. P. It does not arise where such misstatement was induced by the misrepresentation or concealment of the persons to whom it was made. *Porter v. Moore*, (1904) 2 Ch. 367. As to an estoppel arising from silence, see *McKenzie v. British Linen Co.*, 6 Ap. Ca. 82, D. P.; *Ogilvie v. W. Australian, &c., Cor.*, (1896) A. C. 257, J. C. As to that arising from the issue of a blank transfer of shares, see *Williams v. Colonial Bank*, 38 Ch. D. 388, C. A.; 15 Ap. Ca. 267, and cases there cited. Where a company issues share or debenture certificates, stating that a certain person is the holder of the shares or debentures, or where they register shares in his name, this may operate as an estoppel against the company; *vide post*, p. 1119. As to the effect of "certification" by a company on a transfer of their shares, that the certificates of the shares have been lodged with them, *vide post*, p. 1120. See further as to estoppels *in pais*, 2 Smith's L. C., 11th ed. 832 *et seq.*

Admissions of the title of a person to land by accepting a tenancy, or possession of land from him, are considered *post*, p. 1004.

*Admissions on the record.*] By Rules, 1883, O. xix. r. 13, every allegation of fact in any pleading, "if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind, not so found by inquisition." By rule 14 "any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant (as the case may be); and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading." By rule 15, each party must raise "by his pleading all matters which show the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality, either by statute or common law, or Statute of Frauds." By rule 17, "it shall not be sufficient for a defendant in his statement of defence to deny generally the grounds alleged by the statement of claim, or for a plaintiff in his reply to deny generally the grounds alleged in a defence by way of counter-claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth, except damages."

Rule 13 follows in the main the old common law rule. See B. N. P. 298; *Wimbish v. Tailbois*, Plowd. 48; *Toukin v. Crocker*, 2 Lutw. 1215. But rule 15, which requires the Stat. of Frauds to be pleaded, goes much further.

It has been considered that a fact admitted on the pleadings by implication is not in every respect on the same footing as if it had been proved to the jury. Thus, if the defendant plead that a note originated in a gaming debt, and that plaintiff took it with knowledge and without consideration, and plaintiff deny any knowledge of the illegality, it has been held that he need not prove the consideration unless the defendant proves the illegality. *Edmunds v. Groves*, 2 M. & W. 642. But in *Bingham v. Stanley*, 2 Q. B. 117, where the plea to a cheque stated an original illegal transaction and transfer to the plaintiff without consideration, to which the plaintiff replied

a good consideration, on which issue was joined, the Ct. of Q. B. held that such admission on the record put the plaintiff on proof of consideration, and they dissented from the doctrine laid down by the Ct. of Exch. in the above case, viz., that facts admitted in the pleadings are not to be taken as if proved to the jury. Since the decision of this case the Ct. of Exch., in *Smith v. Martin*, 9 M. & W. 304, expressed their adherence to their former opinion; and in *Fearn v. Filica*, 7 M. & Gr. 513, observations made by the Ct. of C. P. in argument seem to countenance the doctrine of the Exch. In *Robins v. Maulstone*, 11, 4 Q. B. 815, Ld. Denman, C.J., corrected the language attributed to the Ct. of Q. B. in *Bingham v. Stanley*, ante, p. 77, and laid down the rule that admissions in pleading of material allegations are to be taken as made for all purposes in the cause "regarding the issue arising from that pleading." This qualification will, perhaps, be found to reduce the difference of opinion between the courts. And in *Carter v. James*, 13 M. & W. 144, Alderson, B., expressed his opinion that *Bingham v. Stanley*, ante, p. 77, was rightly decided, though he could not agree with the reasons given. See also *Lewis v. Parker*, 4 Ad. & E. 838. It is very doubtful, however, whether since the J. Acts and the Bills of Exchange Act, 1882, s. 30 (2), post, p. 399, these decisions would now be followed. See further as to admissions on the pleadings, *Blewett v. Tregouning*, 3 Ad. & E. 554, 579, 583; *Cowlshaw v. Cheslyn*, 1 C. & J. 48; *Cooke v. Blake*, 1 Exch. 220; and *Boileau v. Rutlin*, 2 Exch. 665.

It seems that statements made by parties in the course of their pleadings in another action are not to be used as admissions by them in a subsequent action, except where they are estoppels. As several claims or defences are often put in, contradictory admissions might be proved, if such evidence were allowed. *Seemle, Boileau v. Rutlin*, arg., 2 Exch. 665. See also *Carter v. James*, 13 M. & W. 137. A plea in a discontinued action was not evidence against the defendant in another action. *Allen v. Hartley*, 4 Doug. 20.

Suffering a judgment by default is an admission on the record of the cause of action. Thus in an action against the acceptor of a bill, the defendant, by suffering judgment by default, admits a cause of action to the amount of the bill, unless part payment be indorsed. *Green v. Hearne*, 3 T. R. 301. So in an action on a contract the defendant cannot, after judgment by default, insist upon the fraud of the plaintiff. *E. India Co. v. Glover*, 1 Stra. 612.

[*Whole admission to be taken together.*] The whole of an admission must be taken together; therefore, where an amount rendered by the defendant is produced to establish the plaintiff's demand, it is evidence to prove both the debtor and creditor side of the account. *Randle v. Blackburn*, 5 Taunt. 245; *Thomson v. Austen*, 2 D. & Ry. 361. But the jury are not bound to believe both sides of the account; therefore, where the plaintiff put in evidence an account rendered by the defendant in which he had stated a counter-claim, the plaintiff was permitted to disprove the counter-claim, and to recover the amount admitted. *Rose v. Savory*, 2 N. C. 145. And see *Baildon v. Walton*, 1 Exch. 617, cited post, p. 687. Where the plaintiff put in the defendant's answer in Chancery to prove an admission, defendant had a right to have the bill read, but the judge cautioned the jury not to take the allegations as true. *Pennell v. Meyer*, 2 M. & Rob. 98. See *Proof of Chancery proceedings*, post, pp. 112 et seq. The assertion of a party, in a conversation given in evidence against him, of facts in his favour, is evidence for him of those facts. *Smith v. Blandy*, Ry. & M. 257. But a party cannot examine a witness, who is called to prove the conversation against him, as to unconnected statements made by him (the party) on the same occasion containing distinct assertions of his own rights. In other words, there are

limits to the general proposition that the *whole* of a conversation is evidence, where part is admissible. *Semb. Prince v. Samo*, 7 Ad. & E. 627, cited under *Re-examination of witnesses*, *post*, p. 184.

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## OBJECT OF EVIDENCE.

The object of evidence is to prove the point in issue between the parties; and in doing this, there are three general rules to be kept in view: 1. That the evidence be confined to the issue; 2. That the substance of the issue only need be proved; 3. That the burden of proof lies on the party asserting an affirmative fact, if it be unsupported by any presumption of law.

### EVIDENCE CONFINED TO THE ISSUE.

As the object of pleading is to reduce the matters in difference between the parties to distinct and simple issues, so the rules of evidence require that no proof, oral or documentary, shall be received that is not referable to those issues. All evidence of matters which the courts judicially notice, or of matters immaterial, superfluous, or irrelevant, is therefore excluded.

Thus, where the inquiry is, whether A. made a qualified, or an unqualified sale of goods to B.; and A. denies the qualification, it cannot be shown in disproof of the denial that he had sold to others the like articles subject to such qualification; and it is doubtful whether he can be asked the question, though merely to test his veracity of memory, *Hollingham v. Head*, 4 C. B., N. S. 338; 27 L. J., C. P. 241. For another instance of this rule, see *Hyde v. Palmer*, 3 B. & S. 657; 32 L. J., Q. B. 126; and see on the *Cross-examination of witnesses*, *post*, p. 179.

*Facts of which the court will take judicial notice.*] There are many facts which the courts will notice judicially, and of which it is therefore unnecessary to give any evidence. The following are examples:—They will judicially notice the order and course of proceedings in Parliament, *Lake v. King*, 1 Wms. Saund. 131 *b*; the established privileges of the House of Commons, *Stockdale v. Hansard*, 9 Ad. & E. 1; *Bradlaugh v. Gossett*, 12 Q. B. D. 271; the existence of war with a foreign state, *R. v. De Berenger*, 3 M. & S. 67; the existence of a foreign state recognised by the British Government; but not otherwise, *Taylor v. Barclay*, 2 Sim. 213; *Berne, City of, v. Bank of England*, 9 Ves. 347; *Foster v. Globe Venture Syndicate*, (1900) 1 Ch. 811; and whether a certain territory is within it; S. C.; the several seals of the King; as the great seal, *Ld. Melville's case*, 29 How. St. Tr. 707; privy seal, privy signet, and seal of the Exchequer attached to leases of land in its management; *Lane's case*, 2 Rep. 17 *b*. The court took judicial notice of the seal of the city of London; *Doe d. Woodmass v. Mason*, 1 Esp. 53; so of a seal of a superior court of Westminster. *Tooker v. Beauport, Dk. of*, Say. 297. It is said also that the seals of the Great Sessions of Wales, and of the Ecclesiastical and Admiralty Courts, prove themselves; but the cases usually cited to show this are not satisfactory. See *Kempton v. Cross*, Cas. temp. Hardw. 108 (Ecclesiastical Courts); *Green v. Waller*, 2 Ld. Raym. 893 (Admiralty Court); *Olive v. Guin*, 2 Sid. 145; Hardres, 118 (the Great Sessions of Wales), Com. Dig. Testm. (A. 1), (A. 2); which have ruled, that the seal of those courts authenticates their proceedings; but not that it proves itself; nor does it follow, that where a statute authorises the use of a seal, the court is to take notice of the seal without proof of it.

The following seals are required by statute to be judicially noticed: the Chancery Common Law Seal, 12 & 13 V. c. 109, s. 11; the Seal of the Enrolment Office in Chancery, 12 & 13 V. c. 109, s. 17; of the Probate Court, 20 & 21 V. c. 77, s. 22; of the Divorce Court, 20 & 21 V. c. 85, s. 13; of the Admiralty Court, 24 & 25 V. c. 10, s. 14; of the Bankruptcy Court, 46 & 47 V. c. 52, s. 137; the Wafer Great Seal, and Wafer Privy Seal, 40 & 41 V. c. 41, ss. 4, 5 (3a); the Patent Office Seal, 46 & 47 V. c. 57, s. 84; the Seal of the Railway and Canal Commission, 51 & 52 V. c. 25, s. 2.

By Rules, 1883, O. lxi. r. 7, "all copies, certificates, and other documents appearing to be sealed with the seal of the Central Office shall be presumed to be office copies or certificates or other documents issued from the Central Office, and if duly stamped may be received in evidence, and no signature or other formality, except the sealing with a seal of the Central Office, shall be required for the authentication of any such copy, certificate, or other document."

By the J. Act, 1873, s. 61, writs and documents, and all exemplifications and copies thereof, purporting to be sealed with the seal of a district registry of the High Court of Justice, shall be received in evidence without further proof.

The seal of a notary public has been judicially noticed; Bayley on Bills, 6th ed. 490; *Anon.*, 12 Mod. 345; *Cole v. Sherard*, 11 Exch. 482; and see stat. 52 & 53 V. c. 10, s. 6, *infra*; see, further, *Effect of notarial and consular certificates*, *post*, p. 215.

By the 14 & 15 V. c. 99, s. 10, "Every document which by any law now in force, or hereafter to be in force, is or shall be admissible in evidence of any particular in any court of justice in Ireland, without proof of the seal, or stamp, or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent, and for the same purposes in any court of justice in England or Wales, or before any person having in England or Wales by law, or by consent of parties, authority to hear, receive and examine evidence, without proof of the seal or stamp, or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same."

By the Commissioners for Oaths Act, 1889 (52 & 53 V. c. 10), s. 3 (1), "Any oath or affidavit required for the purpose of any court or matter in England, or for the purpose of the registration of any instrument in any part of the United Kingdom, may be taken or made in any place out of England before any person having authority to administer an oath in that place. (2) In the case of a person having such authority otherwise than by the law of a foreign country, judicial and official notice shall be taken of his seal or signature affixed, impressed, or subscribed to or on any such oath or affidavit."

By sect. 6 (1), "Every British ambassador, envoy, minister, *chargé d'affaires*, and secretary of embassy or legation exercising his functions in any foreign country, and every British consul-general, consul, vice-consul, acting-consul, pro-consul, and consular agent, *acting consul-general, acting vice-consul, and acting consular agent*" (54 & 55 V. c. 50, s. 2), "exercising his functions in any foreign place may, in that country or place, administer any oath and take any affidavit, and also do any notarial act which any notary public can do within the United Kingdom; and every oath, affidavit, and notarial act administered, sworn, or done by or before any such person shall be as effectual as if duly administered, sworn, or done by or before any lawful authority in any part of the United Kingdom. (2) Any document purporting to have affixed, impressed, or subscribed thereon or thereto the seal and signature of any person authorized by this section to administer an



oath in testimony of any oath, affidavit, or act being administered, taken, or done by or before him, shall be admitted in evidence without proof of the seal or signature being the seal or signature of that person, or of the official character of that person."

By sect. 11, "In this Act, unless the context otherwise requires, 'oath' includes affirmation and declaration; 'affidavit' includes affirmation, statutory or other declaration, acknowledgment, examination, and attestation or protestation of honour; 'swear' includes affirm, declare, and protest."

Sect. 12 repeals 18 & 19 V. c. 42, s. 3; 15 & 16 V. c. 86, s. 22; and 21 & 22 V. c. 95, s. 31. Sects. 3, 6, and 11, *ante*, p. 80 and *supra*, replace and extend the provisions of these repealed sections, and avoid the difficulties that arose thereunder.

Rules, 1883, O. xxxviii. r. 6, which relate to the swearing of affidavits and their proof, seems also to be replaced by 52 & 53 V. c. 10, ss. 3, 6, *ante*, p. 80.

There are numerous provisions which make copies of documents, authenticated by the seal of a court or public body, good evidence without further proof. See *post*, pp. 98 *et seq.*

By the 8 & 9 V. c. 113, s. 2, "All courts, judges, justices, masters in chancery, masters of courts, commissioners judicially acting, and other judicial officers shall henceforth take judicial notice of the signature of any of the equity or common law judges of the superior courts at *Westminster*, provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document." This section applies when the signature is affixed by a stamp in the usual manner. See *Blades v. Lawrence*, L. R., 9 Q. B. 374.

By the Bankruptcy Act, 1883 (46 & 47 V. c. 52), s. 137, judicial notice shall in all legal proceedings be taken of the seal and of the signature of the judge or registrar of any court having jurisdiction in bankruptcy. By sect. 127, general rules and orders made under the Act are to be judicially noticed. See also sect. 140, as to orders and certificates issued by the Board of Trade.

By the Railway and Canal Traffic Act, 1888 (51 & 52 V. c. 25), s. 20, general rules made by the railway and canal commission under that Act, for carrying it into effect, are to be judicially noticed.

By 52 & 53 V. c. 30, s. 6 (2), the seal of the Board of Agriculture shall be "judicially noticed, and such seal shall be authenticated by the signature of the president," &c. See also sect. 7, as to orders and certificates. This Board is now styled the Board of Agriculture & Fisheries; 3 E. 7, c. 31. Similar provision is made by 62 & 63 Vict. c. 33, s. 7, with respect to the Board of Education.

By the Land Transfer Act, 1875 (38 & 39 V. c. 87), s. 111, rules made thereunder are to be judicially noticed.

By the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 V. c. 57), s. 96, certain certificates purporting to be under the hand of the comptroller of patents are *prima facie* evidence; but by the Trade Marks Act, 1905, 5 E. 7, c. 15, ss. 51, 73, such certificates so far as they relate to trade marks are now to be under the hand of the registrar of trade marks. See further *Id.* s. 52, *post*, p. 107.

Under the Fisheries Acts (46 & 47 V. c. 22, s. 17; 56 & 57 V. c. 17, s. 8 & *Id.* c. 23, s. 3), documents drawn up under those acts are admissible as evidence of the facts therein stated, if purporting to be signed by the officers named in the respective sections.

There is no doubt that the existence of all the superior courts will be judicially noticed; *Tregany v. Fletcher*, 1 Ld. Raym. 151; and so of course will that of all courts established by Act of Parliament. In *Dobson v. Bell*,

2 Lev. 176, and *Pugh v. Robinson*, 1 T. R., 118, it was stated, generally, that the practice of the superior courts would be judicially noticed; but in *Caldwell v. Hunter*, 10 Q. B. 86, Ex. Ch., Maule, J., seemed inclined to doubt whether, the jury having found the practice to be one way, the court could hold it to be another, when the practice was not prescribed by statute, or by the common law, by which latter expression he seems to mean immemorial usage, as distinguished from modern usage. The doubt is altogether not very clearly expressed, and Parke, B., appears not to have assented to it.

The courts formerly took notice of the law of England as administered in the Court of Chancery. *Sims v. Marryatt*, 17 Q. B. 281; 20 L. J., Q. B. 451. But the practice of that court was proved by oral evidence, as in *Dicas v. Brougham, Ltd.*, 1 M. & Rob. 309, where Ld. Eldon was called as a witness to prove that practice, and in *Tucker v. Iuman*, 4 M. & Gr. 1049, where equity counsel were called for a similar purpose. In *Place v. Potts*, 8 Exch. 705; 22 L. J., Ex. 269, the court informed itself by private inquiry as to the jurisdiction of, and proceedings in the Court of Admiralty; which is the same thing as taking judicial notice of it. The court took a similar course with reference to the practice in the Enrolment Office of the Court of Chancery in *Doe d. Williams v. Lloyd*, 1 M. & Gr. 671. Now under the J. Act, 1873, s. 24, all the courts constituted under that Act are to give effect to every equitable estate, right, and ground of relief. It would seem therefore that every judge of the High Court is bound at *Nisi Prius* to take judicial notice of the practice of the several divisions of the court. In *Pilkington v. Cooke*, 16 M. & W. 615, the court refused to take judicial notice of when an order of the judges, allowing a scale of fees to be taken by sheriffs, was made.

The courts take notice of the diocese in which the superior courts at Westminster are situate, *Adams v. Savage*, 6 Mod. 134; the privileges of their officers, including those of solicitors, *Stokes v. Mason*, 9 East, 426; *Ogle v. Norcliffe*, 2 Ld. Raym. 869; the beginning and end of terms, *Estwick v. Cooke, Id.* 1557; the King's proclamation, at least if the Gazette or other authorized copy be produced, *Van Omeron v. Dowick*, 2 Camp. 44; *Dupays v. Shepherd*, 12 Mod. 216; and see *post*, pp. 105, 106; they will take notice of the different counties, palatinates, and counties corporate, in England, 2 Inst. 557; *Deybel's case*, 4 B. & A. 248; *R. v. S. Maurice*, 16 Q. B. 908; 20 L. J., M. C. 221; the existence of the two English universities, and of the purposes of their institution, viz., religion and learning, *Re Oxford rate*, 8 E. & B. 184; the days of festivals appointed by the calendar of the Church of England, *Brough v. Perkins*, 6 Mod. 81; the number of days in a particular month, 1 Rol. Ab. 524; that a particular day of the month in a year falls on Sunday, *Hanson v. Shackelton*, 4 Dowl. 48; that a place lies east or west of Greenwich, and that its true time therefore differs from that of Greenwich, *Curtis v. Marsh*, 28 L. J., Ex. 36, *per* Pollock, C.B.; that a colony, or place therein, is not in England, *Cooke v. Wilson*, 1 C. B., N. S. 153; 26 L. J., C. P. 15; that the value of money has diminished since the time of Richard I., *Bryant v. Foot*, L. R., 3 Q. B. 497, Ex. Ch. *per* Kelly, C. B. In construing a marine policy, the court will take judicial notice of what appears on the admiralty chart of the portion of the sea to which the insurance relates; *Birrell v. Dryer*, 9 Ap. Ca. 345-347, 353, D. P.

A company incorporated by public statute will be noticed, and its identity with the one named in the pleadings will be assumed. *MacGregor v. Dover Ry. Co.*, 18 Q. B. 618, 627; *Church v. Imperial Gas Co.*, 6 Ad. & E. 856. When any facts are notified by a public Act of Parliament, it seems that they must be judicially noticed; thus the courts will notice that the Isle of Ely is a franchise in the nature of a riding, liable to the repair of its bridges

since 7 W. 4 & 1 V. c. 53. *R. v. Ely*, 15 Q. B. 827. In *R. v. Anderson*, 9 Q. B. 663, the court took judicial notice that the assessor and collector of the land-tax assessed taxes were "public annual" officers within the meaning of the 3 W. & M. c. 11, s. 6.

The courts will not notice judicially the nature and jurisdiction of a local inferior court, *Moravia v. Sloper*, Willes, 37; nor Scotch, colonial, or foreign law, vide *Proof of foreign law*, post, p. 120; nor particular customs, as those of London, *Argyle v. Hunt*, Stra. 187; unless duly certified by the recorder, *Blacquiere v. Hawkins*, 1 Doug. 378; *Piper v. Chappell*, 14 M. & W. 624; as to which see 1 Taylor Ev. 10th ed. § 5, pp. 7, 8; nor that a particular town is within a certain diocese, *R. v. Sympson*, 2 Ld. Raym. 1379. It is indeed said, in the report of *Adams v. Savage*, Id. 854, that the courts notice the "limits of ecclesiastical jurisdiction;" but the report in 6 Mod. 134, shows only that the courts at Westminster will take notice in what diocese they are, and that there is an ecclesiastical division of England into provinces and dioceses. They will not notice the local situation of a town or a street in a county, *Deybel's case*, 4 B. & A. 243; *Humphreys v. Budd*, 9 Dowl. 1000; nor that part of the Tower of London is within the city of London, *Brune v. Thompson*, 2 Q. B. 789; nor that a particular town (as Dublin) is in Ireland, *Kearney v. King*, 2 B. & A. 303; *sed quære?* for this appears in several Acts of Parliament. Though the courts took judicial notice of the articles of war which were printed by the King's printer, *Bradley v. Arthur*, 4 B. & C. 304; *R. v. Withers*, cited 5 T. R. 446, and are now bound to do so by the Army Act, 1881, s. 69, yet the book called "Rules and Regulations for the Government of the Army" will not be noticed. *Bradley v. Arthur*, supra.

The courts would not formerly notice the seal or proceedings of a foreign court; *Henry v. Adey*, 3 East, 221; *Ganer v. Lanesborough, Lady*, Peake, 17; but this is altered by the 14 & 15 V. c. 99, s. 7, cited post, p. 100.

The courts are bound to take notice of the law and privilege of the Stannaries. Co. Litt. 11 b; *Gaved v. Martyn*, 19 C. B., N. S. 732, 757; 34 L. J., C. P. 353, 362, per Erle, C. J.

As to how far judicial notice will be taken of the custom of gavelkind and borough English, see Co. Litt. 175 b (4); Robinson on Gavelkind, 3rd ed., 48; *Rider v. Wood*, 1 Kay & J. 644; 24 L. J., Ch. 737; *In re Chenoweth* (1902) 2 Ch. 488; 1 Taylor Evid., 10th ed. § 5, p. 6. There are other customs of which judicial notice would be taken, especially some of those in use amongst persons engaged in commerce. See *Lethulier's case*, 2 Salk. 443. "When a general usage has been judicially ascertained and established, it becomes part of the law merchant which courts of justice are bound to recognize." *Brandão v. Barnett*, 3 C. B. 519, 530, per Ld. Campbell, C. See also *Ex parte Reynolds*, 15 Q. B. D. 184, 185, per Brett, M. R. Thus the court took judicial notice of the lien of bankers on the securities of customers in their custody. *Brandão v. Barnett*, supra. So of the negotiability of bonds, &c., "to bearer;" *Edelstein v. Schuler* (1902), 2 K. B. 144; vide post, p. 963. Probably judicial notice would, in some cases, be taken of the practice of solicitors. *Shoreditch Vestry v. Hughes*, 17 C. B., N. S. 137; 33 L. J., C. P. 349. In the case of *In re Bodmin United Mines*, 23 Beav. 370; 26 L. J., Ch. 570, Romilly, M. R., refused to take judicial notice of the nature of an association on the cost-book principle; but the constitution of these associations has since been recognised by the legislature in the Stannaries Act, 1869 (32 & 33 V. c. 19). A custom of which judicial notice is taken ought to be considered, not as a fact, but as part of the general law of the land; vide ante, p. 24.

The courts of the City of London will take judicial notice of the city

customs; Com. Dig. London (N. 1), (N. 7); 1 Doug. 380, n.; and the Court of Quarter Sessions, of petty sessional divisions of a county. *R. v Whittles*, 13 Q. B. 248.

*Evidence of collateral facts.*] In general, evidence of collateral facts, not pertinent to the issue, is not admissible. Thus, where the question was whether beer supplied by plaintiff to the defendant was good, the plaintiff was not allowed to give evidence of the quality of beer supplied by him to other persons. *Holcombe v. Hewson*, 2 Camp, 391. In an action by indorsee against the acceptor of a bill, who defends on the ground of forgery, evidence that the drawer suspected of the forgery has forged the defendant's name in other instances is inadmissible. *Balcecci v. Serani*, Peake, 142; *Griffiths v. Payne*, 11 Ad. & E. 131. See also *Hollingham v. Head*, 4 C. B., N. S. 338; 27 L. J., C. P. 241, ante, p. 79. But where a collateral fact is material to the proof of the issue joined between the parties, evidence of such fact is admissible. Thus in an action for work done and materials supplied to certain houses on the orders of a third person, the defendant denying that he is the owner of the house or the real principal, evidence is admissible to show that other persons had received orders from the defendant to do work at the same houses without showing that the plaintiff knew of these orders at the time he did the work. *Woodward v. Buchanan*, L. R., 5 Q. B. 285. So in an action by a rector for tithes, where the question is whether a modus exists of a certain sum of money for a particular farm in a township within the parish, the plaintiff may inquire whether other farms in the same township are not subject to the same payment, for the purpose of showing that such payments cannot be a farm modus. *Blundell v. Howard*, 1 M. & S. 292. So proof of the local usage of trade, &c., may be material to explain a contract, or to disprove an alleged breach of it. *Noble v. Kennoway*, 2 Doug. 510. But the usage at Lloyd's is not evidence, unless the contract be made with reference to that usage. *Gabay v. Lloyd*, 3 B. & C. 793. In a case of libel, where the meaning is ambiguous, other similar libels on the plaintiff by the same defendant may be shown against him. See *Action for defamation*, post, p. 860. Upon a question of skill and judgment, evidence may be given of facts, which, although in other respects collateral, are by means of the skill and judgment of the witness connected with, and tend to elucidate, the issue. *Folkes v. Chadd*, 3 Doug. 157. See *Opinion of Witness, when admissible*, post, p. 175. Where the object of the evidence is to show the *knowledge* of the party with regard to the nature of a particular transaction, evidence of his having been engaged in other transactions of the same kind is admissible: thus, in cases of forgery and coining, proof that the prisoner has passed other forged notes, or other counterfeit coin, is constantly admitted. So also upon questions of *intent*, evidence of other transactions is admissible. In an action for bribery, evidence of other acts of bribery by the defendant at the same time and place is admissible to show the *animus*. *Webb v. Smith*, 4 N. C. 373. The seditious object of a meeting may be shown by the acts of similar meetings in other places convened by the same person. *Redford v. Birley*, 3 Stark. 93. In order to prove that the acceptor of a bill knew the payee to be a fictitious person, or that the drawer had a general authority from him to fill up bills with the name of a fictitious payee, evidence may be adduced that he had accepted other similar bills under circumstances that indicated such knowledge or authority. *Gibson v. Hunter*, 2 H. Bl. 288. Examples of the exclusion or admission of collateral facts might be multiplied to any extent; but it will be enough to add generally, that all proof of facts which merely tends to create an unjust prejudice, or unduly to influence the jury, or occupy the time of the court in irrelevant inquiries,

is inadmissible; but if the proof be directly or inferentially pertinent to the issue, it will be admitted.

As to the admission, in a *quia timet* action to restrain the erection of a smallpox hospital on the ground of apprehended nuisance, of evidence of what has occurred in the neighbourhood of other smallpox hospitals carried on under similar conditions, see *A.-G. v. Nottingham Cor.*, (1904) 1 Ch. 673.

*Evidence of rights in other manors and places.*] As a general rule, proof of a customary right in a particular manor or parish is no evidence as to the customary right in an adjoining manor or parish. *Somerset, Dk. of v. France*, 1 Stra. 661. But there are occasions on which such evidence is relevant. Thus, where there is proof that all the manors in a particular district are held under the same tenure, and a question arises in one of the manors as to an incident to the tenure, evidence may be given of the usage prevailing in the others. *S. C.*; *Champion v. Atkinson*, 3 Keb. 90; *R. v. Ellis*, 1 M. & S. 662. So where in each of several detached manors called by the common name of "assessionable manors," and parcel of the possessions of an ancient earldom and duchy, it appeared that there was a peculiar class of tenants answering the same description, to whom tenements were granted by similar words, it was held that evidence of the mineral and other rights enjoyed by those tenants in one manor might be received to show what were their rights in another. *Rowe v. Brenton*, 8 B. & C. 758 (case of the duchy of Cornwall). But mere contiguity, or the identity of the leet or parish in which two manors are situate, or payment of a chief rent by one to the other, will not let in such evidence. *Anglesey, Mqs. of, v. Hatherton, Ld.*, 10 M. & W. 218. Where the question was, whether a slip of land between some old inclosures and the highway was vested in the lord of the manor or the owner of the adjoining freehold, it was held that evidence could not be received of acts of ownership by the lord of the manor on *similar*, but *distinct*, slips of land within the manor. *Aliter*, if the strips, though detached, could be regarded as part of a continuous tract of waste adjoining the same highway. *Doe d. Barrett v. Kemp*, 2 N. C. 102, Ex. Ch. And, even if the continuity be broken, it is a question for the jury whether such strips alongside the same road be not waste. *Dendy v. Simpson*, 18 C. B. 331. Where the question was as to the right to certain trees growing in a woody belt held entire and undivided under one title, evidence was admitted of acts of ownership in different parts of the belt. *Stanley v. White*, 14 East, 332. So acts of ownership in part of a wood, though unenclosed, or in part of a continuous fence, are evidence as to the whole. *Jones v. Williams*, 2 M. & W. 331. So where the plaintiff claims the whole bed of a river between his land and the defendant's, acts of ownership over the river just below the defendant's land are admissible; and the evidence need not be confined to the precise spot of the trespass. *Id.* 336; *Neill v. Devonshire, Dk. of*, 8 Ap. Ca. 135, D. P. This principle applies also to the foreshore of a navigable tidal river. *Ld. Advocate v. Blantyre, Ld.*, 4 Ap. Ca. 770, 791, D. P. So in the case of an inland non-tidal lake. *Bristow v. Cormican*, 3 Ap. Ca. 641, 670, *per Ld. Blackburn*. But in trespass by the proprietors of a canal, it was doubted whether evidence of acts of ownership by the proprietors on other parts of the banks than those in question was admissible to prove property without showing that they had belonged to one person; for the proprietors may have bought the freehold in one place and not in another; and, being unnecessary, there was no ground for presuming such a purchase in any place. *Hollis v. Goldfinch*, 1 B. & C. 205; *Tyrwhitt v. Wynne*, 2 B. & A. 554. In proof of the boundary between the manors A. and B., evidence is admissible of the boundary between A. and C., C. being a manor abutting on B., and separated from A. by a natural boundary (namely, a mountain ridge), which continued

between A. and B. *Brisco v. Lomax*, 8 Ad. & E. 198. Under a lease of all minerals under a tract of waste land called M. mountain, working a mine under one part of it is evidence of possession of the whole subject of demise, so as to entitle the lessee to sue in trover for ore taken by a wrongdoer from any part of it. *Taylor v. Parry*, 1 M. & Gr. 604; *Wild v. Holt*, 9 M. & W. 672. Where the question was whether a township, A., was liable to repair an ancient highway, the conviction of an adjoining township, B., for non-repair of the part situate in the latter, is evidence against A. that the highway situate in A. is also ancient. *R. v. Brightside Bierlow*, 13 Q. B. 933. Where the construction of the charters of the Duchy of Lancaster was in question, proof that under them coroners were always appointed in some parts of the Duchy was admitted to prove the like right of appointment in any part. *Jewison v. Dyson*, 9 M. & W. 540.

*Evidence of damage.*] By Rules, 1883, O. xxi. r. 4, *ante*, p. 75, damages, unless expressly admitted, are deemed to be put in issue. Evidence tending to increase or diminish the damage is, of course, admissible, though not expressly involved in the issue. Thus, in an action for breach of promise of marriage, plaintiff may give evidence of the defendant's fortune; for it obviously tends to prove the loss sustained by the plaintiff; but not in an action for adultery; *James v. Biddington*, 6 C. & P. 589; nor for seduction; *Hodsoll v. Taylor*, L. R., 9 Q. B., 79; nor for malicious prosecution; for it is nothing to the purpose "that damages are taken from a deep pocket." *Short v. Stoy*, Winton Sum. As. 1836, *per* Alderson, B.

But *special* damage cannot be shown unless alleged in the statement of claim; and it must be alleged with certainty on the sufficiency of which the judge is to decide, who will require that the averment shall be so made as to enable the defendant to meet it by counter-evidence, if untrue. Thus, where, in an action for an irregular distress, it was averred that the plaintiff, in consequence of the injury, had lost *divers* lodgers, without naming any, Ld. Ellenborough rejected evidence of the damage. *Westwood v. Cowne*, 1 Stark. 172. See further *Craft v. Boite*, 1 Wms. Saund. 243 d. (5); *Martin v. Henrickson*, 2 Ld. Raym. 1007; and see *Action for defamation*, *post*, p. 861. And now, Rules, 1883, O. xix. r. 15, *ante*, p. 77, require the plaintiff to allege all such facts as he relies on, as if not so alleged would be likely to take the defendant by surprise. But evidence of the amount of damage which is the *necessary* and *obvious* result of the defendant's breach of contract or tort may, it would seem, still be proved, though only alleged generally in the statement of claim. Thus, formerly, in an action for not giving plaintiff possession of premises demised to him by the defendant, plaintiff was allowed to show his consequent loss of business, though only alleged generally, and though the plaintiff's business was not mentioned in the pleadings. *Ward v. Smith*, 11 Price, 19. See also *Rodgers v. Nowill*, 5 C. B. 109.

*Evidence of character.*] In general, in actions unconnected with character evidence as to the character of either of the parties to a suit is inadmissible, being foreign to the point in issue, and only calculated to create prejudice. For the same reason where particular acts of misconduct are imputed to a party, evidence of general character is excluded; but it is otherwise where general character is put in issue; *Doe d. Farr v. Hicks*, *per* Buller, J., cited 4 Esp. 51; *Jones v. James*, *post*, p. 87; 1 Taylor, Evid. 10th ed., §§ 354, 355; for evidence of bad character is admitted in some actions with a view to the amount of damages. Thus, in actions of crim. con., the defendant could adduce evidence of the wife's bad character for chastity, and even of particular acts of adultery committed by her before her intercourse with him; for by

bringing the action, the husband put her general behaviour in issue. B. N. P. 27, 296. So, in seduction, the defendant may show the previous bad character of the person seduced. See *Action for seduction, post*, p. 913. But even in such cases it has been held that the plaintiff cannot give evidence of the good character of the wife or daughter, until evidence has been offered on the other side to impeach it; *Bamfield v. Massey*, 1 Camp. 460; and if such evidence be not general, but go only to a specific instance, it has been ruled that the plaintiff cannot, in reply, give evidence of general character, but must be restricted to disproof of the specific instance. S. C.; *Dodd v. Norris*, 3 Camp. 519. So, in an action for slander imputing dishonesty to the plaintiff, he cannot adduce evidence in the first instance of good character. *Stuart v. Lovell*, 2 Stark. 93; *Cornwall v. Richardson*, Ry. & M. 305. Where the cross-examination of the plaintiff's witness has been directed to impeach the character of the plaintiff, and the witnesses deny the imputation intended, proof of the plaintiff's good character is not admissible. *King v. Francis*, 3 Esp. 116.

The practice, as reported in some of the above cases, which excludes the proof of general good character, where it is obviously attacked at the trial, though unsuccessfully, has been generally condemned by later text writers; and there are some authorities at N. P. for the admissibility of such testimony. See *Actions for defamation and for seduction, post*, pp. 861, 912; and 1 Taylor Evid. 10th ed., § 362.

In an action for breach of promise of marriage, where the defendant by his defence sets up a general charge of immodesty, the plaintiff may, in the first instance, give general evidence of good character for modesty and propriety of demeanor; though this could not be done in the case of a specific charge of immoral acts. *Jones v. James*, 18 L. T. 243; E. T. 1868, Ex. Where a general character is in issue, evidence of general reputation is admissible. *Foulkes v. Sellway*, 3 Esp. 236.

As to evidence of character, in reference to the veracity of a witness, *vide post*, p. 183.

*Plaintiff confined to his particulars.]* The delivery of particulars of claim or defence in ordinary actions is now regulated by Rules, 1883, O. xix. rr. 6, 7, and particulars are now usually given in the pleadings. A special indorsement under O. iii. r. 6, on a writ of summons, now constitutes a statement of claim, see O. xx. r. 1a, and particulars therein have the same effect as in pleadings.

Where the plaintiff has delivered particulars of his demand, he will be precluded from giving any evidence of demand not contained in them. But the plaintiff may recover more than his particulars demand, where it appears to be due on the defendant's own evidence; as where the defendant gave in evidence an account from which it appeared that there was a sum of money due to the plaintiff beyond that claimed in his particulars. *Hurst v. Watkis*, 1 Camp. 68. *Accord. per Parke, B., in Fisher v. Wainwright*, 1 M. & W. 486. See also *Green v. Marsh*, 5 Dowl. 669. A mistake in the particulars, not tending to mislead, is immaterial. The materiality of the variance is a question for the judge, subject to the opinion of the court above.

The particulars may be amended, even after the discovery of their insufficiency on the trial; and where the mistake has been made inadvertently, and the defendant has not been prejudiced, they will be amended almost as a matter of course. If the amendment may prejudice the defendant the judge may sometimes think proper to adjourn the cause. See *Fromant v. Ashley*, 1 E. & B. 724. This power of amendment renders it useless to retain many cases formerly collected under this head. After delivery of

particulars under a judge's order (or, *ut semb.*, under O. xix. r. 6), fresh or amended particulars cannot be delivered except by a judge's order or by consent, so as to supersede the first at the trial. *Brown v. Watts*, 1 Taunt. 353. It is, however, competent for the opposite party to waive the objection and accept the second particulars; and if the party served plead over and go to trial, he will be taken to have accepted them. *Fromant v. Ashley*, *ante*, p. 87.

If the particulars are too general, or not sufficiently explicit, the remedy is to apply for better; for it seems to be no ground of objection at the trial, except in the case of particulars of set-off, and in that case, where the terms of the order exclude the proof unless the particulars comply strictly with the terms of the order, if the particulars do not strictly comply with the order, the judge will reject the proof of it at the trial; *Ibbett v. Leaver*, 16 M. & W. 770; *Young v. Geiger*, 6 C. B. 552; and the plaintiff does not waive the objection by merely denying the set-off and going to trial. S. CC. Irregular particulars of set-off may, however, be waived. Thus, where the order was to deliver it in a fortnight, and the plaintiff accepted it three weeks later, and the plaintiff afterwards amended his declaration by consent, *Ld. Tenterden, C.J.*, admitted proof of the set-off. *Wallis v. Anderson*, M. & M. 291; also *Lovelock v. Cheveley*, *Holt*, N. P. 552.

*Effect of particulars as an admission.*] The object of particulars is to control the generality of the claim, or set-off, in respect of which they are delivered. Their value as an admission depends upon the mode in which they are framed. When they merely limit the amount claimed in the pleadings, no admission can be implied; but where they, in addition, give credit to the opposing party for some particular specific item, they are evidence in his favour as to the date, origin, and nature of that item. In *Rymer v. Cook*, M. & M. 86, n., where the defendant put in particulars of the plaintiff's demand, containing an admission that he was indebted to the defendant in a certain sum, it was held that that admission was evidence. In *Kenyon v. Wakes*, 2 M. & W. 764, where a payment on account to the amount of 70*l.* was admitted in the particulars, and the jury found that 70*l.* was all that was due, it was held that the particulars were properly received in evidence as an admission of the payment of that sum. See *Boulton v. Pritchard*, 4 D. & L. 117, *post*, p. 89, and *Rowland v. Blaksley*, 1 Q. B. 413. In *Buckmaster v. Meiklejohn*, 8 Exch. 634; 22 L. J., Ex. 242, particulars delivered with a plea of set-off, which had been withdrawn, were admitted in support of a replication of fraud to a plea *puis darrein continuance*. It would seem, however, that particulars can only be made use of as an admission in an issue upon the pleadings in respect of which they are delivered. Therefore, in *Miller v. Johnson*, 2 Esp. 602, where the notice of set-off contained an admission of a sale, this was not allowed to be taken as an admission of the sale upon the plea of never indebted. In *Harington v. Macmorris*, 5 Taunt. 229, an admission of the debt in the notice of set-off was not received in the issue raised upon *non-assumpsit*. And in *Burkitt v. Blanshard*, 3 Exch. 89, where a simple payment of 50*l.* was inserted in the particulars of set-off, *Parke, B.*, expressed an opinion that the plaintiff could not have taken this as an admission of a part payment in order to prevent the operation of the Statute of Limitations.

*Proof of particulars.*] The particulars were formerly proved by the production and proof of the judge's order and the particulars themselves: and by proof of the signature of the party, his attorney, or agent. The



R. G., H. T. 1853, r. 19, which directed that a copy of the particulars of demand and the defendant's set-off should be annexed by the plaintiff's attorney to the record at the time it is entered for trial, obviated the necessity of proving the delivery of them. *Macarthy v. Smith*, 8 Bing. 145. But the particulars were not thereby made part of the N. P. record and incorporated with the pleading to which they were annexed. *Booth v. Howard*, 5 Dowl. 438; *Ferguson v. Mahon*, 9 Ad. & E. 245. The Rules, 1883, contain no provision similar to R. G., H. T. 1853, r. 19, *supra* (see O. xxxvi. r. 30, *post*, p. 110), and it seems therefore that particulars, unless they are in the pleadings, or have been entered with them, must be proved in the same way as was done before 1853. If the defendant require to prove a special indorsement under Rules, 1883, O. iii. r. 6, on the writ of summons, the copy writ served on him, would, it seems, be primary evidence against the plaintiff; *vide ante*, p. 3, and *post*, p. 111.

If the particulars of demand refer to a fuller account already delivered (which it may do without re-starting it, *ut semb. Hatchet v. Marshall*, Peake, 172), the plaintiff ought either to enter the account also with the pleadings, or prove it at the trial. See 2 Chit. Prac., 12th ed. 1456. If the plaintiff delivers "further and better" particulars, in which he omits a specific credit given in his first, it seems that *both* should be annexed to the record; and if the second alone is annexed, the defendant may nevertheless prove the first in order to dispense with a plea of payment. *Boulton v. Pritchard*, 4 D. & L. 117. Where the particulars annexed differ from those delivered, the defendant may prove the latter, and confine the plaintiff to those. But if the defendant is not prepared to prove the real particulars, the plaintiff, if he obtain a verdict for any items *not* contained in them, is in peril of a new trial. *Morgan v. Harris*, 2 C. & J. 461. If none are annexed, the judge may order the plaintiff to annex them at N. P.

#### THE SUBSTANCE OF THE ISSUE ONLY NEED BE PROVED.

It was always the common law rule that the *substance* of the issue joined between the parties need alone be proved, and numerous illustrations of this principle will be found under various titles in this work.

*Variances requiring amendment.*] It is a general rule that a party must recover *secundum allegata et probata*, and cannot succeed upon a proof that differs from his allegation; if his proof so differ it is called a variance. Now, however, by Rules, 1883, O. xxviii. r. 1, either party may at any time be allowed to amend their pleadings, "and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." Since this rule parties must not go to trial on the mere hope that a variance will be fatal. They ought to anticipate that all amendments will be allowed which are necessary to determine the real question in controversy, which both parties must have had in contemplation when the suit commenced. Examples of amendments that have been allowed will be found *sub tit. Practice at Nisi Prius,—Amendment*, *post*, pp. 291 *et seq.*

The only cases of variance which it is necessary to consider here are those relating to parties.

*Variance in the parties.*] The objection on the ground of variance in the parties is now reduced to within very narrow limits by Rules, 1883. By O. xvi. r. 1 (as amended in 1896 by the addition of the words in italics), "All persons may be joined *in one action* as plaintiffs in whom any right to

relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise;" . . . "and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment;" rule 3 provides that the improper or unnecessary joinder of a co-plaintiff shall not defeat a set-off or counter-claim if the defendant prove it as against the other plaintiffs; rule 4 contains similar provisions with respect to defendants; rule 5 provides that it shall not be necessary for every defendant to be interested as to all the relief prayed for or as to every cause of action included in the action; by rule 6, the plaintiff may join as parties "all or any of the persons severally liable on any one contract, including parties to bills of exchange and promissory notes;" by rule 7, where the plaintiff is in doubt, he may join two or more defendants, to the intent that the question as to which, if any, is liable, and to what extent, may be determined as between all parties. By rule 2, provision is made for the substitution or addition of a plaintiff in the case of a *bonâ fide* mistake. By rule 11, "No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court or a judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent *in writing* thereto. Every party whose name is so added as defendant shall be served with a writ of summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings, as against such party, shall be deemed to have begun only on the service of such writ or notice." Rule 12, "Any application to add or strike out or substitute a plaintiff or defendant may be made to the court or a judge at any time before trial by motion or summons, or at the trial of the action in a summary manner." And by O. xxi. r. 20, "No plea or defence shall be pleaded in abatement."

The object of the alteration of O. xvi. r. 1, *ante*, p. 89, was to allow plaintiffs to join different causes of action where under the old rules, as in *Smurthwaite v. Hannay*, (1894) A. C. 494, D. P., they could not do so; such causes may now be joined when the right to relief arises out of the same transaction, and there is also a common question of law or fact. *Stroud v. Lawson*, (1898) 2 Q. B. 44, 54, *per* Vaughan Williams, L. J.; *Walters v. Green*, (1899) 2 Ch. 696. "Transaction" does not necessarily imply something taking place between two parties. *Drineqbir v. Wood*, (1899) 1 Ch. 393, 397, *per* Byrne, J. Thus, four persons who each separately took debentures of a company on the faith of statements in the prospectus, and covering letter issued by the directors, may join in an action against the directors for misrepresentations contained therein. S. C. See also *Universities of Oxford & Cambridge v. Gill*, *Id.* 55, *Bennetts v. McIlwraith*, (1896) 2 Q. B. 464, and *Ellis v. of Bedford, Dk. of*, (1901) A. C. 1, D. P. The court may require the Att.-Gen. to be added as a co-defendant to represent the public, when their rights would be affected by its decision. S. C. (1899) 1 Ch. 494, C. A. *Sed*

*quære*, whether his presence was necessary in this case? See S. C., (1901) A. C. 12, 23, D. P. But the order relates only to the proper parties, and does not enable a plaintiff to bring separate causes of action arising out of several transactions against different persons in one action, although the resulting damage may be the same in each case. *Thompson v. L. County Council*, (1899) 1 Q. B. 840, C. A. As to uniting several persons as co-defendants in respect of substantially the same cause of action, see *Frankenberg v. Gt. Horseless Carriage Co.*, (1900) 1 Q. B. 504, C. A.; *Walters v. Green*, *ante*, p. 91.

Where a child sued the husband on the covenant for maintenance in a separation deed, the wife and the trustees of the deed were allowed to be added as plaintiffs under rule 2. *Gandy v. Gandy*, 30 Ch. D. 57. So, where the real question in the action was the effect of a covenant, and it appeared that some personal bar might exist against the plaintiff, a plaintiff in a similar position, but without the bar, may be added. *Ayscough v. Bullar*, 41 Ch. D. 341, C. A. So where a plaintiff H. sued after he had assigned his cause of action to L., the name of L. was allowed to be substituted for that of H. *Hughes v. Pump House Hotel Co.*, (1902) 2 K. B. 485, C. A. But a party can only be added under rule 2, where there has been a *bonâ fide* mistake; *Clowes v. Hilliard*, 4 Ch. D. 413; a mistake of law is sufficient. *Duckett v. Gover*, 6 Ch. D. 82.

A defendant may be added under rule 4, although alternative relief is claimed against him which is inconsistent with that claimed against the other defendant. *Child v. Steming*, 5 Ch. D. 695, C. A.

Any objection as to parties which was formerly taken by plea in abatement, may now be taken by the application for an order under O. xvi. r. 11; *Kendall v. Hamilton*, 4 Ap. Ca. 504, 516, *per* Ld. Cairns, C.; *Wegg-Prosser v. Evans*, (1895) 1 Q. B. 108, 114, 116, 118, *per* M. R. & L. JJ.; before the trial; *Sheehan v. Gt. E. Ry. Co.*, 16 Ch. D. 59.

A person, W., will not be added as plaintiff, unless his consent in writing, signed by him, has been obtained, see r. 11, *ante*, p. 90; the consent of his solicitor, C., written and signed by C. in W.'s presence, is insufficient. *Ericker v. Van Grutten*, (1896) 2 Ch. 649. This consent of W. is required even although terms necessary for his indemnity have been offered to him; *Tryon v. National Provident Institution*, 16 Q. B. D. 678; and although he is trustee for the plaintiff of the property in respect of which the action is brought. *Besley v. Besley*, 37 Ch. D. 648. The plaintiff may now, however, join as a co-defendant any person to whose nonjoinder as a co-plaintiff exception is taken, and who has not consented to be co-plaintiff on an indemnity against costs having been tendered him. *Cullen v. Knowles*, (1898) 2 Q. B. 380. See also *Van Gelder v. Sowerby Bridge, &c., Flour Soc.*, 44 Ch. D. 374, C. A.

The judge will usually, in his discretion, grant a defendant in an action of contract, an order for the joinder of his co-contractors as defendants, if they are all residing within the jurisdiction. *Pilley v. Robinson*, 20 Q. B. D. 155; see *Wilson, Sons & Co. v. Balcarres Brook SS. Co.*, (1893) 1 Q. B. 422 C. A.; but not otherwise, S. C. And where the order has been made the action will not be stayed if the plaintiff cannot find the new defendant although he be within the jurisdiction. *Robinson v. Geisel* (1891), 2 Q. B. 685, C. A. See also *Byrne v. Brown*, 22 Q. B. D. 657, C. A. But where M. having a joint and several claim against G. and X. sues G. alone, X. will not be added as a co-defendant without M.'s consent. *McCherme v. Giles* (No. 2), (1902) 1 Ch. 911.

In an action for nuisance from noise, brought by the owner, A., of an unlet house L., and his tenant, B., of a house M., the house L. was, after action, let to C. and B. refused to continue the action; C. was allowed at the trial, under rule 11, to be substituted for B. as co-plaintiff. *House Property, &c.*,

*Co. v. H. P. Horse Nail Co.*, 29 Ch. D. 190. And such amendment may it seems be made at any time before final judgment. See *The Duke of Buccleuch*, (1892) P. 201, C. A. But a plaintiff A. cannot be allowed to join B. as a co-plaintiff, when the question to be tried between A. and the defendant C. is wholly different from that between B. and C. *Walcott v. Lyons*, 29 Ch. D. 584, C. A., explained in *Ayscough v. Bullar*, *ante*, p. 91.

As to amendment of misjoinder of husband, suing with his wife in respect of her separate estate, see *Roberts v. Evans*, 7 Ch. D. 830.

Although the misjoinder or nonjoinder of parties is not now usually fatal to the action, it is still necessary to know whether the proper parties are before the court at the trial, as otherwise an amendment may be required under O. xvi. r. 11, *ante*, p. 91, which will sometimes involve the adjournment of the trial.

At common law in an action of tort the omission of a person who ought to be joined as plaintiff was only ground of plea in abatement, and was no variance. *Dockwray v. Dickenson*, Skin. 640; *Bloxam v. Hubbard*, 5 East, 407. And the omission of a person who might have been joined as defendant could not, in general, be taken advantage of; 1 Wms. Saund. 291 f. g. (4); unless in the case of one parcener, joint-tenant, or tenant in common of land sued in respect of the land, in which case he might plead the nonjoinder of his co-tenant in abatement.

In an action of contract it was a variance if it appeared in evidence that a party who ought to be joined as plaintiff had been omitted; *Graham v. Robertson*, 2 T. R. 282; *Jones v. Smith*, 1 Exch. 831; or that a party joined as plaintiff or defendant was no party to the contract; but it was no variance to omit a co-executor as plaintiff; 1 Wms. Saund. 291 k. l.; nor to omit a person who ought to be joined as defendant; *Id.* 291 d. (4); for the nonjoinder could only be pleaded in abatement. Where the cause of action is, in substance, contract, the liability of the defendant cannot be altered by framing the statement of claim in tort. *Alton v. Midland Ry. Co.*, 19 C. B., N. S. 213; 34 L. J., C. P. 292.

Where three persons agreed to be jointly interested in certain goods, but that they should be bought by one of them in his own name only, and he made the contract accordingly; it was held that all the three might sue for a breach of that contract; *Cothay v. Fennell*, 10 B. & C. 671; for the action may be maintained either in the name of the person who actually made the contract, or in the name of the parties really interested. *Skinner v. Stocks*, 4 B. & A. 437; *Clay v. Southern*, 7 Exch. 717; 21 L. J., Ex. 202. But, regularly, on a written contract by A. "on behalf of B.," B. should be sued, and not A.; *Downman v. Williams*, 7 Q. B. 103, Ex. Ch.; *Lewis v. Nicholson*, *infra*; *Collen v. Wright*, 7 E. & B. 301; 26 L. J., Q. B. 147, Ex. Ch.; 8 E. & B. 647; 27 L. J., Q. B. 215; *Jenkins v. Hutchinson*, 13 Q. B. 744; unless A. be the real principal; and proof of this lies on the plaintiff. Thus, if A. falsely represent himself as agent of a person *not named*, being really himself the principal, he may then be sued as such. See *Carr v. Jackson*, 7 Exch. 382; 21 L. J., Ex. 137. So the real principal may sue on a contract in which he calls himself agent of a third person unnamed. *Schmalz v. Avery*, 16 Q. B. 655; 20 L. J., Q. B. 228. But a party *contracting as agent* of B. cannot be sued personally as principal, if he be neither authorized by B., nor be himself the real principal; the only remedy against him will be for the false representation or breach of warranty of authority; *Lewis v. Nicholson*, 18 Q. B. 503; 21 L. J., Q. B. 311; unless indeed B. has no existence, in which case the agent is personally liable. *Kelner v. Baxter*, L. R., 2 C. P. 174. A *del credere* agent selling for a disclosed principal cannot sue in his own name; *Bramble v. Spiller*, 21 L. T. 672, C. P.; nor can a broker. *Fairlie v. Fenton*, L. R., 5 Ex. 169. The fact of the

contracting party being called in the contract the agent of a named principal does not necessarily show that he ought not to be the party to a suit on the contract, although he be really such agent: it is a question of intention arising on the construction of the contract itself; "and it may be laid down as a general rule that where a person signs a contract in his own name without qualification, he is *prima facie* to be deemed to be a person contracting personally; and in order to prevent this liability from attaching, it must be apparent from the other portions of the document, that he did not intend to bind himself as principal." 2 Smith's L. C., 11th ed. p. 400, notes to *Thomson v. Davenport*; *Dutton v. Marsh*, L. R., 6 Q. B. 361, 362; *Norton v. Herron*, Ry. & M. 229; *Lennard v. Robinson*, 5 E. & B. 125; 24 L. J., Q. B. 275; *Parker v. Winlow*, 7 E. & B. 942; 27 L. J., Q. B. 49; *Southwell v. Bowditch*, 1 C. P. D. 374, C. A.; *Gadd v. Houghton*, 1 Ex. D. 357, C. A. In these two last cases, though the agent signed without qualification, the contract showed that the intention was that he should not be bound personally, and in the latter case the decision in *Paice v. Walker*, L. R., 5 Ex. 173, was doubted; it was indeed followed in *Hough v. Manzanos*, 4 Ex. D. 104, but the last two cases have been overruled by *Haigh v. Stuart*, W. N. 1890, 213, T. Sit., C. A. See further *Waystaff v. Anderson*, 5 C. P. D. 171, 175, C. A., per Bramwell, L. J. The addition of the word "broker" to the agent's signature will not exonerate him from personal liability. *Hutcheson v. Eaton*, 13 Q. B. D. 861, C. A. As to admissibility of evidence of custom to charge a broker personally, *vide ante*, p. 25.

Where an attorney carried on business under the firm of "A. and Son," the son not being in fact a partner, but only a clerk, it was held that A. might sue in his own name for the amount of a bill for business done. *Kell v. Nainby*, 10 B. & C. 20. An agent who purchases for an unnamed principal (the bought and sold notes being made out in the agent's name) may, on the renunciation of the contract by his principal, sue for the non-delivery of the goods in his own name. *Short v. Spackman*, 2 B. & Ad. 962. Provisional directors of a proposed company invited applications for shares to a committee of management appointed by and from themselves. The defendant applied for and received shares on the terms that he should pay a deposit, and got a form of receipt for the deposit on account of the "provisional committee." Held, that the action to recover the deposit should be by the provisional committee of directors at large, and not by the committee of management. *Woolmer v. Toby*, 10 Q. B. 691.

Plaintiff may join, as co-defendant, a dormant partner not known to him at the time of the contract, even where there was a written agreement (not under seal) to which such partner was not party. *Drake v. Beckham*, 11 M. & W. 315, Ex. Ch. But this does not apply to the case of a bill of exchange or promissory note; see the Bills of Exchange Act, 1882, s. 23, *post*, p. 357; and if the agreement were in terms with "A. and B. and the survivor of them," it cannot be stated as one between A. and C. (the dormant partner) and the survivor of them. *Beckham v. Knight*, 1 M. & Gr. 738; *De Mautort v. Sammlers*, 1 B. & Ad. 398.

Where a married woman deposited the moneys of her husband with a banker in the name of a child under age, it was held that the husband might sue the bankers for money had and received. *Culland v. Loyd*, 6 M. & W. 26.

By the Bankruptcy Act, 1883, s. 114, "Where a bankrupt is a contractor in respect of any contract jointly with any person or persons, such person or persons may sue or be sued in respect of the contract, without the joinder of the bankrupt."

*Local venue*.—By Rules, 1883, O. xxxvi. r. 1, "there shall be no local

venue for the trial of any action *except where otherwise provided by statute*, but in every action in every division the place of trial shall be fixed by the court or a judge," R. S. C., July 1902, r. 11, which annulled the former rule 1.

Statutory enactments creating local venue were repealed by J. Act, 1875, s. 33 (2) and Sched. 1., O. xxxvi. r. 1, and were not restored on the repeal of that rule (see 46 & 47 V. c. 49, s. 6), the proviso in italics applies therefore only to the statutes passed subsequently to Aug. 11th, 1875; *Buckley v. Hull Docks* (1893), 2 Q. B. 93; and to them now in name only, as the place of trial is under the existing rule fixed by the court or a judge. Hence it is no longer ground of defence that the venue is wrong.

O. xxxvi. r. 1, *supra*, applies only to the venue which determines the place of trial, it does not affect the venue which by the comity of nations determines jurisdiction. *British S. Africa Co. v. Companhia de Mocambique* (1893), A. C. 602, D. P.

#### ONUS PROBANDI.

Generally he who asserts a fact is bound to prove it, if there be no presumption in favour of it; and a negative need not ordinarily be proved. *Ross v. Hunter*, 4 T. R. 33; *Calder v. Rutherford*, 3 B. & B. 302. See *Over v. Harwood*, (1900) 1 Q. B. 803, 806, *per* Channell, J. In an action against a solicitor for negligently letting judgment go by default, after the plaintiff has proved the default, it lies on the defendant to show good ground for it, and not on the plaintiff to show that there was a good defence. *Godfrey v. Jay*, 7 Bing. 413. See a fuller explanation of this rule in Best on Evid., 10th ed. §§ 269 *et seq.* As to presumptions, *vide ante*, pp. 33 *et seq.* It must, however, be borne in mind, that regard must be had to the effect and substance of the issue, and not to its grammatical form. *Soward v. Leggatt*, 7 C. & P. 613, *per* Ld. Abinger; *Doe d. Worcester School, &c., Trustees v. Rowlands*, 9 C. & P. 734, *per* Coleridge, J.; *Belcher v. McIntosh*, 8 C. & P. 720, *per* Alderson, B. And where the assertion of a negative is part of the plaintiff's case he must prove it, as the want of reasonable and probable cause in an action for malicious prosecution. *Abrath v. N. E. Ry. Co.*, 11 Q. B. D. 440, C. A.; 11 Ap. Ca. 247, D. P. For illustrations of the shifting of the onus of proof during a trial, see *Medawar v. Grand Hotel Co.*, (1891) 2 Q. B. 11, C. A.; *Gordon v. Williamson*, (1892) 2 Q. B. 459, 464, *per* Bowen, L.J.

Where the presumption is in favour of the affirmative, as where the issue involves a charge of a culpable omission, it is incumbent on the party making the charge to prove it; for the other party shall be presumed innocent until proved to be guilty. See Best on Evid., 10th ed. §§ 314, 346. Thus where, in a suit for tithes in the spiritual court, the defendant pleaded that the plaintiff had *not* read the Thirty-nine Articles, it was held that the proof of the issue lay on the defendant. *Monke v. Butler*, 1 Roll. Rep. 83. See also *R. v. Hawkins*, 10 East, 211. So in an action by the owner of a ship for putting combustibles on board, "without giving due notice thereof," it was held that the plaintiff was bound to prove the want of notice, as the omission to give such notice would have amounted to criminal negligence on the part of the defendant. *Williams v. E. India Co.*, 3 East, 193. So in an action for the price of goods sold in the ordinary course of business, by a company in liquidation, it was held that it lay on the defendant to show that the sale was illegal under the Companies Act, 1862, s. 131, on the ground that it was not required for the beneficial winding-up of the company. *Hire Purchase Furnishing Co. v. Richens*, 20 Q. B. D. 387, C. A. See further, *ante*, p. 43. In actions for negligence it lies on the plaintiff to prove it, and not on the defendant

to show reasonable care. *Marsh v. Horne*, 5 B. & C. 327. See further, *Action for negligence; Evidence of negligence*, *post*, pp. 777 *et seq.* So, again, where the issue is as to the legitimacy of a child born in lawful wedlock, it is incumbent on the party asserting the illegitimacy to prove it; *Banbury Peerage Case*, 1 Sim. & St. 153; and where the issue is on the life of a person who is proved to have been alive within seven years, the party asserting his death must prove it; see *Presumptive evidence*, *ante*, pp. 41 *et seq.*

It has been stated to be a rule that, where the affirmative is peculiarly within the knowledge of the party charged, the presumption of law in favour of innocence is not allowed to operate, but the general rule applies, viz., that he who asserts the affirmative is to prove it, and not he who avers the negative. 3 Russell on Crimes, 6th ed. 401. Thus it has been said that in action on a *covenant* for not insuring premises against fire, it lies on the defendant to prove that he has insured. *Doe d. Bridger v. Whitehead*, 8 Ad. & E. 576, *per* Littledale, J. *Accord.* *Toleman v. Portbury*, L. R., 5 Q. B. 294, *per* Willes, J. So in an action on the game laws, though the plaintiff must aver that the defendant was not duly qualified, yet he cannot be called upon to prove the want of qualification. *Spieres v. Parker*, 1 T. R. 145; *R. v. Turner*, 5 M. & S. 206. In an action against a person for practising as an apothecary without having obtained a certificate according to 55 G. 3, c. 194, the proof of certificate was held to lie upon the defendant. *Apothecaries' Co. v. Bentley*, Ry. & M. 159. It has, however, been observed that the Act itself seems to throw upon him such proof. *Elkin v. Janson*, 13 M. & W. 662, *per* Alderson, B. So where, on a conviction for selling ale without a licence, the only evidence given was that the party sold ale, and no proof was offered of his want of a licence; it was held, that the conviction was right; for that the informer was not bound to sustain in evidence the negative averment; and it was said by Abbott, C.J., that the party thus called on to answer sustains no inconvenience from the general rule, for he can immediately produce his licence; whereas, if the case is taken the other way, the informer would be put to considerable inconvenience. *R. v. Harrison*, Paley on Convictions, 2nd ed., 45, n. From the observations of the court in *Doe d. Bridger v. Whitehead*, *infra*, it would seem that the burden of proof in the instances above cited of convictions, &c., lies on the defendant, not because the matter is peculiarly within his knowledge, for that cannot vary the rule of the law, but because the legislature has in those cases, by a general prohibition, made the act of the defendant *prima facie* unlawful. See also *Abrath v. N. E. Ry. Co.*, 11 Q. B. D. 440, 457, *per* Bowen, L.J. And in actions for the recovery of possession of land, on the ground of forfeiture, it always rests on the lessor, the plaintiff, to show that the estate which he has granted has been forfeited by the tenant. *Toleman v. Portbury*, *infra*. Thus, where the action is brought on a breach of a condition to insure "in some office in or near London," it lies on the plaintiff to prove the omission. *Doe d. Bridger v. Whitehead*, 8 Ad. & E. 571; see also *Price v. Worwood*, 4 H. & N. 512; 28 L. J., Ex. 329. So where A. was lessee of a dwelling-house under a condition not to permit a sale by auction on the premises without his lessor's consent in writing, and he sublet to the defendant with the lessor's consent, and subsequently assigned his goods on the premises to X., who there sold them by auction; it was held that, in the absence of evidence that the sale was by A.'s permission, there was no forfeiture, and further, that the onus was thrown on the lessor of showing the non-existence of a written consent to the sale. *Toleman v. Portbury*, L. R., 5 Q. B. 288, Ex. Ch.

Under the Rules, 1883, O. xxi. r. 4, *ante*, p. 75, the plaintiff must prove the damages he alleges he has sustained, unless the defendant expressly

admit them. In an action on a common money bond, the plaintiff need not show that the bond is forfeited; it rests on the defendant to prove payment. *Penny v. Foy*, 8 B. & C. 11, 13.

The question of the *onus* of proof is one which may arise in any stage of a trial, and is therefore not necessarily connected with, nor in all cases determined by, the same considerations as the right to begin on trials at *Nisi Prius*; as to which see further *sub tit. Course of Evidence and Practice at Nisi Prius; Right to begin, post*, p. 284.

In many cases there are statutable provisions regulating the burden of proof. See them collected in 1 Taylor, *Evid.*, 10th ed., §§ 372-374; but these chiefly relate to criminal proceedings.

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## PROOF OF DOCUMENTS.

Under the present head will be considered the mode in which various kinds of documents, usually adduced in evidence, must be proved.

As a general rule, before a document can be proved at a trial it must itself be produced in court, but there are certain documents of a public character which either at common law or by statute are provable by copies without production of the original in court. And under O. xxx. r. 7, *post*, p. 154, an order may be made that evidence of a specific fact shall be given by copies of documents or entries in books.

Before enumerating the means of proving the several documents under their respective heads, it will be convenient to show here when and how this method of proof is admissible.

### PROOF BY COPIES.

The various kinds of copies by which original documents may in general be proved may be classed under four heads, viz.: 1. Exemplifications; 2. Office copies; 3. Examined copies; and 4. Certified copies.

There are certain statutory provisions for proving particular documents; these will be found under the title of the documents to which they respectively apply.

#### *Proof by Exemplification.*

Exemplifications are of two kinds:—under the Great Seal, or under the seal of the court in which the record is preserved. An exemplification under the Great Seal may be obtained of any record of the Court of Chancery, or of any record which has been removed thither by *certiorari*; but private deeds, so exemplified, will not be admitted in evidence. B. N. P. 227. An exemplification produced from the proper custody, and purporting to exemplify a commission from the Crown, is evidence, though the seal has been lost. *Beverley, Mayor of, v. Craven*, 2 M. & Rob. 140. An exemplification under the seal of the Exchequer is evidence of a commission out of that court and of the return thereto, in respect of Crown lands. *Tooker v. Beaufort, Dk. of, Sayer*, 297. So an exemplification of a recovery under the seal of the Great Sessions of Wales, *Olive v. Guin*, 2 Sid. 145. So of Chester, S. C. *Id.* And the seals of those courts (it is said) prove themselves. Com. Dig. Testm. (A. 2), *ante*, p. 79. Exemplifications may be given of a lost probate. *Shepherd v. Shorthose*, Stra. 412.



*Proof by Office Copy.*

An office copy, that is, a copy made by the officer having custody of the document, always was, in the same court and in the same cause, equivalent to the document of which it was a copy. *Per* Ld. Mansfield in *Denn v. Lucas v. Fulford*, 2 Burr. 1179; B. N. P. 229. And for this purpose the judge who tried the issue at N. P. was considered as acting under the authority of the court in which the action is pending, and as an emanation of that court. *R. v. Jolliffe*, 4 T. R. 285, 292. And now by the J. Act, 1873, ss. 29, 30, a judge or commissioner trying causes shall be deemed to constitute a court of the High Court of Justice. An office copy of depositions in Chancery was evidence in that court, but would not be admitted in a court of common law without examination with the original; B. N. P. 229; unless, perhaps, in the case of the trial of an issue out of Chancery. See *Highfield v. Peake*, M. & M. 109, *per* Littledale, J. See, however, *Burnand v. Nerot*, 1 C. & P. 578, *cor.* Best, C.J., *contra*. See, further, as to proof of depositions, affidavits, &c., by office copies, *post*, pp. 115, 116. In an action against the sheriff for a false return, the plaintiff could not use office copies of the writ and return, though the original cause was in the same court, for the cause is a different one. *Pitcher v. King*, 1 Car. & K. 655.

By Rules, 1883, O. xxxvii. r. 4, "Office copies of all writs, records, pleadings, and documents filed in the High Court of Justice shall be admissible in evidence in all causes and matters, and between all persons or parties to the same extent as the original would be admissible." The rule, however, in so far as it alters the rule of evidence above stated, seems to be *ultra vires*; see J. Act, 1875, s. 20, *post*, p. 153. By O. lxi. r. 7, *ante*, p. 80, office copies are sufficiently authenticated if they appear to be stamped with a seal of the central office (constituted by stat. 42 & 43 V. c. 78, ss. 4 *et seq.*).

Office copies of documents registered or deposited in the central office, *e.g.*, bills of sale, under 41 & 42 V. c. 31, s. 16; powers of attorney, under 44 & 45 V. c. 41, s. 48, *post*, p. 138, are made evidence in some cases by statute.

Where a copy is made by a public officer specially intrusted to make copies and to deliver them to the parties as part of their title, they are admissible in evidence without proof of having been actually examined. B. N. P. 229; *Appleton v. Braybrook, Ltd.*, 6 M. & S. 34, 38. But a copy of a judgment purporting to have been examined by the clerk of the Treasury (who is not intrusted to make copies), is not admissible without proof of its accuracy. B. N. P. 229. See further, *Proof by certified copy*, *post*, p. 98; *Effect of public books and documents*, *post*, pp. 211 *et seq.*

*Proof by Examined Copy.*

The contents of a document of a public nature required by law to be kept, may be proved by producing a copy verified by the oath of a witness who has compared it with the original, and will swear that it is complete and correct. What are public documents, in this sense, has never been very accurately defined; but the term seems to include all documents in which the community at large is interested, and which it is desirable not to remove from their place of deposit. *Lynch v. Clarke*, 3 Salk. 154. The term would clearly include all records of any court whatsoever, and all registers of births, deaths, and marriages; registers having reference to shipping and navigation, to trade, and to the public health; *vide post*, pp. 125 *et seq.* The rule

applies equally to such public registers kept abroad, as there is a presumption that the foreign authority in whose custody they are, would not allow their removal to this country. *R. v. Castro*, Q. B., trial at bar (shorthand notes, pp. 3033-4) 28th Nov., 1873, (*post*, p. 131), following *Lanesborough's (El. of) Claim*, 1 H. L. C. 510, n., and *Abbott v. Abbott*, 29 L. J., P. M. & A. 57, cited *post*, p. 129. See *Burnaby v. Baillic*, 42 Ch. D. 282.

As to proof of depositions and affidavits filed in court, see *Proof of depositions and affidavits*, *post*, pp. 114 *et seq.*

An examined copy of a record or other document must be proved by a witness who has examined it line for line with the original, or who has examined the copy while another person read the original. *Reid v. Margison*, 1 Camp. 469. And it is not necessary (though in peerage cases a more rigorous rule prevails; *Slane Peerage*, 5 Cl. & Fin. 42) for the persons examining to exchange papers, and read them alternately. *Gyles v. Hill*, 1 Camp. 471, n.; *Rolf v. Dart*, 2 Taunt. 52. The copy must not contain abbreviations which do not occur in the original. *R. v. Christian*, Car. & M. 388. Where an examined copy is put in evidence some account should be given of the original record; thus, it ought to be shown that the record, from which the copy was taken, was seen in the hands of the proper officer, or was in the proper place for the custody of such records. *Adanthwaite v. Synge*, 1 Stark. 183; S. C., 4 Camp. 372.

The 14 & 15 V. c. 99, s. 14 (*post*, p. 101), contains provisions for the admissibility of examined copies of public books and documents, and puts examined copies and copies certified under that Act on the same footing. See cases decided thereon, *post*, p. 101.

Examined copies of bankers' books may be given in evidence, and may be verified by affidavit. Bankers' Books Evidence Act, 1879, 42 & 43 V. c. 11, ss. 3-5, *vide post*, pp. 123, 124.

#### *Proof by Certified Copy.*

By the Public Record Office Act, 1838 (1 & 2 V. c. 94), s. 12, it is provided "that the Master of the Rolls, or deputy keeper of the records, may allow copies to be made of any records in the custody of the Master of the Rolls, at the request and costs of any person desirous of procuring the same: and any copy so made shall be examined and certified as a true and authentic copy by the deputy keeper of the records, or one of the assistant record keepers," appointed under the Act, "and shall be sealed or stamped with the seal of the Record Office, and delivered to the party for whose use it was made." By sect. 13, "every copy of a record in the custody of the Master of the Rolls, certified as aforesaid, and purporting to be sealed or stamped with the seal of the Record Office, shall be received as evidence in all courts of justice, and before all legal tribunals, and before either House of Parliament, or any committee of either house, without any further or other proof thereof, in every case in which the original record could have been received there as evidence."

The records of all the superior courts, and some public records not of a judicial character, are, after the lapse of a certain time, deposited in the Record Office, in the custody of the Master of the Rolls.

There are some cases in which copies certified by persons not attached to any court, but holding a public position, are made evidence.

The following are amongst the statutes containing provisions making certified copies evidence:—The 3 & 4 W. 4, c. 87, ss. 2 and 4; 8 & 9 V. c. 118, s. 146, awards and orders of Inclosure Commissioners; 7 G. 4, c. 46, ss. 4 and 6, returns made by bankers of the members, &c., of their firms; 5 & 6 V. c. 27, s. 14, leases and exchanges by ecclesiastical corporations;

6 & 7 W. 4, c. 86, s. 38, documents from the General Register Office; 5 & 6 V. c. 45, s. 11; 7 & 8 V. c. 12, s. 8; 25 & 26 V. c. 68, ss. 4 and 5, entries at Stationers' Hall relating to copyright; 49 & 50 V. c. 33, ss. 7, 8 (2), copyright register abroad or in colony; 6 & 7 V. c. 18, s. 68, decisions in appeals from revising barristers; 5 & 6 V. c. 108, s. 29, leases and instruments deposited with the Ecclesiastical Commissioners; 6 & 7 V. c. 86, s. 16, cab licences; 46 & 47 V. c. 52, s. 134, proceedings of the Court of Bankruptcy; 7 & 8 V. c. 101, s. 69, proceedings of boards of guardians; 8 & 9 V. c. 18, s. 50, proceedings of the sheriff's court under the Lands Clauses Consolidation Act, 1845; *Id.* c. 20, s. 10, plans and books deposited with clerks of the peace by railway companies, with whose Acts the Railways Clauses Consolidation Act, 1845, is incorporated; 53 & 54 V. c. 5, s. 144, orders, reports, and certificates in lunacy; *Id.* s. 152, licences, orders, and instruments of Lunacy Commissioners; 51 & 52 V. c. 43, s. 28, proceedings in the County Courts; 25 & 26 V. c. 53, s. 123; 38 & 39 V. c. 87, ss. 80, 107, 120, certificates and instruments from the office of land registry; 45 & 46 V. c. 39, s. 7 (8), acknowledgments of deeds by married women; 21 & 22 V. c. 97, s. 7, amended by 62 & 63 V. c. 33, s. 1 (3), orders of the Privy Council under the Public Health Act, 1858; 38 & 39 V. c. 55, s. 186, bye-laws made by local authority under the Public Health Act, 1875, and *Id.* s. 326, bye-laws not inconsistent with that Act, and made under Public Health Acts thereby repealed; 54 & 55 V. c. 76, s. 114, bye-laws made by the county council or any sanitary authority under the Public Health (London) Act, 1891; 14 & 15 V. c. 99, ss. 7, 8, 13 (*post*, pp. 100, 101), proclamations, treaties, and other acts of state, and judgments, decrees, orders, and other judicial proceedings of any foreign state, or in any British colony, and qualifications of apothecaries; 53 & 54 V. c. 21, s. 24, regulations, minutes and notices issued by the Commissioners of Inland Revenue; 16 & 17 V. c. 137, s. 8; 18 & 19 V. c. 124, s. 5; 50 & 51 V. c. 49, s. 3, orders and proceedings of the Board of Charity Commissioners; 33 & 34 V. c. 75, s. 83, orders, &c., of Committee of Privy Council on Education; 49 & 50 V. c. 48, s. 23, orders made under the Medical Acts, or the Dentists Act, 1878; 16 & 17 V. c. 41, s. 5, entries in registers kept under the Common Lodging House Acts of 1851, 1853, in the Metropolis (see 55 & 56 V. c. 19); 57 & 58 V. c. 60, s. 695 (2), shipping documents; 37 & 38 V. c. 42, s. 20, certificate of incorporation, &c., and rules of building societies; 59 & 60 V. c. 25, s. 100; 56 & 57 V. c. 39, s. 75, documents relating to friendly and industrial and provident societies; 25 & 26 V. c. 89, ss. 61, 174; 40 & 41 V. c. 26, s. 6, proceedings of joint stock companies; 26 & 27 V. c. 65, s. 24; 60 & 61 V. c. 47, rules of volunteer corps; certificates under 27 & 28 V. c. 120, s. 18, and c. 121, s. 20, relating to railways; 28 & 29 V. c. 63, s. 6, colonial laws; 29 & 30 V. c. 117, s. 33, and c. 118, s. 29, rules of reformatory and industrial schools; 31 & 23 V. c. 37 (extended by several subsequent Acts, *vide post*, pp. 105-7, proclamations and orders; 32 & 33 V. c. 67, s. 61, valuation of property in the metropolis; 33 & 34 V. c. 14, s. 12, declarations and certificates under Naturalization Act, 1870; 44 & 45 V. c. 58, s. 165, proceedings of court martial; 44 & 45 V. c. 60, s. 15, register of newspaper proprietors; 45 & 46 V. c. 50, s. 24, bye-laws and proceedings of municipal corporations; 46 & 47 V. c. 57, ss. 89, 96, amended as to trade marks by 5 E. 7, c. 15, ss. 50, 73, patents and documents and registers in the Patent Office; 49 & 50 V. c. 39, s. 4 (3), orders, certificates, &c., under the Salmon and Freshwater Fisheries Acts; 51 & 52 V. c. 54, s. 5 (1), bye-laws under the Sea Fisheries Regulation Act, 1888. There are also provisions which authenticate registers of births, baptisms, marriages, deaths, and burials, which are noticed at length *post*, pp. 125 *et seq.* By the Crown Lands Act, 1873 (36 & 37 V. c. 36), s. 6, a print, purporting to have been made by the order of either House of Parliament, of

a report made by the Commissioners of Woods and Forests to her Majesty or Parliament, is as good evidence as the original.

By the Documentary Evidence Act (8 & 9 V. c. 113), s. 1, "Whenever by any Act now in force, or hereafter to be in force, any certificate, official or public document, or document or proceeding of any corporation, or joint stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either House of Parliament, or any committee of either house, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp, and signed as directed by the respective Acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature, or of the official character of the person appearing to have signed the same, and without any further proof thereof in every case in which the original record could have been received in evidence."

The meaning of the last paragraph in this section is by no means clear. In many cases there is no original record. The object of the statute seems to have been to dispense with proof of the genuineness of a document in all cases where it is by statute made evidence of the facts to which it relates. The signature of a *de facto* officer, who by virtue of that office has the custody of the records, is sufficient under this section, even though he be not the officer *de jure*. *R. v. Parsons*, L. R., 1 C. C. 24.

By the Evidence Act, 1851 (14 & 15 V. c. 99), s. 7, "All proclamations, treaties, and other acts of state of any foreign state, or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by-law, or by consent of parties, authority to hear, receive, and examine evidence, either by examined copies, or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy, to be admissible in evidence, must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy, to be admissible in evidence, must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or in the event of such court having no seal, to be signed by the judge, or if there be more than one judge, by any one of the judges of the said court, and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement."

A foreign patent is an "act of state" within the meaning of this section. *In re Bell's Patent*, 1 Moo. P. C., N. S. 49. And an order of a foreign court made *ex parte* on a shareholder is a judicial proceeding within the same

section. *Leishman v. Cochrane*, *Id.* 315. Where the seal of the foreign court is affixed to a copy of the proceedings, for the double purpose of authenticating the proceedings and cancelling a stamp affixed thereon, that is sufficient. *Loibl v. Strampfer*, 16 L. T. 720, *cor.* Lush, J. It seems that the seal should be used, though so much worn as no longer to make any impression. *Cavan v. Stewart*, 1 Stark. 525.

By sect. 8, a certificate of the qualification of an apothecary, purporting to be under the common seal of the society of apothecaries of the city of London, shall be received in evidence, without further proof.

Sect. 12, now repealed, related to registers, &c., of shipping: for the existing enactments *vide post*, p. 130.

By sect. 13, "Whenever in any proceeding whatever it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be certified, or purport to be certified, under the hand of the clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof."

See *R. v. Parsons*, L. R., 1 C. C. 24, cited *ante*, p. 100. This section applies to proof in civil proceedings, even on the issue of *nul tiel record*. *Richardson v. Willis*, L. R., 8 Ex. 69. Stat. 34 & 35 V. c. 112, s. 18 is to the same effect as regards the proof of convictions, and includes summary convictions, *vide post*, p. 109. As to proof, under the Crim. P. Act, 1865, s. 6, of a conviction, in order to discredit a witness, see *post*, p. 183.

By sect. 14, "Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof, or extract therefrom, shall be admissible in evidence in any court of justice, or before any person now or hereafter having, by law, or by consent of parties, authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted;" and the officer is required to furnish such certified copy or extract on application at a reasonable time and payment of a reasonable sum not exceeding 4*d.* per folio of 90 words.

The first part of this last section down to the word "or" seems merely to declare the common law rule; *vide Proof by examined copy*, *ante*, p. 98. Where the copy is signed and certified as the section provides, it is admissible on its mere production in court. *R. v. Weaver*, L. R., 2 C. C. 85. Where a copy is informally certified, and therefore inadmissible, under this section, it may yet be proved to be an examined copy by *virâ voce* evidence, for the provisions of the section are cumulative. *R. v. Manwaring*, 1 Dears. & B. 132, 141; 26 L. J., M. C. 10, 14.

The register of parliamentary voters of a borough and the poll books were provable under this section by copies; *Reed v. Lamb*, 6 H. & N. 75; 29 L. J., Ex. 452; so are registers of births, marriages, &c.; *vide post*, pp. 125 *et seq.*; and Scottish parochial registers of baptism; *Lytell v. Kennedy*, 14 Ap. Ca. 437, D. P.; and the bye-laws of a railway company duly made and allowed under 8 & 9 V. c. 20, ss. 108—111, may be proved by a certified copy under the hand of the secretary of the company in whose custody they are. *Motteram v. E. Counties Ry. Co.*, 7 C. B., N. S. 58; 29 L. J., M. C. 57. As to proof of the bye-laws of a municipal corporation under 45 & 46 V. c. 50, s. 24, see *Robinson v. Gregory*, (1905) 1 K. B. 534.

It should be observed that copies or extracts, attested or in any manner authenticated, are in many cases liable to stamp duty. *Vide Stamps—Copy, post, p. 225.*

#### CUSTODY OF ANCIENT WRITINGS.

In general the admissibility of ancient writings, which are incapable of direct proof, depends upon the custody from which they are produced, and from which their genuineness may be inferred; before, therefore, proceeding to consider the proof of particular documents, a few observations of a general character will be made on this subject.

Ancient ecclesiastical terriers are not admissible unless found in a proper repository, viz. the registry of the bishop, or of the archdeacon of the diocese; *Atkins v. Hatton*, 2 Anstr. 386; *Potts v. Durant*, 3 Anstr. 795; or, as it seems, the church chest; *Armstrong v. Hewitt*, 4 Price, 216; which are also the proper repositories for the vicar's books; S. C. A terrier found in the registry of the dean and chapter of Lichfield has been admitted as against a prebendary of Lichfield. *Miller v. Foster*, 2 Anstr. 387, n. But mere private custody is not sufficient. *Potts v. Durant*, 3 Anstr. 789; *Atkins v. Drake*, M. Cl. & Y. 213. See also, as to terriers, *R. v. Hall*, L. R., 1 Q. B. 632. On an issue respecting the boundaries of two parishes, certain old papers were produced by the plaintiff (the rector of one of the parishes), which had come into the possession of the son of a former rector on his father's death, and had been delivered by him, as papers belonging to the parish, to the witness (an attorney); it was held that the papers were sufficiently authenticated without calling the son of the former rector. *Earl v. Lewis*, 4 Esp. 1. Where a book, purporting to be the book of a former rector, came out of the custody of the defendant, his grandson, the proof was held insufficient; it not appearing how it came into the defendant's possession. *Randolph v. Gordon*, 5 Price, 312. In a suit for tithes, a receipt purporting to be a receipt given by a former rector forty-five years ago to a person of the same name as the defendant, and produced from the custody of the defendant, has been held admissible. *Bertie v. Beaumont*, 2 Price, 303. Where A., the defendant in a title suit, offered in evidence a receipt purporting to be a receipt from one B. to one A. fifty years before, without showing who B. was, or where the paper had been kept, it was rejected. *Manby v. Curtis*, 1 Price, 225, Wood, B., *dissentiente*.

An ancient document relating to the interest of all the estates in the parish would reasonably be expected to be found among the title deeds of a large estate in the parish. *R. v. Mytton*, 2 E. & E. 557; S. C., *sub nom. Mytton v. Thornbury*, 29 L. J., M. C. 109.

An ancient writing enumerating the possessions of a monastery, produced from the Herald's Office, is inadmissible. *Lygon v. Strutt*, 2 Anstr. 601. So an old grant to an abbey, contained in a manuscript register entitled "Secretum Abbatis" in the Bodleian library, was rejected, as not coming from the proper repository. *Michell v. Rabbetts*, cited 3 Taunt. 91; *Bank of England v. Anderson*, 4 Scott, 83. So an ancient grant to a priory among the Cottonian manuscripts in the British Museum was rejected; it not appearing that the possession of the grant was connected with any person having an interest in the estate. *Swinerton v. Stafford*, Mqs. of, 3 Taunt. 91.

In order to make an old document, as a manor book, &c., evidence, it was held not enough to produce it in court by the counsel of the party to whose custody it belongs, or by his steward, or even by the party himself; some witness who can speak as to the custody of it, should be sworn in court. *Evans v. Rres*, 10 Ad. & E. 151. And if any suspicion arise as to the

genuineness of it, the judge, before he admits it in evidence, will require information where it has been kept for some years back; when it was first seen, &c. *R. v. Mothersell*, Stra. 93. But however reasonable this security against fraud may be in some cases, it has been held enough if it be shown that such an instrument as an expired lease comes from the possession of the land agent of the lessor, though he may not be in court to produce it; *Doe d. El. Shrewsbury v. Keeling*, 11 Q. B. 884; or from the family solicitor; *Doe d. Jacobs v. Phillips*, 8 Q. B. 158. In this, as in other cases, the admissibility of the evidence is for the determination of the court.

The "proper custody" means that in which the document may be reasonably expected to be found, although in strictness it ought to be in another place; thus a cartulary in the possession of the owner of a part of some abbey lands is admissible, though not owner of the greater part: in such a case the Augmentation Office will also be a proper place of deposit. *Bullen v. Michel*, 2 Price, 413; 4 Dow, 297. So, a tithe collector's book, produced from the possession of his successor. *Jones v. Waller*, 3 Gwill. 847. So, a bond to indemnify overseers in a case of bastardy from a chest in the union workhouse. *Slater v. Hodgson*, 9 Q. B. 727. So, a document relating to a bishop's see may be produced from the custody either of his descendants or of his successors in the see. *Meath, Bp. of, v. Winchester, Mqs. of*, 3 N. C. 183, D. P.; and see *Id.* 201, per Tindal, C.J.; *Doe d. Neale v. Samples*, 8 Ad. & E. 151; *Croughton v. Blake*, 12 M. & W. 205; *Doe d. Jacobs v. Phillips*; and *R. v. Mytton, ante*, p. 102.

In a suit for tithes by a rector against occupiers, the defendants pleaded a modus payable to the vicar for the tithes claimed. It was held, first, that the copy of the vicar's endowment, contained in an old book, recording the acts of former bishops of the diocese, was admissible for the plaintiff (the bishop's registry having been searched for the original without success), and that no search was necessary either in the public Record Offices, or in the vicar's house, although it was expressed in the instrument that one part of it was to remain with the vicar; secondly, that a terrier, appearing to be signed by a former incumbent, who was both rector and vicar of the parish, and whose handwriting was proved by the churchwardens, was admissible for the plaintiff, though produced from the custody of one who claimed the tithes in a particular district in the parish, and not from the usual depositories. *Tucker v. Wilkins*, 4 Sim. 241. The bishop's registry is the proper place for sequestrator's receipts and accounts. *Pulley v. Hilton*, 12 Price, 629.

A will of lands relating also to personal property is properly produced from a box containing the title deeds of the tenant for life of the lands. *Andrew v. Motley*, 12 C. B., N. S. 527; 32 L. J., C. P. 128. Expired leases, coming from the possession of the lessor, are admissible. *Plaxton v. Dare*, 10 B. & C. 17; *Doe d. El. Shrewsbury v. Keeling, supra*. Or from that of the lessee. *Hall v. Ball*, 3 M. & Gr. 242; *Elworthy v. Sandford*, 3 H. & C. 330; 34 L. J., Ex. 42.

#### PROOF OF PARTICULAR DOCUMENTS.

Those classes of documents which it is most frequently required to prove at *Nisi Prius*, will be found classified below, under appropriate headings.

#### *Proof of Acts and Journals of Parliament.*

Acts of Parliament may be divided into four classes:—1. Public general Acts; 2. Public local and personal Acts; 3. Private Acts, printed by the King's printer; 4. Private Acts, not printed by the King's printer. This

division is only established by custom, and this a very uncertain one, at least until lately. A table (No. iii.) of all these classes is given at the end of the King's printer's edition of the statutes.

Formerly it was the custom to declare most local and personal Acts to be public; some of these were printed by the Queen's printer with, and formed part of, the regular series of public Acts; other public local and personal Acts, as well as local and personal Acts not public, and private Acts, were not always printed. The public local and personal Acts not printed were chiefly road Acts.

By a resolution of both Houses of Parliament, which took effect in the year 1798 (38 G. 3), the public Acts were divided into two series: public general Acts, and public local and personal Acts; and all public local and personal Acts have, since that time, been printed. The other Acts were all classed as private, although they included many which ought clearly to come under the denomination of local and personal; as, for instance, Inclosure Acts.

Since 1815 the series of public local and personal Acts have been numbered by small Roman numerals, by way of distinction.

In 1815 a resolution was passed, under which almost all private Acts—except name Acts, estate Acts, naturalization Acts, and divorce Acts—have been printed. These form a third series of printed Acts; they are numbered by italic Arabic numerals.

All public Acts, whether general or local and personal, are part of the law of the land, which all tribunals are bound to notice and apply.

By the Interpretation Act, 1889 (52 & 53 V. c. 63), s. 9 (replacing 13 & 14 V. c. 21, s. 7), it is provided that "every Act" (including, by sect. 39, a local and personal Act, and a private Act), "passed after the year 1850, whether before or after the commencement of this Act" (Jan. 1st, 1890) "shall be a public Act, and shall be judicially noticed as such, unless the contrary is expressly provided by the Act."

Such Acts should be, and probably are, all inserted in the series of public general, or public local and personal Acts.

The printed statute book is used as evidence of a public statute, not as an authentic copy of the record itself, but as aids to the memory of that which is supposed to be in every man's mind already. Gilb. Evid., 6th ed. 8, 9.

By the 8 & 9 V. c. 113, s. 3, it is provided that "all copies of private, and local and personal Acts of Parliament, not public Acts, if purporting to be printed by the Queen's printers, and all copies of the journals of either House of Parliament, and of royal proclamations, purporting to be printed by the printers to the Crown, or by the printers to either House of Parliament, or by any or either of them, shall be admitted as evidence thereof by all courts, judges, justices, and others, without any proof being given that such copies were so printed."

But the marginal note of a statute in the copy so printed forms no part of the statute itself, and cannot be used to explain or construe the section; *Claydon v. Green*, L. R., 3 C. P. 511. See also *A.-G. v. Gl. E. Ry. Co.*, 11 Ch. D. 460, 461, 465, *per C. A.*, and *Sutton v. Sutton*, 22 Ch. D. 513, *per Jessel*, M.R. This is in accordance with the parliamentary practice, that no amendments can be moved to marginal notes, or titles to clauses as printed in the bill. See Hansard's Parl. Deb., II. Com. 20th July, 1875, pp. 1759—60. Hence a title to sections or groups of sections is not in general part of the Act, notwithstanding *dicta* to the contrary attributed to Ld. Esher in *R. v. Local Gov. Board*, 10 Q. B. D. 321; and *In re Joyce*, (1892) 1 Q. B. 644, 645; and to the D. P. in *Inglis v. Robertson*, (1898) A. C. 616; though it is otherwise if such title is so referred to in the sections of the Act as to become incorporated in it; see *Lang v. Kerr*, 3 Ap. Ca. 535, 536, 542, *per*



Lds. Cairns, C., and Hatherley; or is in the nature of a subsidiary preamble, as in the case of the Lands Clauses Act, 1845 (8 & 9 V. c. 18). *E. Counties, &c., Ry. Cos. v. Marriage*, 9 H. L. C. 32. See *Fletcher v. Birkenhead Cor.*, *infra*.

It was formerly held that the title of a statute formed no part of the law; *Claydon v. Green*, L. R., 3 C. P. 522, *per* Willes, J.; *R. v. Williams*, 1 W. Bl. 95; as it did "not pass with the same solemnity as the law itself," S. C.; 8 H. L. C. 603, n. But this is now otherwise; it is subject to amendment in either House of Parliament, and is part of the statute. *Fielden (or Fielding) v. Morley Cor.*, (1899) 1 Ch. 1, 3, 4, C. A.; *R. v. Cockerton*, (1901) 1 K. B. 726, 731, C. A.; see also *In re a Debtor*, (1903) K. B. 708, *per* Collins, M.R. *In re Cross*, (1904) P. 269, the title was not allowed to cut down the generality of a section; nor in *Fletcher v. Birkenhead Cor.*, (1906) 1 K. B. 605; (1907) 2 K. B. 205, C. A., was a subsidiary preamble, *vide supra*. See, however, *Fielden v. Morley*, *supra*, cited *post*, p. 1132. The punctuation is not part of the statute. *Claydon v. Green*, *ante*, p. 104.

If it should be necessary to prove a private Act, not printed by the Queen's printer, it must be done by procuring an examined copy of the Parliament roll. B. N. P. 225. This was the way in which the journals of Parliament were formerly proved, the printed journals not being evidence of them. *Melville's (Ld.) case*, 29 How. St. Tr. 683; *R. v. Gordon*, 2 Doug. 593. As to secondary proof of a private Act, see *Doe d. Bacon v. Brydges*, 6 M. & Gr. 282.

In searching for private Acts (and they are sometimes very difficult to find), Vardon's Index to the Local and Personal and Private Acts from 1798 to 1839, Bramwell's Analytical Table of the Private Statutes from 1727 to 1812, and the Index to the Statutes, Public and Private, published by the Select Committee on the Library of the House of Lords, from 1810 to 1859, will be found useful. The best collection of private Acts is in the British Museum. There are also fair collections in the libraries of the Inner Temple, Lincoln's Inn, and the Incorporated Law Society.

The stat. 41 Geo. 3, c. 90, s. 9 (*post*, p. 120), provides for the proof of Irish statutes passed prior to the Union.

#### *Proof of Proclamations and Orders.*

The provisions of 8 & 9 V. c. 113, s. 3 (*ante*, p. 104), have been extended by the Documentary Evidence Act, 1868 (31 & 32 V. c. 37), which, by sect. 2, provides that "*primâ facie* evidence of any proclamation, order, or regulation issued before or after the passing of this Act by her Majesty or by the Privy Council, also of any proclamation, order, or regulation issued before or after the passing of this Act by or under the authority of any such department of the Government or officer as is mentioned in the first column of the schedule hereto, may be given in all courts of justice and in all legal proceedings whatsoever, in all or any of the modes hereinafter mentioned: that is to say,

- (1.) "By the production of a copy of the Gazette purporting to contain such proclamation, order, or regulation." See *The Olivia*, 1 Lush. 497, decided on 17 & 18 V. c. 104, s. 295.
- (2.) "By the production of a copy of such proclamation, order, or regulation purporting to be printed by the Government printer." See *R. v. Wallace*, 14 W. R. 462, C. C. R. Ir. This provision has been extended by the Documentary Evidence Act, 1882 (45 & 46 V. c. 9), s. 2, to a copy purporting "to be printed under the superintendence or authority of her Majesty's Stationery Office." The production of such evidence is *primâ facie* evidence of publication of the order. *Huggins v. Ward*, L. R., 8 Q. B. 521.

- (3.) "By the production, in the case of any proclamation, order, or regulation issued by her Majesty or by the Privy Council, of a copy or extract purporting to be certified to be true by the clerk of the Privy Council, or by any one of the lords or others of the Privy Council; and in the case of any proclamation, order, or regulation issued by or under the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said schedule in connexion with such department or officer.

"Any copy or extract made in pursuance of this Act may be in print or in writing, or partly in print and partly in writing.

"No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this Act, to the truth of any copy of or extract from any proclamation, order, or regulation."

"SCHEDULE.

Column 1. <i>Names of Department or Officer.</i>	Column 2. <i>Names of Certifying Officers.</i>
The Commissioners of the Treasury.	Any Commissioner, Secretary, or Assistant-Secretary of the Treasury.
The Commissioners for executing the office of Lord High Admiral.	Any of the Commissioners for executing the office of Lord High Admiral, or either of the Secretaries to the said Commissioners.
Secretaries of State.	Any Secretary or Under Secretary of State.
Committee of Privy Council for Trade.	Any member of the Committee of Privy Council for Trade or any Secretary or Assistant-Secretary of the said Committee.
The Poor Law Board.	Any Commissioner of the Poor Law Board, or any Secretary or Assistant-Secretary of the said Board." <i>Vide infra.</i>

This schedule has been extended by subsequent Acts, as follows:—

The Education Department (33 & 34 V. c. 75, s. 83).	Any member of the Education Department, or any Secretary or Assistant-Secretary thereof.
The Postmaster-General (33 & 34 V. c. 79, s. 21).	Any Secretary or Assistant-Secretary of the Post Office.
The Board of Agriculture (58 & 59 V. c. 9).	The President or any member of the Board, or the Secretary of the Board, or any person authorised by the President to act on behalf of the Secretary.

The Act applies to the Local Government Board appointed under 34 & 35 V. c. 70, in the same way as it previously applied to the Poor Law Board (s. 5); it has also been applied to any regulation made by the Secretary of State under the Naturalization Act, 1870 (33 & 34 V. c. 14), s. 12; or the

Prison Act, 1877 (40 & 41 V. c. 21), s. 51; and to a bye-law made by him under the Military Land Act, 1892 (55 & 56 V. c. 43): see sect. 17 (3); and to proclamations, &c., by the Lord Lieutenant of Ireland; 45 & 46 V. c. 9, s. 4. See also the Salmon Fishery Act, 1873 (36 & 37 V. c. 71), s. 64.

By the Trade Marks Act, 1905, 5 Edw. 7, c. 15, s. 52 (1), "All documents purporting to be orders made by the Board of Trade and to be sealed with the seal of the Board, or to be signed by a secretary or assistant secretary of the Board, or by any person authorized in that behalf by the President of the Board, shall be received in evidence, and shall be deemed to be such orders without further proof, unless the contrary is shown. (2) A certificate, signed by the President of the Board of Trade, that any order made or act done is the order or act of the Board, shall be conclusive evidence of the fact so certified." This section would, however, from its collocation, seem to apply only to documents relating to trade marks.

#### *Proof of Letters Patent of the Crown.*

Letters patent may be proved by production of them under the Great Seal; or by an examined copy of the original enrolment of them in the public records, *ante*, p. 97, or a copy thereof certified by the Master of the Rolls under 1 & 2 V. c. 94, *ante*, p. 98; or by an exemplification under the Great Seal, *ante*, p. 96. Letters patent for inventions are now sealed with the seal of the Patent Office, impressions of which shall be judicially noticed and received in evidence. 46 & 47 V. c. 57, ss. 12, 84.

#### *Proof of Records and Judgments.*

The proceedings of a court of record can be proved only by the record thereof; the record may be made up at any time when it becomes necessary to put it in evidence. Com. Dig. Record (A) (B); *Kemp v. Neville*, 10 C. B., N. S. 523; 31 L. J., C. P. 158; *Kelly v. Morray*, L. R., 1 C. P. 667.

In the case of a judgment prior to the J. Acts, upon an issue of *nul tiel record*, the proof is by the production of the original record, or by the tenor of it duly certified under a writ of *certiorari*. In case of variance the court may amend under Rules, 1883, O. xxviii. r. 1, *post*, p. 291. See *Hunter v. Emanuel*, 15 C. B. 290; 24 L. J., C. P. 16. Where the record is in the custody of the M.R. it seems that a copy certified under the seal of the Record Office is, under 1 & 2 V. c. 94, ss. 12, 13, *ante*, p. 98, as admissible in evidence as the original record. And now see Rules, 1883, O. xxxvii. r. 4, *ante*, p. 97, as to office copies and observations thereon. A criminal record may, even in civil proceedings, be proved by a certified copy under 14 & 15 V. c. 99, s. 13, *ante*, p. 101. *Richardson v. Willis*, L. R., 8 Ex. 69.

Where there is not an issue of *nul tiel record*, but it is necessary to prove a record in support of some allegation in the pleadings, the record is to be proved either by production of the original when complete, by an exemplification, *ante*, p. 96, or by an examined or other authenticated copy; *ante*, pp. 97 *et seq.*

Records of judgments of the Superior Courts at Westminster, &c., prior to the J. Acts, were not complete until entered on parchment and enrolled; B. N. P. 228; *Glynn v. Thorpe*, 1 B. & A. 153; and a copy of a judgment in paper, signed by the Master, was not evidence of the judgment, for it had not yet become permanent; B. N. P. 228; though such entry was sufficient to warrant execution. In *Pagan v. Dawson*, 4 M. & Gr. 711, the issue roll not under the seal of the court, with a *nolle pros.* entered thereon against a co-defendant, was held insufficient proof of the *nolle pros.* It should seem that a regular entry on record was necessary. But a certified

copy of the entry of a judgment in the entry book of judgments in the Court of Exchequer has been admitted in bankruptcy in proof of the judgment. *Ex pte. Anderson*, 14 Q. B. D. 606, C. A. In this case, however, the point was not argued. Where the pleadings did not allege any matter of record, but only averred the pendency of a judicial proceeding before the record is made up,—as that a trial was had,—the fact might be proved by the production of the *Nisi Prius* record, or indictment, with the official minutes; and, in some cases, perhaps, by mere oral evidence. *Pitton v. Walter*, Stra. 162; *R. v. Browne*, M. & M. 815; *R. v. Newman*, 2 Den. C. C. 390.

In the case of a judgment under the J. Acts, it is provided by the Rules, 1883, O. xli. r. 1, that "Every judgment shall be entered by the proper officer in the book to be kept for the purpose. The party entering the judgment shall deliver to the officer a copy of the whole of the pleadings in the cause." Forms of entering judgment are given in *Id.* App. F. The pleadings will be filed by the officer, and under O. v. rr. 12, 13, a copy of the writ of summons will have previously been filed; and it is presumed by analogy to the former Chancery practice (*vide post*, pp. 112 *et seq.*) that these documents, together with the judgment, now constitute the record, and that no enrolment is necessary. This record may in every case be proved by its production under a judge's order (*vide post*, p. 159), or under 14 & 15 V. c. 99, s. 14 (*ante*, p. 101), by an examined or certified copy; or perhaps by an office copy under O. xxxvii. r. 4. See observations thereon, *ante*, p. 97. Where the judgment is pleaded in a general form as an estoppel, the court will examine the pleadings and judgment to see what questions were in issue in the former action. *Houstoun v. Sligo, Marquis of*, 29 Ch. D. 448. The grounds of the judgment may, it seems, be proved by a shorthand note sworn by the writer. S. C., *Id.* 457, 458, C. A.

It has been held that the minute book of the clerk of the peace is not enough to prove that an indictment was preferred; nor is the original indictment itself, though indorsed as a true bill; *R. v. Smith*, 8 B. & C. 341; *per* Patteson, J., *Porter v. Cooper*, 1 C. M. & R. 388; yet in both these cases the allegation of the indictment was only introductory to the gist of the proceeding, which was a conspiracy to keep back a witness in one case, and an action on an agreement, after indictment found, in the other. Nor is the minute book in which the proceedings at sessions are entered, and from which the record is made up, evidence of the names of the justices in attendance at the trial of it. *R. v. Bellamy*, Ry. & M. 171. Where the record alleges an adjournment by A. and others, parol evidence may be given as to the justices actually present. S. C. The minutes of proceedings are evidence of them on a trial before the same court sitting under the same commission. *R. v. Tooke*, cited 8 B. & C. 343; *R. v. Newman*, *supra*. An allegation that an appeal came on to be heard at the sessions must be proved by the production of the record regularly made up in parchment; *R. v. Ward*, 6 C. & P. 366; *Accord. Giles v. Siney*, *infra*; but where (as is usually the case) no record but the minute book is kept by the sessions, such book was admitted in evidence. *R. v. Yeoveley*, 8 Ad. & E. 806.

As to proof of a conviction or acquittal, now see 14 & 15 V. c. 99, s. 13, *ante*, p. 101. And as to proof of conviction in order to discredit a witness, see Crim. P. Act, 1865, s. 6, cited *post*, *Proof by witnesses*, p. 183.

It is the duty of a justice of the peace to return all convictions before him to the Quarter Sessions to be filed among the records of that court; 11 & 12 V. c. 43, s. 14; see *Ex pte. Hayward*, 3 B. & S. 546; 32 L. J., M. C. 89; and such conviction could formerly have been proved only by the production of the record thereof or an examined copy; *Hartley v. Hindmarsh*, L. R., 1 C. P. 553; *Accord. Giles v. Siney*, 13 W. R. 92, M. T. 1864, Q. B.

Now however by 34 & 35 V. c. 112, s. 18 it may be proved by production of a copy of the conviction "purporting to be signed by any justice of the peace having jurisdiction over the offence in respect of which such conviction was made, or to be signed by the proper officer of the court by which such conviction was made, or by the clerk or other officer of any court to which such conviction has been returned." The register of the minutes or memoranda of convictions of a court of summary jurisdiction kept under 42 & 43 V. c. 49, s. 22 by its clerk, is admissible in evidence to prove a previous conviction of the defendant, but in the same court only. *Police Commr. v. Donovan*, (1903) 1 K. B. 895, following *L. School Board v. Harvey*, 4 Q. B. D. 451. The dismissal of a complaint was proved in a similar way in *R. v. Hutchins*, 5 Q. B. D. 353, 356. And the dismissal of an information or complaint may also be proved by the certificate given under 11 & 12 V. c. 43, s. 14, *vide* S. C. In *Watson v. Little*, 5 H. & N. 472; 29 L. J., Ex. 267, a bastardy order, made by two deceased magistrates, was admitted in evidence on proof of their handwriting, on the ground that it was an official minute of the proceedings made in discharge of their judicial duty; as to the purpose for which it was so admitted, *vide post*, p. 207.

A condemnation by any justice under the Customs Laws may be proved by production of a certificate thereof purporting to be signed by the justice, or by an examined copy of the record of such condemnation certified by his clerk. 39 & 40 V. c. 36, s. 263.

Where an ancient record of a judgment has been lost, it may be proved to the jury by parol or other testimony; as where the rolls of a court of a manor of ancient demesne had been destroyed, an old copy of a recovery in it under the hand of the steward was admitted without other proof, the possession having long gone according to it. *Green v. Proude*, 1 Mod. 117; S. C., 1 Vent. 257. So the enrolment of the decree respecting London tithes under the 37 H. 8, c. 12, being lost, has been proved by user. S. C.; *Macdougall v. Young*, Ry. & M. 392.

On a question whether a decree in equity has been reversed by the House of Lords, a copy of the minutes of the judgment in the Journals is evidence; *Jones v. Randall*, Cowp. 17; and now see 8 & 9 V. c. 113, s. 3, *ante*, p. 104. But as a judgment of the House on error or appeal from the Superior Courts of *Common Law* was entered on record, it would seem that in such case the minutes would not be sufficient. See also C. L. P. Act, 1852, ss. 155, 157. Under the Appellate Jurisdiction Act, 1876 (39 & 40 V. c. 59), this distinction, however, is now abolished, and it seems that any judgment of the House given since 1875 (see J. Act, 1875, s. 2), may now be proved by a copy of the minutes in its Journals.

As to proof of judgments, &c., of Inferior Courts, *vide post*, p. 117.

#### *Proof of Fines and Common Recoveries.*

A common recovery is proved in the same manner as the record of a judgment in an adverse suit.

The chirograph or indenture of a fine, as formerly delivered by the chirographer, is the proper evidence of it. B. N. P. 229. But it has been held that the indorsement of proclamations on it is not evidence of them, because he has no official authority to deliver a copy of such indorsement. B. N. P. 230; *Doc d. Hatch v. Bluck*, 6 Taunt. 485. The original entry of the proclamations was usually filed with the note of the fine, and was in the custody of the chirographer, and this "note" is said to be the "*principal recordum*," from which others are amendable. 3 Leon. 183. Besides these records, the proceedings on a fine were formerly enrolled in the Court of C. P. under stats. 5 H. 4, c. 14, and 23 El. c. 3; and it should

seem, on principle, that examined copies of these enrolments of record when found, or office copies stamped with the seal of the Record Office (1 & 2 V. c. 94, *ante*, p. 98), are legitimate evidence. The foot or *pes finis*, is a third counterpart of the indentures made by the chirographer, and originally engrossed on the same parchment. The entry of the proclamations on this is official, and the proper custody of it was, until lately, that of the *Custos brevium*. The result appears to be that there are several authentic records of fines, which show exactly the same facts, viz., the date, parties, property, concord, and proclamations. It must, however, be remembered that the practice and form of levying fines have undergone variations at different periods. See generally, on the mode of recording fines, 5 Rep. 39 a, and 2nd Report of Deputy Keeper of Public Records (1841), Appendix 1.

By 5 & 6 W. 4, c. 82, other officers were substituted for the chirographer, whose copies were made as available as the old ones, and all the records of fine (with a few recent exceptions) are now in the custody of the M.R., under 1 & 2 V. c. 94. The 11 & 12 V. c. 70, enacted that all fines levied in the C. P. should be conclusively deemed to have been levied with proclamations, except where, at the passing of the Act (August 31st, 1848), the land was actually enjoyed under a title inconsistent with such fine. The Act was expressly designed to save the expense of other proof of proclamations. It is remarkable, however, that it proceeded on the false supposition that "all fines" had previously been levied with proclamations.

In the case of Welsh fines there is a special statute to facilitate the proof of them. See 4 V. c. 32, s. 2; and *Doe d. Cadwalader v. Price*, 16 M. & W. 603.

#### Proof of Verdicts.

When a verdict is offered as evidence of the truth of the facts found, the *postea* alone was not sufficient, but the judgment must also have been proved to show that it had not been arrested, nor a new trial granted; *Pitton v. Walter*, Stra. 162; B. N. P. 234; except in the case of an issue, when no judgment was entered up; B. N. P. 234. But *semb.* the verdict should in that case have been shown to have been satisfactory by proof of the decree, or other adoption by the court. *Id.* See *Robinson v. Duleep Singh*, 11 Ch. D. 798, C. A. As to proof of the judgment, see *ante*, p. 108. The *Nisi Prius* record with the *postea* indorsed, or with minute of the verdict indorsed by the officer of the court, was sufficient where the only object is to show that the cause came on to be tried. *Pitton v. Walter*, *supra*; *R. v. Browne*, M. & M. 315. But without such minute, the N. P. record alone was no evidence of the trial. *Per* Lord Tenterden, C.J., *Id.*

Under Rules, 1883, O. xxxvi. r. 30, two copies of the pleadings in the action are delivered to the officer when the action is entered for trial, one of which is for the use of the judge at the trial; this delivery corresponds with the former delivery of the N. P. record (see O. xxvi. r. 1); and by r. 41, "the associate or master shall enter all such findings of fact as the judge may direct to be entered, and the directions, if any, of the judge as to judgment," in a book to be kept for the purpose. Under r. 42, where the judge directs any judgment to be entered for any party absolutely, judgment may be entered on a certificate given by the associate in Form 17, App. B.; this certificate seems to correspond to the *postea*.

#### Proof of Writs.

A writ must be proved by a copy of the record of it after its return; and this is said to be necessary whenever it is the gist of the action (*i.e. ut semble* wherever it is treated as matter of record in the pleading); B. N. P. 234; otherwise the writ itself may be produced, or secondary evidence given,

when its non-production is accounted for. A copy of the judgment-roll containing an award of an *elegit* and the return of the inquisition is evidence (and *ut semb.* the best evidence) of the *elegit* and inquisition. *Ramsbottom v. Buckhurst*, 2 M. & S. 565. To prove that the defendant issued a writ, it is not sufficient secondary evidence to produce the filacer's book unless it be shown that it has not been returned but is in the defendant's hands, who has had notice to produce it. *Edmonstone v. Plaisted*, 4 Esp. 160. Where a writ is pleaded in terms, and *nul tiel record* is replied, it must be proved by the production of the record, as in other cases of records; *ante*, pp. 107, 108. As to proof by office copy, see Rules, 1883, O. xxxvii. r. 4, and observations thereon, *ante*, p. 97.

A writ of summons may be proved by production of the original writ, or by the copy thereof left with and filed by the officer under Rules, 1883, O. v. rr. 12, 13. *R. v. Scott*, 2 Q. B. D. 415. If the defendant has to prove the writ, it should seem that the copy served on him by the plaintiff is primary evidence; *vide ante*, p. 3.

### *Proof of Inquisitions.*

Where the return to an inquisition is given in evidence, it is in general necessary to show that the inquiry was made under proper authority. On this head some distinctions are observable. Inquests of office are either by commission under the Great Seal, as offices of entitling, &c.; or by commission or writ under the seal of the Exchequer; or they are taken *ex-officio*, as by coroners, escheators, &c. The returns made under any of the above special commissions, or writs, are generally inadmissible as evidence, unless the commission be proved, or the non-production of it accounted for. But inquisitions taken *ex-officio* by officers acting under a *general* commission or appointment, as escheators, &c., seem to be admissible on principle, without further evidence of authority than that they were acting as such officers. See generally as to the nature of inquests of office, 3 Bl. Com. 258; 16 Vin. Ab. 79, tit. *Office*.

In the case of an inquisition *post mortem*, and such private offices, the return cannot be read without also reading the commission under which it was taken; unless, as it seems, the inquisition be old. 12 Vin. Ab. Ev. (A. b. 42). In cases of more general concern, such as the return to the commission, *temp.* Hen. 8, to inquire of the value of livings, the commission is said to require no proof. B. N. P. 228. So an ancient extent of Crown lands found in the proper office, purporting to have been taken by a steward of the king's lands, and following in its form the direction of the statute 4 E. 1, stat. 1, will be presumed to have been taken under competent authority, though the commission cannot be found. *Rowe v. Brenton*, 3 M. & Ry. 164; S. C., 8 B. & C. 747. And there are many cases to show that an old commission may be presumed: see references, S. C., 3 M. & Ry. 171, 349. The book called Domesday is an inquest of this kind. An inquisition is admissible though it has become illegible in material parts. *Anderton v. Magawley*, 3 Bro. P. C. 208. A lost inquisition *post mortem* may be proved by a recital of it in ancient proceedings, as on a petition of right in the *Coram Rege* roll, where it was incidentally certified *verbatim* to the Court of K. B. and set forth on the record. *Rowe v. Brenton*, 3 M. & Ry. 141, 142.

### *Proof of Rules or Orders of Court, and Judges' Orders.*

An order (in the common law courts formerly called a rule) of a superior court, is proved by an office copy thereof, for such a copy is the order itself.

*Per Cur.*, *Streeter v. Bartlett*, 5 C. B. 564; *Selby v. Harris*, 1 Ld. Raym. 745; *Ludlow v. Charlton*, 9 C. & P. 242. Where a court (as that of Insolvent Debtors) prints and circulates copies of its general rules for the guidance of its officers, one of such copies is evidence of the rules, without showing it to have been examined with the original. *Darice v. Robson*, M. & M. 291. But the rules must be shown to have been sanctioned by the court in order to support an indictment for perjury on an affidavit required by them. *R. v. Koops*, 6 Ad. & E. 198.

A judge's order may be proved either by producing the order itself signed by the judge, and delivered out in the usual way, or by proof of the rule or order, if any, making it a rule or order of court. *Still v. Holford*, 4 Camp. 17. An order of court, however, is not matter of record in the strict sense of the word. *R. v. Bingham*, 3 Y. & J. 101. The statute 8 & 9 V. c. 113, s. 2 (*ante*, p. 81), enacts that all courts are to take judicial notice of the signature of the superior judges of equity and common law attached to an official or judicial document; and by 46 & 47 V. c. 52, s. 137 (*ante*, p. 81), this provision is extended to the signatures of judges and registrars of courts having jurisdiction in bankruptcy.

As to proof of orders made in chambers in the Chancery Division, and drawn up by the chief clerk (now called "master"), see Rules, O. lv. rr. 74, 74a (Dec. 1885), and J. Act, 1875, s. 20, *post*, p. 153.

#### *Proof of Decrees and Answers in Chancery.*

A decree in Chancery may be proved by an exemplification; or by an examined copy; or by production of a decretal order on paper, together with proof of the bill and answer, where such proof may be necessary. *Trowel v. Castle*, 1 Keb. 21; B. N. P. 244. The bill and answer need not be proved if they are recited (as they formerly were) in the decree. *Id.*; Com. Dig. Testm. (C. 1); *Accord. Wharton Peerage*, 12 Cl. & Fin. 295. The rule laid down in a text-book of authority is, that where a party intends to avail himself of the contents of a decree, and not merely to prove an extrinsic collateral act (as that a decree was made by the court), he ought regularly to give in evidence the proceedings on which the decree was founded. 1 Phill. & Arn. Ev. 10th ed. 207. And see Peake, Ev. 74; *Hewitt v. Piggott*, 5 C. & P. 75. Still, if the decree or order itself contain all the facts required, it has been held unnecessary to produce the bill and answer, though it is otherwise where it is material to show the particular issue raised. Thus, in an action against the sheriff for an escape under an attachment issued out of Chancery for non-payment of costs, the order for an attachment is *primâ facie* proof of the pendency of a suit in Chancery without proof of bill and answer; and for this purpose a decree, even without a recital, or other evidence of bill and answer, would be admissible. *Blower v. Hollis*, 1 Cr. & M. 396. This case was doubted at N. P. by Ld. Abinger, C.B., in *Attwood v. Taylor*, 1 M. & Gr. 289, 290, where the vendor of an estate sued the vendee for interest due on the contract of sale, and the plaintiff, in order to account for the laches in suing, offered in evidence an injunction in a suit of Equity by the defendant against him, restraining him from suing at law; the L. C. B. refused to admit the order until the bill and answer were produced. The case seems to be reconcilable with *Blower v. Hollis*, *supra*, and it is possible that Lord Abinger only dissented from the *marginal* note of the case in the above report of it. It might be that the injunction was obtained on grounds which did *not* relieve the plaintiff from his imputed laches. As to proof of the reversal in D. P. of a decree, see *ante*, p. 109. As to proof of judgments of the High Court of Justice, *vide ante*, pp. 107, 108.



An answer in Chancery is proved by the production of the bill and answer, or by examined, or Record Office, copies of them; but on proof by the proper officer that the bill has been searched for in the proper office and not found the answer may be read without the bill. Gilb. Ev. 6th ed., 49, 50. A distinction was sought to be drawn between proof of answers filed in Chancery, and affidavits, but the distinction is untenable; *vide post*, pp. 114, 115. Some proof of the identity of the parties is requisite. *Rees d. Howell v. Bowen*, M'Cl. & Y. 383, 391, 392. This may be given by a witness, who has seen the handwriting of the defendant to the original answer, though it is not produced in court. *Dartnall v. Howard*, Ry. & M. 169. Identity may also be inferred from the intrinsic evidence; as if the name, description, and character of the party to the action agree with the name and description of the party answering in equity, it is *prima facie* evidence of identity. *Hennell v. Lyon*, 1 B. & A. 182. See also *Garvin v. Carroll*, 10 Ir. L. R. 330, and the case of *Hubbard v. Lees*, L. R., 1 Ex. 255, 257 (cited *post*, p. 125, decided on a family register), whence it seems that such evidence is sufficient for the jury, and where the jury are satisfied with the identity the court will not interfere. See, however, *Rees d. Howell v. Bowen*, *supra*; *Burnand v. Nerot*, 1 C. & P. 578; and *Proof of Deeds, &c.*, *post*, p. 135.

An answer, offered in evidence as an admission of the party on oath, is sufficiently proved by an examined copy of it without proof of a decree, or of the party's handwriting. *Dartmouth, Ly. v. Roberts*, 16 East, 334. See *Fleet v. Perrins*, L. R., 3 Q. B. 536, *post*, p. 114. So when it is used to contradict the party making it, or to cross-examine him on it, *vide post*, pp. 178, 179. A letter written by the plaintiff's agent, referred to by the plaintiff in his answer to a bill in Chancery filed by a third person, and deposited by consent of parties with a clerk in court, was evidence against the plaintiff in an action at law, without reading the answer in Chancery. *Long v. Chapman*, 2 B. & Ad. 284. But *quere*, whether—where A. had obtained sight of a letter or document of B. by means of a bill of discovery, to which B. had put in an answer with the document annexed—A. could read it in evidence without also reading the whole answer? See S. C. The mere fact that the document was obtained by a bill of discovery is not enough to exclude it, or to oblige the party who uses it to put in the bill and answer. *Sturge v. Buchanan*, *per Cur.*, 10 Ad. & E. 605.

Where an answer was read as a mere admission by the defendant, he was formerly entitled to require that the bill as well as the interrogatories should be read as part of the plaintiff's case. *Pennell v. Meyer*, 2 M. & Rob. 98. The principle being, that the questions as well as answers should be read, and that in equity a defendant was bound to answer not only the interrogatory part, but also the narrative part of the bill. S. C. But defendants in equity were relieved by the Gen. Order, 26 Aug. 1841, and by the Act 15 & 16 V. c. 86, s. 12, from answering except to interrogatories. This might perhaps dispense with the reading of anything but the interrogatories; but as the answer was not necessarily confined to the interrogatories (see sect. 14), it is still a question how far the reading of the bill, if required by the defendant, may be necessary? See *Fleet v. Perrins*, L. R., 3 Q. B. 536; L. R., 4 Q. B. 500, Ex. Ch., and *Admissions on compulsory process*, *ante*, p. 62. Where a bill, answer, and decree are put in evidence to prove a fact which appears on the face of those documents to have been in issue, the party producing them is not bound also to put in the depositions as part of his own case. *Laybourn v. Crisp*, 4 M. & W. 320.

*Proof of Depositions and Affidavits.*

A deposition used by a party to a suit in Chancery, for the purpose of proving certain facts, is primary evidence of the same facts against the same party in an action by a stranger. *Richards v. Morgan*, 4 B. & S. 641; 33 L. J., Q. B. 114. But such depositions are not, in general, admissible without proof of the bill and answer; B. N. P. 240; *Gilb. Ev.* 6th ed., 56, n.; unless no bill or answer can be found; *Rowe v. Brenton*, 8 B. & C. 765; *Byam v. Booth*, 2 Price, 234, n.; *Bayley v. Wylie*, 6 Esp. 85; 1 Phillipps, *Ev.* 7th ed., 395; or unless the depositions are offered in evidence as containing an admission merely, or for the purpose of contradicting a witness. *Id.* The bill and answer are only required to satisfy the judge that the depositions are admissible by enabling him to see what was in issue; and the opposite counsel therefore has no right to have them read, or to comment upon them to the jury. *Chappell v. Parday*, 14 M. & W. 303.

In general, depositions taken in *perpetuum rei memoriam* were not evidence at law unless an answer had been put in and proved; but if the defendant in equity were in contempt, or had neglected to take advantage of an opportunity to cross-examine, the deposition might be read on proof of the bill without the answer; B. N. P. 240; *Lancaster v. Lancaster*, 6 Sim. 439; so in case of a bill filed for a commission to examine witnesses *de bene esse*; *Cuzenove v. Vaughan*, 1 M. & S. 4. Whether the deposition was taken on a bill to perpetuate testimony, or a bill to examine *de bene esse* (which are distinct proceedings), it was not evidence without proof of the death or inability of the witness to attend; but a court of equity might have made a special order to read it without such proof, and without proof of the bill, answer, or other proceedings. See Jeremy's Equity Jurisdiction, 271, 280, and the authorities there cited.

Affidavits taken by the standing commissioners of the superior courts may be proved without producing the commission. The acting as such is *prima facie* sufficient proof of it. *R. v. Howard*, 1 M. & Rob. 187. The handwriting of the commissioner must be proved, and that of the deponent, if the original is produced. But if the affidavit be filed in a superior court of law or equity, an examined copy, or (in the same court and cause) an office copy of it, is in civil cases evidence against the party by whom it has been used or acted on, without proof of the handwriting of the person making it. *Fleet v. Perrins*, L. R., 3 Q. B. 536; B. N. P. 229. And now see Rules, 1883, O. xxxvii. r. 4, as to office copies, and observations thereon, *ante*, p. 97. It has even been held that an examined copy of the affidavit of a defendant, used by him in a cause and filed, was sufficient evidence of the affidavit on an indictment for perjury; *R. v. James*, 1 Show. 397; and see 3 Doug. 78, n.; although the present practice seems to require that the original affidavit should in such a case be produced. 2 Taylor, *Evid.*, 10th ed. § 1535. Where an examined copy was offered in evidence of an affidavit filed in Chancery in another cause, and alleged to have been made by the defendant, but not shown to have been used or acted on by him, it was held inadmissible without proof of the deponent's identity with the defendant. *Rees d. Howell v. Bowen*, M'Cl. & Y. 383. In this case a distinction was taken by the court between answers which formed part of the records, and were not allowed to be removed from the files of the court, and affidavits which could be removed. But no such distinction in fact exists, for the affidavits form as much part of the proceedings as the answer. *Garvin v. Carroll*, 10 Ir. L. R. 300, *per* Crampton, J. And on the ground that examined copies are good evidence in civil cases at law, the Court of Chancery will not allow its documents to be removed except in aid of criminal prosecutions.

*A.-G. v. Ray*, 6 Beav. 335; 1 Daniell's Chan. Prac. 6th ed. 601. It seems, therefore, that a deposition or affidavit filed in the course of Chancery proceedings is to be proved in the same way as an answer; *vide ante*, pp. 112, 113.

Under the Act 15 & 16 V. c. 86, the examination or testimony of parties or witnesses in equity was taken either orally before an examiner, or by answers to interrogatories, or by affidavits sworn before persons qualified to take them. The parties to the suit were examined under interrogatories filed in the record office of the court, to which the answers were also returned. See sects. 12, 19, 25. Oral examinations were reduced to writing by the examiner in a narrative form, and returned, with the proper examinations, to the same office. Sects. 31, 32, 34. Office copies of examinations are delivered under sect. 4. It would seem that those office copies, *purporting* to be signed and certified as true copies by the proper officer, are admissible as evidence in all courts by stat. 14 & 15 V. c. 99, s. 14; *ante*, p. 101.

The question as to whether a witness can be cross-examined on an examined or office copy of an affidavit or other document filed in court is considered under *Cross-examination of witnesses*, *post*, pp. 178, 179.

As to proof under the J. Acts by affidavit or depositions in the action, *vide post*, p. 185 *et seq.*

By Rules, 1883, O. xxxi. rr. 1, 4, 8, either party may, by leave of a judge, deliver interrogatories to the opposite party, which he is bound to answer by affidavit within ten days. Where relief is sought on the ground of fraud or breach of trust, no such leave is required. An office copy of the answer to the interrogatories will, as against the party making it, be sufficient evidence of the answer at the trial; see *Fleet v. Perrins*, cited *ante*, p. 114, although the answering party may, if he think fit, put in evidence the interrogatories to which the answer is made. S. C. If the answer is not in the same court and cause, an examined copy of the answer will be sufficient evidence. S. C. And now see Rules, 1883, O. xxxvii. r. 4, as to office copies, and observations thereon, *ante*, p. 97. It seems that such examined or office copy will be admissible for the purpose of cross-examination or contradiction of the deponent; *vide post*, pp. 178, 179. In case of an insufficient answer, the party interrogated may, by r. 11, be ordered to be examined orally. A party may be examined as to a lost document; but the loss must be proved at the trial. *Wolverhampton Waterworks Co. v. Hawksford*, 5 C. B., N. S. 703; 28 L. J., C. P. 198. By O. xxxi. r. 24, "Any party may at the trial of a cause, matter, or issue, use in evidence any one or more of the answers, or any part of an answer, of the opposite party to interrogatories without putting in the others, or the whole of such answer: provided always, that in such case the judge may look at the whole of the answers," and order answers connected with those put in, also to be put in.

By O. lxxv. r. 54, the copy of an affidavit of discovery of documents, "delivered by the party filing it, may be used as against such party."

The stat. 52 & 53 V. c. 10, ss. 3, 6, *ante*, p. 80, now determines before what persons an affidavit may be sworn abroad, and provides that judicial notice shall be taken of their seal, signature, &c., except in the case of persons having authority to administer an oath under the law of a foreign country only. As to the proof by certificate of the authority to administer an oath in this excepted case, see *Cooper v. Moon*, W. N. 1884, p. 78, *cor.* Field, J.

*Proof of Oral Testimony on a Former Trial.*

What a witness, since dead, has sworn on a trial between the same parties, may be given in evidence, either from the judge's notes, or from notes that have been taken by any other person who will swear to their accuracy; or it may be proved by any person who can swear from memory. *Per* Mansfield, C.J., *Doncaster, Mayor of v. Day*, 3 Taunt. 262; *Strutt v. Bovingdon*, 5 Esp. 56. The witness must, it has been held, be prepared to prove the words of the former witness, and not merely the supposed substance or effect of them. *Id.* *Palmerston's case*, cited *per* Ld. Kenyon, C.J., 4 T. R. 290; *Ennis v. Donisthorpe*, 1 Phil. & Arn. Ev. 10th ed., 307. See, however, observations thereon. *Id.* If the judge's notes are used their accuracy must, it seems, be proved by a witness who heard the evidence given. *Griffin's Divorce Bill*, (1896) A. C. 133, D. P. As to when this evidence is admissible, see *Effect of depositions and examinations in other suits*, *post*, pp. 201 *et seq.*

*Proof of Proceedings in the Ecclesiastical and Admiralty Courts.*

The minute book of the Consistory Court is said to have been admitted as evidence of a decree for alimony. *Houliston v. Smyth*, 2 C. & P. 25; *semb. acc.* *Leake v. Westmeath*, 2 M. & Rob. 396. And a sentence of separation *à mensâ*, &c., was admitted by Lord Kenyon *dubitavit* without proof of the libel. *Stedman v. Gooch*, 1 Esp. 3. So the sentence of an admiralty court was held evidence of a condemnation without producing the libel and answer, at least if not found, or not unusually filed with it. *Per* Trevor, J., in *Wheeler v. Louth*, Com. Dig. Testm. (C. 1). But it seems questionable whether a sentence in either of these courts is generally admissible without proof of the previous proceedings in the suit. In the *Kingston's (Ds. of) case*, 20 How. Sta. Tri. 377, on objection taken to the reading of a sentence in a jactitation suit without the libel, allegations, and all other proceedings in it, they were all put in evidence. In *Cleeve v. A.-G.*, Somerset Sum. As. 1841, where defendant put in a suit for subtraction of tithe in order to disprove a *modus*, Rolfe, B., required that the depositions, which had been found and were produced with the rest of the proceedings by the registrar, should also be read. In *Leake v. Westmeath*, 2 M. & Rob. 394, Tindal, C.J., refused to admit a decree for alimony to be given in evidence without proof of all the prior proceedings—namely, the libel, answer, and defensive allegations,—and where a decree was affirmed on appeal to the Arches, his lordship required that the process of appeal should be duly proved by a transcript of the proceedings below, in order to make the decree of the Arches court admissible; but he expressed an opinion that the depositions filed need not be produced. The action there was by the attorney of the defendant's wife, who had acted for her in the various proceedings in the matter of her divorce *à mensâ*, &c., and her claim of alimony; and the evidence of the divorce was put in by the plaintiff in order to show that she was living apart justifiably, and so to fix defendant with liability. The plaintiff recovered a verdict subject to a case. This holding seems to be, in part at least, at variance with *Stedman v. Gooch*, *supra*, and perhaps neither case can, under the circumstances, be taken as an authoritative decision. Tindal, C.J., treated the judgment of the ecclesiastical court on the same footing as a decree in Chancery in respect of the evidence of it. See *Phillips v. Crawly*, Freem., 83, 84; *Laybourn v. Crisp*, 4 M. & W. 320, cited *ante*, p. 113.

By 20 & 21 V. c. 85, the Court for Divorce and Matrimonial Causes was established, in which all jurisdiction in such cases was vested, and that of

the Ecclesiastical Courts abolished, except as to granting marriage licences. By sect. 13, this court had a seal, and all decrees and orders, or copies thereof, sealed with it "shall be received in evidence." The language of this section differs from that of the Probate Court Act (20 & 21 V. c. 77), s. 22 (*post*, p. 119), and does not expressly make the seal prove itself, though the courts are bound to notice that the court has a seal. But the 8 & 9 V. c. 113, s. 1 (*ante*, p. 100), seems to render any proof of the seal unnecessary. The proceedings in this court were by petition, citation, and answer; and the decree was recorded in the court book, and may be proved either under the above clause, and, *ut semble*, by the usual proofs of entries in public books, as to which *vide ante*, pp. 96 *et seq.* The jurisdiction of this court has been transferred by the J. Act, 1873, s. 16, to the High Court of Justice, and is assigned by sec. 34 to the Probate, Divorce, and Admiralty Division, but the old forms and proceedings are retained. J. Act, 1875, s. 18.

The jurisdiction of the High Court of Admiralty has also been transferred to the High Court of Justice, and is assigned to the same division. J. Act, 1873, ss. 16, 34.

#### *Proof of Judgments in Inferior Courts.*

The judgment of a county court, court baron, or other inferior jurisdiction, may be proved by the production of the book or rolls, containing the proceedings of the court from the proper custody; and if not made up in form, the minutes of the proceedings will be evidence or an examined copy of them. *R. v. Hains*, Comb. 337; 12 Vin. Ab. (A. b. 267); *Hennell v. Lyon*, 1 B. & A. 182; *R. v. Smith*, 8 B. & C. 341; *Dawson v. Gregory*, 7 Q. B. 756. But this rule does not extend to proceedings of the court of quarter sessions, on the crown side, which is a court of oyer and terminer, and is not an inferior court. *R. v. Smith*, *supra*. As to proof of convictions before that court, *vide ante*, p. 108. In proving the judgment of an inferior court, as the old county court, evidence should also be given of the proceedings previous to judgment. Com. Dig. Testm. (C. 1). See *Fisher v. Lane*, 2 W. Bl. 834; *Thompson v. Blackhurst*, 1 Nev. & M. 266.

By the County Courts Act, 1888 (51 & 52 V. c. 43), s. 28, the registrar's book kept under the Act, or copies of entries in it, bearing the seal of the court, and purporting to be signed and certified as true copies by him, shall be admitted as evidence of the entries and proceedings referred to in them, and of the regularity of the proceedings, without any further proof. The clause does not seem to dispense with proof of the seal; but perhaps this is cured by 8 & 9 V. c. 113, s. 1, *ante*, p. 100, or by 14 & 15 V. c. 99, s. 14, *ante*, p. 101. See further, *Deus v. Riley*, 11 C. B. 434; 20 L. J., C. P. 264; *Harmer v. Bean*, 3 Car. & K. 307.

#### *Proof of Proceedings in Courts of Summary Jurisdiction.*

By the Summary Jurisdiction Act, 1879 (42 & 43 V. c. 49), s. 41, "In a proceeding within the jurisdiction of a court of summary jurisdiction, without prejudice to any other mode of proof, service on a person of any summons, notice, process, or document required or authorized to be served, and the handwriting and seal of any justice of the peace or other officer or person on any warrant, summons, notice, process, or document may be proved by a solemn declaration taken before a justice of the peace, or before a commissioner to administer oaths in the Supreme Court of Judicature, or before a clerk of the peace, or a registrar of a county court; and any declaration purporting to be so taken shall, until the contrary is shown, be sufficient

proof of the statements contained therein, and shall be received in evidence in any court or legal proceeding, without proof of the signature or of the official character of the person or persons taking or signing the same."

As to proof of conviction before justices forming a court of summary jurisdiction, *vide ante*, pp. 108, 109. As to proof of depositions, in proceedings before a justice, *vide post*, p. 883.

*Proof of Probates and Letters of Administration.*

Where the title to personal property under a will is in question, the original will cannot, in general, be read in evidence; but the probate must be produced. *Pinney v. Pinney*, 8 B. & C. 335; *Pinney v. Hunt*, 6 Ch. D. 98. And this rule is now extended to freehold estate belonging to a person dying after Dec. 31st, 1897, *vide post*, p. 145. Probate from a court in the United Kingdom is not necessary to establish the right to receive money payable on a policy of life assurance effected by a person who has died domiciled elsewhere. See 47 & 48 V. c. 62, s. 11, amended by 52 & 53 V. c. 42, s. 19. The probate is sealed with the seal of the court, *vide infra*. But the probate is not the only evidence of the will: for the probate itself, as also letters of administration *cum testamento*, &c., are only certificates that the will has been proved, and other evidence of equal authority can always be obtained; thus the Act Book of the Ecclesiastical Court, containing an entry of the will having been proved and of probate granted to the executors therein named, is admissible evidence of executorship, without accounting for the non-production of the probate. *Cox v. Allingham*, Jacob, 514. An examined copy of the Act Book is also evidence since Act 14 & 15 V. c. 99, s. 14, *ante*, p. 101; *Dorret v. Meux*, 15 C. B. 142; 23 L. J., C. P. 221; and it was so before that Act. See *Davis v. Williams*, *post*, p. 119. And the original will with an indorsement or note at the foot of it by the surrogate and deputy registrar is primary evidence of probate, when no other record of it is kept. *Doe d. Bassett v. Mew*, 7 Ad. & E. 240. See also *Gorton v. Dyson*, 1 B. & B. 219, and *Waite v. Gale*, 2 D. & L. 925.

These cases are put on the ground that the record in the Ecclesiastical Court is primary evidence of the will, and so it would seem that no secondary evidence would be admissible until both the non-production of the probate and the non-production of any other record of the Ecclesiastical Court had been accounted for.

It was said by Holt, C.J., in *Hoe v. Nelthrope*, 3 Salk. 154; S. C. *sub nom. Hoe v. Nathorp*, 1 Ld. Raym. 154, that the copy (of course, examined) of a probate of a will is good evidence, because the probate is an original taken by authority; but this view has not generally been adopted, though it is not altogether inconsistent with principle. Where the probate of a will is admissible in evidence under 20 & 21 V. c. 77, s. 64, *post*, p. 151, in proof of a devise of real estate, a copy stamped with any seal of the Probate Div. of the High Ct., *vide post*, p. 119, is rendered equally admissible by the section.

If the probate be lost, it is not the practice of the Ecclesiastical Court to grant a second probate, but only an exemplification, which will be evidence of the proving of the will. *Shepherd v. Shorthose*, Stra. 412. To prove the probate revoked, an entry of the revocation in the book of the Prerogative Courts is good evidence where no other record is kept. *Ramsbottom's case*, 1 Leach, C. C. 4th ed., 25, n. (b). As to the authority of the probate, and the manner in which it may be impeached in evidence, see *Effect of Probate, &c.*, *post*, pp. 203, 204.

Administration is proved by the production of the letters of administration, or of a certificate of exemplification thereof, granted by the Ecclesiastical Court; *Kempton v. Cross*, Cas. t. Hardw. 108; B. N. P. 246; or, without

producing the letters of administration, by the original book of acts recording the grant of the letters. *Id.*; *Elden v. Keddell*, 8 East, 187. It is said that the seal of the Ecclesiastical Court proves itself, and *Kempton v. Cross*, *ante*, p. 118, is cited in the text books for that purpose; but the case only shows that the act of the Prerogative Court under its seal will be credited by the courts of law; and not that the seal itself requires no proof. It would be a strong thing to require the courts to take notice of the seals of some hundreds of local and limited probate courts which existed in the kingdom. *Vide ante*, p. 79. An examined copy of the Act book, stating the grant of letters of administration to the defendant, is proof of his being administrator, without notice to produce the letters. *Davis v. Williams*, 13 East, 232. See further, *Wms. Exors.*, 10th ed., 1532.

By the Act for establishing the Court of Probate (20 & 21 V. c. 77), s. 22, seals were provided for the court: *i.e.* for the principal and district registries, "and all probates, letters of administration, orders, and other instruments, and exemplifications and copies thereof respectively, purporting to be sealed with any seal of the Court of Probate, shall in all parts of the United Kingdom be received in evidence without further proof thereof." See also sect. 64, *post*, p. 151. The court was a court of record (sect. 23); and its jurisdiction has been transferred to the High Court of Justice by the J. Act, 1873, s. 16, and is assigned by sect. 34 to the Probate, Divorce, and Admiralty Division. See *Pinney v. Hunt*, 6 Ch. D. 98.

#### *Proof of Court Rolls.*

In order to prove the title of a copyholder, the court rolls may be produced without producing the stamped copy; *Doe d. Bennington v. Hall*, 16 East, 208; or they may be proved by examined copies; *Doe v. Cawthorn v. Mee*, 4 B. & Ad. 617; *Breeze v. Hawker*, 14 Sim. 350; but by the Stamp Act, 1891, s. 65 (3), the entry on the court rolls of a surrender or grant is not available as evidence thereof, unless the surrender or grant, if made out of court, or the memorandum thereof, or the copy of court roll, if made in court, is duly stamped; but this is sufficiently proved by a certificate of the steward on the margin of the entry. See further, *sub tit.*, *Stamps, Copyhold and customary estates*, *post*, p. 253, where the cases decided under the former Stamp Acts are collected. The title may also be proved by the stamped copy delivered and signed by the steward. *Co. Litt.* s. 75; *Scriven, Copyh.*, 7th ed., 487; *Peake, Evid.* 94. And where an admittance is more than 30 years old, proof of the signature of the steward is unnecessary. *Ely, Dean and Chapter of v. Stewart*, 2 Atk. 44; *Rowe v. Brenton*, 3 M. & Ry. 296; but see *Somerset, Duke of v. France*, *Fortescue*, 43. Whether court rolls of a manor may be proved by a copy certified by the steward having them in his custody, under stat. 14 & 15 V. c. 99, s. 14, *ante*, p. 101, is open to question. The rolls need not be signed by the steward. *Bridger v. Huett*, 2 F. & F. 35. A surrender and presentment may be proved by the draft of an entry, produced from the muniments of the manor, and the oral testimony of the foreman of the homage jury who made the presentment. *Doe d. Priestley v. Calloway*, 6 B. & C. 484. And such a draft is admissible though there may have been a subsequent regular enrolment. *Id.* 495. And if the original roll be put in, it may be shown to be incorrect by producing the minute of the steward, or by other evidence. *Id.* 491; *Scriven, Copyh.*, 7th ed. 111, 112, 467, 468. Where a surrender was made in 1774, and there was no record of it on the court rolls, the books of the manor containing a record of the admission, which recited the surrender, were received as evidence of the surrender. *R. v. Thruscross*, 1 Ad. & E. 126. As to proof of a recovery in a manor of ancient demesne, see *Green v. Proude*, 1 Vent. 257,

cited *ante*, p. 109. A presentment in a manor book will not be rejected because part of it has been cut off, there being no ground for supposing the mutilation to be fraudulent. *Evans v. Rees*, 10 Ad. & E. 151.

#### *Proof of Proceedings in Bankruptcy.*

The proof of proceedings in bankruptcy is provided by the Bankruptcy Act, 1883, ss. 21 (4), 30 (3), 35 (3), 37 (6), 127 (2), 132, 133, 134, 136, 137, 138, 140. *Id.* 1890, s. 3 (13).

#### *Proof of Foreign Law.*

The courts cannot take cognizance of the laws of foreign states: they must be proved as facts. *Mostyn v. Fabrigas*, Cowp. 174; *Sussex Peerage case*, 11 Cl. & F. 114-117. The laws of Scotland—*Mule v. Roberts*, 3 Esp. 163; *Woodham v. Edwards*, 5 Ad. & E. 771; *R. v. Povey*, *post*, p. 121; of the Channel Islands; *Brenan's case*, 10 Q. B. 492, 498; and of the colonies; *Astley v. Fisher*, 6 C. B. 572; *Wey v. Yally*, 6 Mod. 194; *The Peerless*, Lush. 103; 29 L. J., P. M. & A. 49—fall within this rule; though in an appeal to the House of Lords, that tribunal will take judicial notice of the laws prevailing in each of the three kingdoms; *Cooper v. Cooper*, 13 Ap. Ca. 88, D. P.; *Lyell v. Kennedy*, 14 Ap. Ca. 437, D. P.; and in an appeal from a colonial court, the judicial committee of privy council will take judicial cognizance of the laws of the colonies of Great Britain. As the laws of Ireland are substantially the same as those of England they would probably now be noticed. See *Reynolds v. Fenton*, 3 C. B. 187, 191, *per* Maule, J., explaining *Ferguson v. Mahon*, 11 Ad. & E. 179. By stat. 41 G. 3, c. 90, s. 9, the copy of the statutes of the Kingdom of Ireland, made by the parliament there, printed by the king's printer, shall be received as conclusive evidence of the statutes enacted by the parliament of Ireland, prior to the union, in any court of civil or criminal jurisdiction in Great Britain. As to the manner of proving the ancient Welsh laws, see *A.-G. v. Jones*, 2 H. & C. 347, 354, n.; 33 L. J. Ex. 249, 257, n.

By 28 & 29 V. c. 63, s. 6, a copy certified by the clerk or other proper officer of a legislative body in any colony, of any colonial law assented to by the Governor of the colony or reserved by him for the signification of her Majesty's pleasure shall be *prima facie* evidence that the law has been duly passed, or the bill passed, and presented to the Governor; and the assent or dissent of her Majesty to the bill may be proved *prima facie* by a proclamation purporting to be published by the authority of the Governor in any newspaper in the colony.

It was formerly laid down that the written law of a foreign state should be proved by a copy duly authenticated. *Olegg v. Levy*, 3 Camp. 166; *Picton's case*, 30 How. St. Tr. 491. But this doctrine has been overruled on a trial at bar, in which oral evidence of a foreign advocate was admitted to prove a decree of the National Assembly of France, 1789. *De Bode's case*, 8 Q. B. 208. And in the *Sussex Peerage case*, *supra*, it was held that the law is properly receivable *only* from such oral evidence, although a witness may refresh his own memory from the written law. If he state that any text-book, decision, code, or other legal document truly represents the foreign law, the court may regard such legal document as part of his testimony, and give effect to it accordingly. *Concha v. Murrieta*, 40 Ch. D. 543, 551, 554, following *Bremer v. Freeman*, 10 Moo. P. C. 306. See *De Hart v. Campania*, &c. "*Aurora*," (1903) 2 K. B. 505, 506, *per* Vaughan Williams, L.J. A French vice-consul has been admitted to prove the French written law of marriage by referring to a printed edition of the Cinq Codes, and by his



own testimony; *Lacon v. Higgins*, 3 Stark. 178; Dowl. & Ry. N. P. 38; and a practising advocate attached to the consulate was admitted to prove the French law of bills of exchange. *Trimbey v. Vignier*, 1 N. C. 151.

Foreign law should be proved by witnesses of competent skill; thus a tobacconist was rejected as a witness of the law of Scotland respecting marriage, cited in *R. v. Brampton*, 10 East, 287. See also *R. v. Povey*, Dears. 32; 22 L. J. M. C. 19. But the Jewish marriage law has been allowed *ex necessitate* to be proved by persons in trade, and of inferior station. *Lindo v. Belisario*, 1 Hagg. Con. Rep. 216. And it has since been held that experience as a legal practitioner was in certain cases not necessary, and that a witness who was formerly a merchant and stockbroker in Belgium might be received as competent to inform the court on the law or custom of bills of exchange there; this was decided on the ground that the witness, from the course of his business, had necessarily become acquainted with the Belgian law of bills of exchange. *Vanderdonckt v. Thellusson*, 8 C. B. 812. So a notary public who has had experience in the law of Chili has been allowed to prove that law as to representation on death. *In re Whitelegg*, (1899) P. 267. But a juris-consult, attached to the Prussian consulate, who had no other qualification than having studied law at Leipsig, was held incompetent to prove the stamp law of Cologne on the ground that he had had no practical acquaintance with the law in question. *Bristow v. Sequeville*, 5 Exch. 275; *In re Turner*, (1906) W. N. 27, Keke-wich, J. So the evidence of an English lawyer who has studied the foreign law here was rejected. *In re Bonelli*, 1 P. D. 69. An instrument purporting to be a divorce under the seal of the synagogue at Leghorn, is not admissible without previous proof of the law of the country; *Ganer v. Lanesborough, Ly.*, Peake, 17; but Ld. Kenyon permitted the party divorced to give oral evidence of her divorce at Leghorn, according to the ceremony and custom of the Jews there. S. C. A Roman Catholic vicar-apostolic in England has been admitted to prove the modern marriage law of the church of Rome in Italy. *Sussex Peerage case*, 11 Cl. & F. 114, 117 *et seq.* The competency of the witness to prove foreign law is a question for the court, and the only general rule that can be collected from the reported cases is, that the witness must from his profession or business have had peculiar means of becoming acquainted with that branch of law which he is called to prove; see *Vanderdonckt v. Thellusson*, *supra*; *Wilson v. Wilson*, (1903) P. 157 (Maltese marriage). The evidence of an ex-colonial governor has been admitted to prove the validity of a marriage entered into in the colony. *Cooper-King v. Cooper-King*, (1900) P. 65. So that of the A.-G. of the Isle of Man as to a marriage there. *Roberts v. Brennan*, (1902) P. 143. So that of a Persian Ambassador to prove the Persian law of inheritance. *In re Dost Aly*, 6 P. D. 6. And the certificate of a foreign ambassador under the seal of the legation was held sufficient evidence of the law of the country by which he was accredited. *In re Klingemann*, 3 Sw. & T. 18; 32 L. J., P. M. & A. 16; *In re Prince Oldenburg*, 9 P. D. 234.

By 24 & 25 V. c. 11, the High Court (see J. Act, 1873, s. 16) may remit a case for the opinion of a court in any foreign state with which her Majesty may have made a convention for that purpose; it does not, however, appear that any such convention has yet been made. By 22 & 23 V. c. 63, a case may be stated for the opinion of the superior court of any part of her Majesty's dominions, in order to ascertain the law of that part. A case may be stated thereunder for the opinion of the Court of Session in Scotland. *De Thoren v. A.-G.*, 1 Ap. Ca. 686, D. P.

*Proof of Foreign Judgments.*

A judgment duly verified by a seal proved to be that of the foreign court was presumed to be regular and agreeable to the foreign law until the contrary is shown. *Alivon v. Furnival*, 1 C. M. & R. 277. And now the stat. 11 & 15 V. c. 99, s. 7, cited *ante*, p. 100, provides for the proof of a foreign or colonial judgment, &c., by means of a copy under the seal of the court, or signed by a judge thereof, with a certificate by him that the court has no seal, and proof of the seal or signature of the judge is unnecessary. See the cases decided thereon, *ante*, pp. 100, 101.

By the Judgments Extension Act, 1868 (31 & 32 V. c. 54), s. 1, certificates of Irish judgments for the payment of debt, damages, or costs may be registered in the Central Office of the High Court; see J. Act, 1873, s. 16, and J. (Officers) Act, 1879, s. 5; and the certificate "shall from the date of such registration be of the same force and effect, and all proceedings shall and may be had and taken on such certificate as if the judgment of which it is a certificate had been a judgment originally obtained or entered up on the date of such registration" in the High Court. Sect. 3 makes a similar provision with respect to a Scotch decree, except (sect. 8) one "pronounced in absence in an action proceeding on an arrestment used to found jurisdiction." See *In re Low*, (1894) 1 Ch. 147.

The report of an Irish judge to the Irish court, to be used on an application to set aside the verdict, is evidence in an action between the same parties of what took place at the trial before him and of his decision. *Houstoun v. Slijo, Mqs. of*, 29 Ch. D. 448, C. A. And a shorthand note of the judgment, sworn to by the writer, is admissible to prove the grounds of the judgment. S. C.

*Proof of Entries in Public Books, Postmarks, &c.*

Whenever an original is of a public nature and admissible in evidence as such, an examined copy is, on grounds of public convenience, also admissible. *Lynch v. Clerke*, 3 Salk, 154, *vide ante*, pp. 97, 98. Thus examined copies of the entries in the council book; or of a licence preserved in the Secretary of State's office; *Eyre v. Pulsgrave*, 2 Camp. 606; so of a record deposited in the Land Revenue Office, under 2 W. 4, c. 1, though it be only a rental of a crown grantee, and not a judicial record; *Doe d. William IV. v. Roberts*, 13 M. & W. 520; of entries in the bank books; *Mortimer v. McCallan*, 6 M. & W. 58; of a bank-note filed at the bank; *Man v. Carey*, 3 Salk. 155; of entries in the books of the East India Company; *R. v. Gordon*, 2 Doug. 593; or in the books of the commissioners of land-tax; *R. v. King*, 2 T. R. 234; or of excise; *Fuller v. Fotch*, Car. 346; or in a poll-book at an election; *Mead v. Robinson*, Willes, 424; *Reed v. Lamb*, 6 H. & N. 75; 29 L. J., Ex. 452; or the register of voters; S. C.; or an old book kept in the chapter-house of a dean and chapter, purporting to contain copies of leases; *Coombs v. Coether*, M. & M. 398; *Wakeman v. West*, 7 C. & P. 479, are all good evidence of the originals. The rules of savings banks under 26 & 27 V. c. 87, may be proved by an examined copy, sect. 4. A copy of an old deed contained in one of the books of the Bodleian Library (which the statutes of the university forbid to be removed) was admitted in evidence under the special circumstances (but query if the original would itself have been admissible? *ante*, pp. 102, 103). *Dounes v. Mooreman*, Bunb. 189. A collection of treaties, published by the direction of the American government, is not sufficient to prove a treaty; an examined (or authenticated) copy should be produced. *Richardson*

v. *Anderson*, 1 Camp. 65, n. Early treaties were enrolled in Chancery; more recent treaties are deposited at the State Paper Office. As to how examined copies are made, *vide Proof by examined copy, ante*, p. 98.

The *postmark* on a letter is usually taken as genuine without proof; but, if disputed, it has been doubted whether the person who made it must be called; or whether it may be proved by any postmaster; or by any one in the habit of receiving letters through the same post-office. *Abbey v. Lill*, 5 Bing. 299; *Kent v. Lowen*, 1 Camp. 177; *Arcangelo v. Thompson*, 2 Camp. 620; *Fletcher v. Braddyll*, 3 Stark. 64; *R. v. Plumer*, R. & Ry. 264; *Woodcock v. Houldsworth*, 16 M. & W. 124. Probably it may be verified in any of those ways; and the person who stamped the letter is not likely to recollect that he did so, or to be better qualified to speak of it than any one who happens to be acquainted with the particular post-office mark.

There are various provisions by Act of Parliament for proving instruments in the custody of registrars of public companies, or other public officers, by certified copies. See *Proof by certified copy, ante*, p. 98 *et seq.* Of this kind are the registers of joint-stock and banking companies; as to these, *vide sub tit., Action by and against companies, post*, pp. 1098, 1118, 1130. Evidence of proceedings under the Bankruptcy Acts, 1883, 1890, may be given by office copies which prove themselves.

#### *Proof of Entries in Bankers' Books.*

The Bankers' Books Evidence Act, 1879, 42 & 43 V. c. 11, contains important special provisions relating to the means of proving entries in bankers' books and to their effect in evidence. Its provisions are mainly as follows:—

By sect. 3. "Subject to the provisions of this Act, a copy of any entry in a bankers' book shall in all legal proceedings be received as *prima facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded." The expression "legal proceeding" "includes an arbitration;" sect. 10.

Sect. 3 makes copies of entries in bankers' books evidence of the matters therein recorded even *inter alios*. *Hurdling v. Williams*, 14 Ch. D. 197.

By sect. 4. "A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank. Such proof may be given by a partner or officer of the bank, and may be given orally or by an affidavit sworn before any commissioner or person authorised to take affidavits."

By sect. 5. "A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be further proved that the copy has been examined with the original entry and is correct. Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any commissioner or person authorised to take affidavits."

By sect. 9. "In this Act the expressions 'bank' and 'banker' mean any person, persons, partnership, or company carrying on the business of bankers, and having duly made a return to the Commissioners of Inland Revenue, and also any savings bank certified under the Acts relating to savings banks, and also any post-office savings bank.

"The fact of any such bank having duly made a return to the Commissioners of Inland Revenue may be proved in any legal proceeding by production of a copy of its return verified by the affidavit of a partner or

officer of the bank, or by the production of a copy of a newspaper purporting to contain a copy of such return published by the Commissioners of Inland Revenue; the fact that any such savings bank is certified under the Acts relating to savings banks may be proved by an office or examined copy of its certificate; the fact that any such bank is a post-office savings bank may be proved by a certificate purporting to be under the hand of Her Majesty's Postmaster-General or one of the secretaries" [or the controller or assistant controller, 56 & 57 V. c. 69, s. 6] "of the Post Office.

"Expressions in this Act relating to 'bankers' books' include ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank."

By 45 & 46 V. c. 72, s. 11 (2), the expressions "bank" and "bankers" in the above Act, "shall include any company carrying on the business of bankers to which the provisions of the Companies Acts, 1862 to 1880, are applicable, and having duly furnished to the registrar of joint stock companies a list and summary with the addition specified by this Act, and the fact of such list and summary having been duly furnished may be proved in any legal proceedings by the certificate of the registrar or any assistant registrar for the time being of joint-stock companies." By sect. 11 (1), this list and summary is that specified in the Companies Act, 1862, Part II., and "the addition" is a statement of the names of the places where the company carries on its business.

The Acts apply to a bank L. which has taken over the business and books of the bank H. in which books the entries have been made. *Asylum for Idiots v. Handysides*, 22 T. L. R. 573, C. A. So also to a bank in Scotland. *Kissam v. Link*, (1896) 1 Q. B. 574, C. A.

#### *Proof of Entries in Corporation Books.*

The official acts of a municipal corporation, registered in books, may be proved by production of them. *Thetford case*, 12 Vin. Ab. 90. To make the books evidence, it must appear that they come from the proper custody; as from a chest which has always been in the custody of the clerk of the corporation. S. C.; *Shrewsbury, Mercers of, v. Hart*, 1 C. & P. 114. When the entries in the books are admissible as being of a public nature, examined copies are evidence. *Brocas v. London, Mayor of*, Stra. 307. And where, in order to prove the defendant a freeman, a copy upon stamped paper was produced of a loose paper upon a file, which the witness said was also on a stamp, and was kept with other similar stamped entries on a file among the corporation papers, and it appeared that there was also a book in which the acts of the corporation were kept, and wherein there was an entry more at large of the freeman's admission made when he was originally admitted, but there was no stamp in the book; it was held that the loose paper being the only effectual act, as having the proper stamp, must be looked upon as the proper and original act of the corporation, and that a copy of that was good evidence. *Per Noel, J., R. v. Heat, Peake*, Ev. 92, n. This case seems to turn on the necessity of a stamp. Entries of a private nature, which do not relate to corporate acts, must, if admissible, be produced; and copies of them are not evidence, though long kept among the corporate muniments. *R. v. Gwyn*, 1 Stra. 401. An erasure in the entry in the minute book of a corporation must be presumed to have been made before the entry was signed. *Steeven's Hospital v. Dyer*, 15 Ir. Ch. R. 405. Where entries made in the books of a college were usually attested by the registrar who was a notary public, and signed by him as such, entries not so attested were held inadmissible as evidence of reputation. *Fox v. Bearblock*, 17 Ch. D. 429.

*Proof of Registers of Births, Baptisms, Marriages, Deaths, and Burials.*

Parish registers of baptisms, marriages, and burials may be proved by production of the register itself, or by examined copies. B. N. P. 247. If a copy be produced, it should be shown that the original was in its proper custody; this is regulated by 52 G. 3, c. 146, s. 5, *infra*; it is not sufficient to show that the register was in the custody of the parish clerk. *Doe d. Id. Arundel v. Fowler*, 14 Q. B. 700. In order to prove the register of a marriage it is not necessary to call the attesting witnesses; but, as the register affords no proof of the identity of the parties, some evidence of that fact must be given, as by calling minister, clerk, or attesting witnesses, or others present; or the handwriting of the parties may be proved. *Birt v. Barlow*, 1 Doug. 172. But whatever is sufficient to satisfy the jury as to the identity is good evidence; *Id.* 174; *Hubbard v. Lees*, L. R., 1 Ex. 255; and it seems from the last case that the mere similarity of names is sufficient evidence for the jury, and where the jury are satisfied as to the identity the court will not interfere. See also *La Cloche v. La Cloche*, L. R., 4 P. C. 325, 333, and *R. v. Weaver*, *post*, p. 127. To prove the handwriting of the parties in the register it is not necessary to produce the original register for that purpose, but the witness may speak to the handwriting in it without producing it. *Sayer v. Glossop*, 2 Exch. 409. A photographic likeness may often be used for the purpose of identification; this has been constantly done in actions for divorce (see, however, *Frith v. Frith* (1896), P. 74), and even in criminal trials. Thus where a woman was tried for bigamy, a photograph of her first husband was allowed by Willes, J., to be shown to witnesses present at the first marriage, in order to prove his identity with the person mentioned in the certificate of that marriage. *R. v. Tolson*, 4 F. & F. 103. If a marriage be proved by a person who was present, it is not necessary to prove the registration, or licence, or banns. *Allison's case*, R. & Ry. 109. The register is admissible evidence, although it be shown that the incumbent was accustomed to cause the entries to be made from the information of others, and not from personal knowledge. *Doe d. France v. Andrews*, 15 Q. B. 756.

The Act still in force for the registration of *baptisms* and *burials* by clergy of the Church of England is 52 G. 3, c. 146. It directs that the parish register shall be kept by the clergyman either at his residence or in the church (sect. 5), and provides that verified copies shall be annually sent to the registrar of the diocese (sect. 7). It seems that the latter, being public documents, are evidence as well as the former, and may be proved by examined copies. *Walker v. Beauchamp*, 6 C. & P. 552, *per* Alderson, B.; and see *A.-G. v. Oldham*, cited in Burn on Parish Registers, 209. But *quære* whether the bishop's transcripts, made before that Act, can be used except as secondary evidence? See *Walker v. Beauchamp*, *supra*.

The registration of *marriages* by clergy of the Church of England is now regulated by 6 & 7 W. 4, c. 86. By sect. 31 and schedule, the minister, after solemnizing a marriage, is to register, in two register books, in the form prescribed by the Act, the date, names, age, condition, and rank of the parties, their residence at the time of the marriage, and the names and rank of their fathers; and the entries are to be signed by the minister, the parties married, and two witnesses; by sect. 33, one of these books, when filled, is to be sent to the superintendent registrar, and the other to be kept by the minister with the registers of baptisms and burials. As to proof of these registers by copies, *vide post*, p. 126.

By 27 & 28 V. c. 97, all burials in any burial ground in England are to be registered. By sect. 5 these registers and copies thereof may be used in

evidence of the burials entered therein. By the Cremation Act, 1902, 2 E. 7, c. 8, s. 7, registers of burnings and copies thereof may in like manner be used in evidence.

A burial under the Burial Laws Amendment Act, 1880 (43 & 44 V. c. 41), is by sect. 10 to be certified by the person in charge thereof, to the person who is bound to keep the register, and the latter is to enter the burial therein.

By 3 & 4 V. c. 92, certain non-parochial registers of births, baptisms, deaths, burials, and marriages, transferred to the custody of the Registrar-General, are made admissible in evidence, either by producing them, or by certified extracts from them, after previous notice to the opposite party of the intention to use them. And by 21 & 22 V. c. 25, numerous other non-parochial registers and records of births, deaths, baptisms, burials, and marriages have been since certified to be faithful, and deposited with the Registrar-General, and have become admissible in evidence.

By 42 & 43 V. c. 8, s. 3, where by lawful authority documents such as registers, muster-rolls, and pay lists have been kept, showing deaths, births, and marriages among officers and soldiers, and these or certified extracts thereof have been transmitted to the Registrar-General, they and certified copies thereof shall be admissible in evidence; but (sects. 4, 5) in respect of births, deaths, and marriages in the United Kingdom, only as to those which occurred prior to 1st July, 1879.

The general registration of births, marriages, and deaths is regulated by the 6 & 7 W. 4, c. 86, explained and amended by the 1 V. c. 22. By these Acts district registrars are appointed, whose duties are independent of those belonging to the parochial clergy. Regulations are made for the custody of the register books, and the registrars are directed to learn and register the particulars required to be registered according to the forms in the schedules to the first Act. These particulars comprise in the case of births, the time of birth, name (if any), and sex, the names of the parents, and the condition of the father, and in the case of deaths, the age, sex, and condition of the deceased; and by 1 V. c. 22, the Registrar-General may direct the *place* of birth or death to be added to the register of those facts, and the addition, when so made, shall be taken, to all intents, to be part of the entry in the register.

The stat. 6 & 7 W. 4, c. 86, as above stated, regulates the registration of marriages by clergymen of the Church of England, and it also regulates those by Quakers and Jews. For the particulars required to be registered, *vide ante*, p. 125.

The Act 6 & 7 W. 4, c. 85, for amending the law of marriage, provides for the registration of marriages *solemnized under that Act*, and is also incorporated with the above Act, c. 86, and it, by sect. 44, enacts that the provisions of the Act, c. 86, *ante*, p. 125, relating to the register of marriages, or certified copies thereof, shall extend to marriages under the Act, c. 85. The Marriage Act, 1898, 61 & 62 V. c. 58, ss. 7, 11, provides for the registration of marriages entered into under that Act.

By 6 & 7 W. 4, c. 86, s. 38, it is provided that certified copies of entries, purporting to be sealed with the seal of the Registrar-General's office, shall be "evidence of the *birth, death, or marriage* to which the same relates, without any further or other proof of such entry, and no certified copy purporting to be given in the said office shall be of any force or effect, which is not sealed or stamped as aforesaid." The identity of the party must of course be proved. *Parkinson v. Francis*, 15 Sim. 160. As to this *vide ante*, p. 125. By sect. 35 the registrars, as also all rectors, curates, &c., are bound to give certified copies: it is not expressly provided that these latter certificates shall be evidence without further verification. It has, however, been

held that under 14 & 15 V. c. 99, s. 14, cited *ante*, p. 100, certified copies of parish registers, purporting to be signed by A. B., "incumbent," or "rector," or "vicar," or "curate," without specifying the parish over against the name, or adding, "of the above parish," are admissible without verification; for it will be intended that the incumbent, &c., is incumbent of the parish named in the certificate, and is the officer intrusted with the custody of the original register. *In re Hall's Estate*, 22 L. J., Ch. 177, L. JJ. So, a certificate of birth purporting to be signed by the registrar having the custody of the original register is admissible on its mere production. *R. v. Weaver*, L. R., 2 C. C. 85, and is evidence of the date of the birth. S. C.; *R. v. Cox*, 18 Cox, C. C. 675, *per* Ld. Russell, C.J. *Acc. In re Goodrich*, *cor. Jeune*, P. (1904) P. 138, overruling *In re Wintle*, L. R., 9 Eq. 373, where Romilly, M.R., had held that the certificate was evidence of the fact, *i.e.*, that the birth was prior to the entry, but not of its date. And it would seem that these certificates are evidence of all the facts which the registrar is required to enter therein; see *Huntley v. Donovan*, 15 Q. B. 96, 101, 102, *per cur.*; *Doe d. France v. Andrews*, *Id.*, 756, 759, *per* Erle, J., and *Wigley v. Treasury Solicitor*, *post*, p. 218. Under this section the entries of other registrars besides the Registrar-General may be evidence under certain limitations. Thus the district registrar's certificate is evidence of death. See *Trill v. Kibblewhite*, 10 Jur. 107, Shadwell, V.-C., 1847.

The Births and Deaths Registration Act, 1874 (37 & 38 V. c. 88), which is (by sect. 52) to be read with the earlier Acts relating thereto, by sect. 38, provides that an entry in these registers or a certified copy thereof, "shall not be evidence of such birth or death unless such entry either purports to be signed by some person professing to be the informant, and to be such a person as is required by law at the date of such entry to give to the registrar information concerning such birth or death, or purports to be made on a certificate from the coroner, or in pursuance of the provisions" for the registration of births and deaths at sea, *vide post*, p. 128, and the Interpretation Act, 1889, 52 & 53 V. c. 63, s. 38 (1). The persons required to give notice under these acts are defined as to births in 37 & 38 V. c. 88, ss. 1-8; and as to deaths in *Id.* ss. 9-13. A person "required by law," here includes a person entitled to give information under 6 & 7 W. 4, c. 86, ss. 19, 20, 25. *In re Goodrich*, *supra*.

The registration of a building under 6 & 7 W. 4, c. 85, for the solemnization of marriages under that Act may be proved either by a certified copy under 14 & 15 V. c. 99, s. 14, *ante*, p. 100, or by an examined copy of the register. *R. v. Manwaring*, 1 Dears. & B. 132; 26 L. J., M. C. 10. By stat. 19 & 20 V. c. 119, s. 24, every certified copy or extract sealed or stamped with the seal of the General Register Office, shall be received as evidence of the place of meeting therein mentioned having been, at the time therein stated, duly certified and registered or recorded as by law required, without any further or other proof of the same.

*Baptisms and marriages in Scotland and Ireland.*] Scotch parochial registers of baptism are admissible in evidence. *Lyell v. Kennedy*, 14 Ap. Ca. 437, D. P.

The Act 19 & 20 V. c. 96, s. 1, invalidates every irregular marriage in Scotland contracted after 31st December, 1856, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for 21 days next preceding such marriage. By sect. 2, the registrar of the parish or burgh in which an irregular marriage has been contracted after the said day, is, upon receiving a certain warrant from the sheriff, &c., granted on the joint petition of the parties, to enter the marriage in a register, and a certified copy of such entry signed by the registrar is to be

received in evidence of such marriage, and of such residence or of such previous living 21 days in Scotland, in all courts in the U. K. and dominions thereunto belonging. Such evidence is *prima facie* only and may be rebutted. *Pheysey v. Pheysey*, July 9th, 1906, *cor.* Barnes, P., Times, July 10th, 1906.

The Irish Marriage Act (7 & 8 V. c. 81), amended by and incorporated with 26 & 27 V. c. 27; 33 & 34 V. c. 110, Part II.; and 36 & 37 V. c. 16, provides for the registration of all marriages in Ireland. By 7 & 8 V. c. 81, s. 71, certified copies of entries are given at the register office in Dublin, and these, if purporting to be sealed or stamped with the seal of the office, are made evidence of the marriage to which they relate without any further proof of such entry or of the seal. A marriage in a church of the Protestant Episcopal Church of Ireland, may be proved by a copy of the marriage register, duly certified by the curate of the church, *Whitton v. Whitton*, (1900) P. 178.

*Births, deaths, and marriages in India and the Colonies.*] Books kept among the archives of the East India Co. before the transfer of their supreme powers to the crown, being copies of marriage registers kept at each presidency, and transmitted officially to the company, are evidence of marriages in India, when produced from the proper custody. *Ratcliff v. Ratcliff*, 1 Sw. & Tr. 467; 29 L. J., P. M. & A. 171. So where copies of registers of marriages solemnized since the transfer have been deposited in the India office, an entry therein may be proved by a certified copy, *Westmacott v. Westmacott*, (1899) P. 183. So similar copies of registers of baptism in India are admissible in evidence. *Queen's Proctor v. Fry*, 4 P. D. 230. These registers are deposited at the offices of the Secretary of State for India.

By the 14 & 15 V. c. 40, s. 11, provision was made for the registration of the marriages of persons professing the Christian religion in India, solemnized under that Act before a registrar, and, by sect. 12, duplicates of the register were directed to be transmitted to the secretary to the government in the presidency or place, or place of residence of the registrar, to be kept by him; and in certain instances these duplicates were to be transmitted to the Registrar-General of Births, &c., in England. Sect. 21 enacted, that the Act was not to affect marriages solemnized in India by persons in holy orders, nor Scotch marriages there legalized by stat. 58 G. 3, c. 84, nor other legal marriages there; and the Governor-General was empowered to make laws for the registration of such marriages; and to provide for the transmission of duplicates to the Registrar-General of Births, &c., in England. Sect. 22 provided that certified copies of the certificates delivered under this Act to the Registrar-General, purporting to be sealed or stamped with the seal of the General Register Office, should be received as evidence of the marriage to which they relate, without further proof of such certificate, or of any entry therein. This Act was repealed by the Stat. Law Rev. Act, 1875, with the proviso that such repeal shall not affect "the proof of any past act or thing." These marriages are now regulated by Indian Acts. See Indian Act, No. xv., 1872, ss. 27-37, 54, 55, 59, 62, 80, 81, and *Martin v. Martin*, Times, Dec. 7th, 1898, P. D. *cor.* Barnes, J.

In Australia, Canada, Nova Scotia, the West Indies, and other of the British colonies, Acts of Parliament are in force for the registration of births, marriages, and deaths, and where such is the case the registers may be used in evidence.

*Births, deaths, and marriages at sea.*] By the Merchant Shipping Act, 1894, 57 & 58 V. c. 60, s. 254 (1), masters of ships are required to record in the log-book, or otherwise, the births and deaths taking place on board,



and, by sub-sect. 2, a return is to be made of such record to the Registrar-General of Shipping and Seamen, who (sub-sect. 4) is to send a certified copy of such return to the Registrar-General of Births and Deaths, and this copy is to be filed or copied in "a marine register-book," which is to be deemed to be a certified copy of a register-book within the meaning of the Registration Acts. By sect. 339 these provisions apply to a ship, not British, carrying passengers to or from the United Kingdom. The Births and Deaths Registration Act, 1874 (37 & 38 V. c. 88), s. 37, contains similar provisions for the record of births and deaths happening on board H.M.'s ships.

By 57 & 58 V. c. 60, s. 240, the master of a ship for which an official log-book is required shall enter therein (6) "every marriage taking place on board." As to the admissibility of the entry in evidence, *vide* sect. 239, *post*, p. 130.

By the Foreign Marriage Act, 1892, 55 & 56 V. c. 23, s. 12, marriages under that Act may be solemnized on board one of H.M.'s ships on a foreign station, and with respect thereto (a) the commanding officer of the ship may be authorized to be a marriage officer, and (b) the provisions of the Act *vide infra* shall apply.

*Births, deaths, and marriages abroad.*] Foreign registers of births, baptisms, marriages, and deaths would seem to be admissible as to those matters properly and regularly recorded in them, if proved to have been prepared under official authority. See *Lyell v. Kennedy*, 14 Ap. Ca. 448, 449, *per* Lord Selborne. Thus, in *Abbott v. Abbott*, 29 L. J., P. M. & A. 57, a certificate copied from a register of marriages kept by the *curé* of a parish in Chili, under public authority, was received. In this case the certificate was signed by the *curé*, whose signature and character were verified by the certificate of a notary public, whose character was further certified by the certificates of three other notaries public, their character being in turn verified by the Minister for Foreign Affairs for Chili, and this again by the British consul there. In *Brinkley v. Att.-Gen.*, 15 P. D. 76, a certificate of a marriage in Japan given by the chief secretary, and verified by the Vice-Minister of State, was received, evidence being given that they occupied those offices, and as to the law of marriage there. Registers of births, baptisms, marriages, and burials of British subjects beyond seas, which have been transmitted from different British embassies and factories on the continent of Europe and elsewhere, are now placed in the registry of the Consistory Court of London.

By stat. 42 & 43 V. c. 8, registers kept under Queen's regulations of births, deaths, and marriages occurring out of the United Kingdom, among British officers and soldiers, are to be transmitted to the Registrar-General, and filed or copied in the "Army Register Books," which is to be deemed a certified copy of the register book within the meaning of the Registration Acts. See *Adams v. Adams*, (1900) W. N. 32, H. S., Barnes, J.

By the Foreign Marriage Act, 1892, 55 & 56 V. c. 23, s. 1, marriages between parties, of whom one at least is a British subject, may be solemnized abroad by or before a marriage officer (see sect. 11) at his official house (sect. 8 (2)) in accordance with marriage regulations made by an Order in Council under sect. 21 (*vide post*, p. 130): and he is directed by sect. 9 to make entries of these marriages in duplicate in two register books, and, by sect. 10, to forward a certified copy thereof, and the duplicate register book, when filled, to the Secretary of State, to be by him forwarded to the Registrar-General. By sect. 16 (1) "Any book, notice, or document directed by this act to be kept by the marriage officer or in the archives of his office, shall be of such a public nature as to be admissible in evidence on its mere

production from the custody of the officer. (2) A certificate of a Secretary of State as to any house, office, chapel, or other place being, or being part of, the official house of a British ambassador or consul shall be conclusive." By sect. 17 all the provisions and penalties of stat. 6 & 7 W. 4, c. 86, and the Acts amending the same (*vide* sect. 24) "relating to any registrar, or register of marriages or certified copies thereof, shall extend to every marriage officer, and to the registers of marriages under this act, and to the certified copies thereof (so far as the same are applicable thereto), as if herein re-enacted and in terms made applicable to this act, and as if every marriage officer were a registrar under the said acts." *Vide ante*, p. 126. By sect. 18, "Subject to the marriage regulations" (*vide ante*, p. 129) "a British consul, or person authorized to act as British consul, on being satisfied by personal attendance that a marriage between parties, of whom one at least is a British subject, has been duly solemnized in a foreign country, in accordance with the local law of the country, and on payment of the proper fee, may register the marriage in accordance with the marriage regulations as having been so solemnized, and thereupon this act shall apply as if the marriage had been registered in pursuance of this act, except that nothing in this act shall affect the validity of the marriage so solemnized." An Order in Council of Oct. 28th, 1892, has been made under sect. 21, *ante*, p. 129; see London Gazette, Nov. 4th, 1892, p. 6161. This act repeals the Consular Marriage Acts, 1849, 1868, 12 & 13 V. c. 68, 31 & 32 V. c. 61; the Marriage Act, 1890, 53 & 54 V. c. 47, and the Foreign Marriage Act, 1891, 54 & 55 V. c. 74.

#### *Proof of Merchant Shipping Documents.*

By the Merchant Shipping Act, 1894 (57 & 58 V. c. 60), various provisions are made for the easier proof of documents relating to such shipping. By sect. 64 (2), "The following documents shall be admissible in evidence in manner provided by this act, namely, (a) any register book under this part of this act on its production from the custody of the registrar or other person having the lawful custody thereof; (b) A certificate of registry under this act purporting to be signed by the registrar or other proper officer; (c) An indorsement on a certificate of registry purporting to be signed by the registrar or other proper officer; (d) Every declaration made in pursuance of this part of this act in respect of a British ship. (3) A copy or transcript of the register of British ships kept by the Registrar-General of Shipping and Seamen under the direction of the Board of Trade shall be admissible in evidence in manner provided by this act, and have the same effect to all intents as the original register of which it is a copy or transcript."

Sect. 239 requires official log-books to be kept in a prescribed form, and the entries to be authenticated as therein provided, and by sub-sect. 6 "every entry made in an official log-book in manner provided in this act shall be admissible in evidence." Sect. 240 enacts what events shall be entered therein: these (sub-sect. 6) include marriages, but the record of births and deaths is provided for by sect. 254, *vide ante*, p. 128. By sects. 242, 256, the official log-book is to be sent "to the Registrar-General of Shipping and Seamen, and he shall record and preserve them, and they shall be admissible in evidence in manner provided by this act."

Sect. 310 provides special evidence of the bond given by the master of an emigrant ship. Sect. 694 providing for the proof of documents which the Act requires to be attested, will be found *post*, p. 134. Sect. 695 (1) "Where a document is by this act declared to be admissible in evidence, such document shall, on its production from the proper custody, be admissible in

evidence in any court or before any person having by law or consent of parties authority to receive evidence, and, subject to all just exceptions, shall be evidence of the matters stated therein in pursuance of this act, or by any officer in pursuance of his duties as such officer. (2) A copy of any such document or extract therefrom shall also be so admissible in evidence if proved to be an examined copy or extract, or if it purports to be signed and certified as a true copy or extract by the officer to whose custody the original document was intrusted."

By sect. 719, all documents purporting to be issued or written by direction of the Board of Trade, and to be sealed with the seal of the Board or signed by their secretary or one of their assistant secretaries, or, if a certificate, by one of the officers of the marine department, shall be received in evidence and deemed to be so issued or written without further proof, unless the contrary be shown.

Under sect. 720 the Board issues forms of books, instruments, and papers required by the Act and sealed with its seal or some other distinguishing mark, and (sub-sect. 4) unless so made in such form "shall not be admissible in evidence in any civil proceeding on the part of any owner or master of any ship." By sub-sect. 5 a form purporting to have been so issued, and bearing the seal or mark, is to be taken *prima facie* as in the form required.

In *R. v. Castro*, Q. B. trial at bar, Shorthand Notes, pp. 3033-4, 28 Nov., 1873, crew lists of vessels which had cleared from the custom-house at New York were allowed to be proved by examined copies, without accounting for the non-production of the originals, *vide ante*, pp. 97, 98.

#### *Proof of Corporation Deeds.*

Fixing the common seal is tantamount to delivery. Com. Dig. Fait (A. 3). But if the seal be affixed without the intent that the deed should take effect presently, a subsequent delivery is necessary. *Derby Canal Co. v. Wilmot*, 9 East, 360; *Mowatt v. Castle Steel, &c. Co.*, 34 Ch. D. 58, C. A. See *Staple of England, Mayor of, v. Bank of England*, 21 Q. B. D. 165, 166, *per Wills*, J. The seal must be proved by some one who knows it, but it is not necessary to call a witness who saw it affixed. *Moises v. Thornton*, 8 T. R. 307; *Brounker v. Atkyns*, Skinn. 2. Some corporation seals, as that of London, require no proof. *Doe d. Woodmass v. Mason*, 1 Esp. 53. Not so the seal of the Bank of England; *semb. Doe d. Bank of England v. Chambers*, 4 Ad. & E. 410; nor the seal of any other corporation, unless it be made to prove itself by some statute, or be made admissible by the Act 8 & 9 V. c. 113, s. 1, *ante*, p. 100.

If the seal of a corporation be attached to an instrument, it will be presumed, as against them, to have been regularly attached, and it lies on them to give strict proof to the contrary, so as to exclude such presumption. *Clarke v. Imperial Gas Co.*, 4 B. & Ad. 315. The presumption may, however, be rebutted by evidence. *Anon.*, 12 Mod. 423; *Staple of England, Mayor, &c. of, v. Bank of England*, 21 Q. B. D. 160, C. A. The irregularity, when a defence, might formerly have been shown under *non est factum*. *Hill v. Manchester Waterworks Co.*, 5 B. & Ad. 866; *R. British Bank v. Turquand*, 5 E. & B. 256; *D'Arcy v. Tamar, &c. Ry. Co.*, L. R., 2 Ex. 158. But it would now seem necessary to plead it specially, as the objection would be likely to take the plaintiff by surprise. See Rules, 1883, O. xix. r. 15, *ante*, p. 77. A person who manages the affairs of a trading corporation must of necessity have power to use the corporate seal for those acts he is authorized to perform. *Ex pte. Contract Corporation*, L. R., 3 Ch. 105, 116. As to the power of *de facto* directors to bind their company, see *In re County Life Assurance Co.*, L. R., 5 Ch. 288. See further on this subject, *post*,

Part III., *Actions by and against Companies, &c.* It is not settled whether such a deed proves itself after thirty years. *R. v. Bathwick*, 2 B. & Ad. 639. Lapse of time does not increase the difficulty of proving a corporation seal, which is one, but not the only, reason for dispensing with proof.

As to proof where the deed is attested, *vide post*, p. 132, and as to what constitutes attestation, *vide post*, p. 134. The name of a corporation as stated in a deed must be the same in substance with the true name, but need not be the same in words or syllables. *R. v. Haughley*, 4 B. & Ad. 650, citing *Lynn's (Mayor of) Case*, 10 Rep. 124; *Croydon Hospital v. Farley*, 6 Taunt. 467. And where a municipal corporation which, under 21 & 22 V. c. 98, s. 24, was also the local board of health, entered into a contract under seal as such local board, the corporation was held to be bound. *Andrews v. Ryde, Mayor, &c. of*, L. R., 9 Ex. 302.

Where a question arises as to the effect of two deeds relating to the same subject-matter, both executed on the same day, it must be proved which was in fact executed first; but if there is anything in the deeds themselves to show an intention either that they shall take effect *pari passu*, or even that the later deed shall take effect in priority to the earlier, then the court will presume that the deeds were executed in such order as to give effect to that intention. *Gartside v. Silkstone and Dodworth Coal and Iron Co.*, 21 Ch. D. 762.

#### *Proof of Private Deeds and Writings.*

*Attesting witness, when to be called.*] It was long a settled rule that wherever a deed or other instrument is subscribed by attesting witnesses, one of them at least must be called to prove the execution; and it was held that such testimony could not be dispensed with, though the defendant had admitted the execution in his answer to a bill in Chancery. *Call v. Dunning*, 4 East, 53. Thus a notice to quit, *Doe d. Sykes v. Durnford*, 2 M. & S. 62, or a warrant to distrain, *Higgs v. Dixon*, 2 Stark. 180, if attested, could only be proved by calling the attesting witnesses. This rule was considered of indispensable obligation, and to be "so inflexible, clear, and universal, as not to be set aside by any reasoning, however cogent." Hence, although *Slatterie v. Pooley*, 6 M. & W. 664, had decided that an admission by a party was primary evidence against him of any document and its contents, and although the stat. 14 & 15 V. c. 99, s. 2, had provided that parties to a suit were competent and compellable to give evidence in it, yet it was ruled in *Whyman v. Garth*, 8 Exch. 803; 22 L. J., Ex. 316, that the plaintiff could neither prove the execution of an attested deed by the testimony in open court of the defendant who executed it, nor examine such defendant as to the contents of it. The law has now been partially amended by the Criminal Procedure Act, 1865\* (28 & 29 V. c. 18), ss. 1, 7 (replacing C. L. P. Act, 1854, s. 26), which enacts, that "it shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved as if there had been no attesting witness thereto." But as there are many instruments to which attestation is essential, as wills, instruments under powers, bills of sale, &c., it is still necessary to retain many of the old decisions on the subject, although even in these cases the necessity for calling the attesting witnesses only arises where it is necessary to *prove* the instrument, for the parties against whom any of these instruments requiring attestation are sought to be used may waive the necessity for calling the attesting witness by admissions. Thus, if, in the course of the proceedings in the cause, the party voluntarily

\* Cited for brevity as Crim. P. Act, 1865.

admit the execution, or if by his pleadings he do not require the execution to be proved, there is no necessity for calling the attesting witness. But where *proof* has to be given of attestation, the necessity for calling the attesting witness cannot be avoided by putting the party to the deed, against whom it is sought to be used, into the witness-box, and extracting an admission of the execution from him. *Whyman v. Garth*, *ante*, p. 132.

Where the attesting witness is dead (*Anon.*, 12 Mod. 607), or insane (*Currie v. Child*, 3 Camp. 283), or infamous (*Jones v. Mason*, Stra. 833), or absent in a foreign country, or not amenable to the process of the superior courts (*Prince v. Blackburn*, 2 East, 252), although he might have been examined on interrogatories (*Glubb v. Edwards*, 2 M. & Rob. 300), or where he cannot be found after diligent inquiry (*Spooner v. Payne*, 4 C. B. 328; *Cunliffe v. Sefton*, 2 East, 183);—evidence of the witness's handwriting has always been admissible. A subscribing witness, who has become blind, ought nevertheless to be called in order to learn from him anything material that passed at the execution. *Crank v. Frith*, 2 M. & Rob. 262, *per* Lord Abinger, C.B. *Accord.* *Rees v. Williams*, 1 De G. & Sm. 314. In *Pedler v. Paige*, 1 M. & Rob. 258, Park, J., admitted proof of the handwriting of a blind witness (but with some expression of doubt), on the authority of *Wood v. Drury*, 1 Ld. Raym. 734; but that case is obscurely reported, and if it be an authority for the proposition, it also shows that it would be sufficient to prove his handwriting, though there be another attesting witness who might have been called, which is not the present practice; *vide infra*. It is not sufficient ground for admitting evidence of the witness's handwriting that he is unable to attend from illness, and lies without hope of recovery. *Harrison v. Blades*, 3 Camp. 457. The party interested in his testimony must, in such a case, get a judge's order to examine him out of court.

With regard to the *inquiry* necessary to let in such evidence, it has been held that an inquiry after an attesting witness to a bond at the residence of the obligor and obligee is sufficient. *Cunliffe v. Sefton*, *supra*. So, diligent inquiry at the witness's usual place of residence, and information there and from the witness's father that he had absconded to avoid his creditors. *Crosby v. Percy*, 1 Taunt. 364; *accord.* *Falmouth, El. of, v. Roberts*, 9 M. & W. 469. So, inquiry after the witness at the Admiralty, where it appeared by the last report that he was serving on board a ship in the navy; *Parker v. Hoskins*, 2 Taunt. 223; or proof that the witness went abroad twenty years ago, and has not been heard of since. *Doe d. Johnson v. Johnson*, 1 Phillipp's Ev., 7th ed. 474, n. A witness who was defendant's clerk, being subpoenaed, said he would not attend, and the trial was twice put off in consequence of his absence; search was then made at the defendant's house, and in the neighbourhood, and upon information at the defendant's that the witness was gone to Margate, inquiry was made there without success: held that, under these circumstances, evidence of his handwriting was admissible. *Burt v. Walker*, 4 B. & A. 697; *Spooner v. Payne*, *supra*. Where diligent inquiry had been made without success for a witness, proof of his handwriting was admitted, although it appeared that a letter from him, concealing his retreat, had been received before the trial. *Morgan v. Morgan*, 9 Bing. 359. So, where an attorney's clerk was witness, and the attorney could give no account of him; although afterwards at the trial he recollected where he might perhaps be heard of. *Miller v. Miller*, 2 N. C. 76.

The sufficiency of the inquiry is for the determination of the judge, who will found his opinion on the nature and circumstance of each case. It therefore seems of little importance to collect all the cases that have been decided upon this point. When the court is satisfied that due diligence has been used to find the witness, then it is sufficient to prove his handwriting without proving the handwriting of the party, unless with a view to establish

his identity. *Nelson v. Whittall*, 1 B. & A. 19; *Gough v. Cecil*, C. B., T. T. 24 G. 3; M. S., cited Selw. N. P., 13th ed. 494.

Where the name of a fictitious person is inserted as witness; *Fassel v. Brown*, Peake, 23; or where the subscribing witness denies any knowledge of the execution; *Talbot v. Hodson*, 7 Taunt. 251 (overruling *Phipps v. Parker*, 1 Camp. 412); *Fitzgerald v. Elsee*, 2 Camp. 635; *Boxer v. Rabeth*, Gow, 175; or gives evidence that the document was not duly executed; *Bowman v. Hodgson*, L. R., 1 P. & M. 362; or where the attesting witness subscribes his name without the knowledge or consent of the parties; *M'Crow v. Gentry*, 3 Camp. 232;—in these cases it becomes necessary to prove the instrument by calling some one acquainted with the handwriting of the person executing it, or who was present at the time of execution; or by the admission of the party.

Where there are two attesting witnesses, and one of them is incompetent or his evidence cannot be obtained, the other witness must be called; and evidence of the handwriting of the absent witness will not be sufficient. *Adm. in Cunliffe v. Sefton*, 2 East, 183. But where a bond is attested by two witnesses, and one of them is dead, and the other beyond the reach of the process of the court, proof of the handwriting of either seems to be sufficient. *Adam v. Kerr*, 1 B. & P. 360.

It will not be assumed that a name subscribed to an instrument is necessarily that of an attesting witness; thus, where a deed purported to be "sealed by order of the Governor and Company of the bank, J. Knight, Secretary"—it was held unnecessary to call J. Knight; *Doe d. Bank of England v. Chambers*, 4 Ad. & E. 410; and where the seal of a company was affixed to a deed, and two directors signed their names in the following form:—"Seal of the said Company affixed at the board meeting this [date], in the presence of O., Chairman, C., Director. (Countersigned) D., Sec. pro tem."—it was held that the signatures of O. and C. formed part of the execution of the deed, and that they were not attesting witnesses. *Deffell v. White*, L. R., 2 C. P. 144; following *Shears v. Jacob*, L. R., 1 C. P. 513; see also *Dunn v. Dunn*, L. R., 1 P. & M. 277. The attorney who attested the petition of an insolvent under 5 & 6 V. c. 116, was held not such a witness as need be called to prove it. *Bailey v. Bidwell*, 13 M. & W. 73. But this decision has been considered to proceed on the ground that the petition had been acted upon by the court below and authenticated by its seal, and was put in only to prove the fact of a petition presented; and where the schedule of the insolvent is used to show an admission by him, the attorney who attested the insolvent's signature must be called. *Streeter v. Barlett*, 5 C. B. 562. In *Bailey v. Bidwell*, *supra*, it was considered that where a mere rule of practice of the court required an attesting witness, he need not be called. *Streeter v. Barlett*, *supra*, is *contra* on this point. It will therefore still be a question whether, in such a case, the Crim. P. Act. 1865, s. 7 (*ante*, p. 132), dispenses with calling the attesting witness. Non-compliance with the rule may make the instrument irregular without making it "invalid." The witness must still be called if attestation is requisite to its "validity."

Where an attested agreement was indorsed with subsequent variations, and the plaintiff sued on it as altered, it was held enough to prove the execution of the indorsement, for it formed a new agreement incorporating the old one and dispensing with the necessity of any other proof of it. *Fishmongers' Co. v. Dimsdale*, 6 C. B. 896; 12 C. B. 557; 22 L. J., C. P. 44, Ex. Ch.

The Merchant Shipping Act, 1894 (57 & 58 V. c. 60), s. 694, provides that in the case of documents required by that Act to be attested, they "may be proved by the evidence of any person who is able to bear witness to the requisite facts without calling the attesting witness."

*Execution, how proved.*] Where attestation is necessary to the validity of a writing, the form and nature of it must depend on the provision of the law or other authority which has made it necessary. Unless it be otherwise provided, in attesting a deed, it is not necessary that the witness should see the party sign or seal; if he see him deliver it already signed and sealed, or sealed only where signature is unnecessary, it will be sufficient. Thus proof by the witness that he was not present when the deed was executed, but was afterwards requested by one of several parties to sign the attestation, is sufficient evidence of the execution by such party; *Grellier v. Neale*, Peake, 146; and witnesses may be called to prove the handwriting of the remaining parties, as to whom the deed must be considered as unattested; and sealing and delivery may be presumed. S.C. A general form of attestation must be taken as affirming that all has been done in the presence of the witnesses which is stated in the body of the deed. *Buller v. Birt*, cor. Leach, M.R., cited 4 Ad. & E. 15. It is not necessary for the attesting witness to be able to say whether certain blanks in the deed were filled up at the time of execution, for this will be presumed; and the witness generally sees nothing but the delivery. *England v. Roper*, 1 Stark. 304. See *Doe d. Tatum v. Catomore*, 16 Q. B. 745; 20 L. J., Q. B. 364. Where a bond was executed by the defendant, and attested by a witness in one room, and was then taken into an adjoining room, and at the request of the defendant's attorney, and in the defendant's hearing, was attested by another witness who knew the defendant's handwriting, it was held that the execution might be proved by the latter witness, the whole being considered as one transaction. *Parke v. Mears*, 2 B. & P. 217; and see *Anon.*, Arch. Pl. & Ev., 1st ed. 378. In proving the execution of a deed, the attesting witness frequently states that he does not recollect the fact of the deed being executed in his presence, but that, seeing his own signature to it, he has no doubt that he saw it executed; this has always been received as sufficient proof of the execution. *Per Bayley, J., Maugham v. Hubbard*, 8 B. & C. 16; *per Taunton, J., R. v. S. Martin's, Leicester*, 2 Ad. & E. 213. See *Wright v. Sanderson*, 9 P. D. 149, C. A., cited *post*, p. 149. As to qualified execution, see *Exchange Bank of Yarmouth v. Blethen*, 10 Ap. Ca. 293, J. C. As to the priority of two deeds executed on the same day, *vide ante*, p. 132. The grantee under a deed is not competent to attest the execution thereof by the grantor. *Seal v. Claridge*, 7 Q. B. D. 517, C. A. See *Ex pte. Cullen*, (1891) 2 Q. B. 151.

*Identity of persons signing, &c.*] Some evidence of the identity of the party to the instrument must be given, though very slight evidence will be sufficient. Where the proof of the acceptance of a bill was simply the handwriting of the attesting witness on an acceptance, some evidence of the identity of the defendant and the person whose acceptance is thus proved, was held necessary; *Whitelocke v. Musgrove*, 1 Cr. & M. 511; and it has been thought not sufficient merely to prove that a person calling himself by the same name (which was common in the neighbourhood where the witness saw the signature put) accepted the bill. *Jones v. Jones*, 9 M. & W. 75. Where the witness to a bond stated that he saw it executed by a person who was introduced under the name of *Hawkshaw* (the name of the defendant), but could not identify him, the plaintiff was non-suit. *Parkins v. Hawkshaw*, 2 Stark. 239; *Middleton v. Sandford*, 4 Camp. 34. But where the attestation states the residence of the party, proof that the party sued resided there would be *primâ facie* evidence of identity. See *Whitelocke v. Musgrove*, and *Jones v. Jones*, *supra*; *per Cur.* Thus where the acceptor was described as "C. B. Crawford, East India House," proof that the signature was that of a person of the same name, a clerk of the East India House, was held to be *primâ*

*facie* evidence of identity; *Greenshields v. Crawford*, 9 M. & W. 314; and in *Roden v. Ryle*, and *Sewell v. Evans*, 4 Q. B. 626, it was held that, unless the name is so common as to neutralize the inference of identity, or other facts appear to raise a doubt, identity of name is *primâ facie* enough to charge the defendant. *Accord. Humber v. Roberts*, 7 C. B. 861. See further, *Birt v. Barlow*, and *Hubbard v. Lees*, cited *ante*, p. 125. That the defendant had spoken of the contents of the deed is evidence of identity. *Doe d. Wheddon v. Paul*, 3 C. & P. 613. Where a note was made payable to J. H. and indorsed by a person so named, and there were two persons, father and son, named J. H., it will be presumed that the son was the payee, if the son indorsed it. *Stebbing v. Spicer*, 8 C. B. 827. In an action by an indorsee against the acceptor of a bill, whereof S. was the payee, the plaintiff proved that a person calling himself S. came to the plaintiff's residence with the bill in question and a letter of introduction, proved to be genuine, which was expressed to be given to a person introduced to the writer as S., and also another bill drawn by the writer of that letter. The bearer of these documents, after remaining some days at the plaintiff's residence, indorsed to him the bill in question. This was held to be *primâ facie* evidence of the identity of this person with S. *Bulkeley v. Butler*, 2 B. & C. 434.

[*Sealing and Delivery.*] The sealing of the deed need not take place in the presence of the witness; it is sufficient if the party acknowledge an impression already made. Where one party in the presence of his co-partner executed a deed for both, but there was only one seal, and it did not appear whether the seal had been put twice upon the wax, it was held sufficient; for that no particular mode of delivery was requisite, and it was enough if a party executing a deed treated it as his own. *Ball v. Dunsterville*, 4 T. R. 313. But where a deed is executed under the authority of a power requiring it to be under the *hands and seals* of the parties, the parties must use separate seals. Thus, by stat. 8 & 9 W. 3, c. 30, certificates were required to be under the hands and seals of the overseers and churchwardens; it was held that a certificate signed by two churchwardens and one overseer, but bearing two seals only, was not a valid certificate. *R. v. Austrey*, 6 M. & S. 319. The circumstance of a party writing his name opposite to the seal on an instrument which purports to be sealed and delivered by him, is evidence of a sealing and delivery to go to a jury. *Talbot v. Hodson*, 7 Taunt. 251. So, where the defendant delivers to the plaintiff a deed signed and sealed and expressed to be signed, sealed, and delivered, it will be taken as against the defendant that it has been also delivered. *Xenos v. Wickham*, L. R., 2 H. L. 296. Where a party, A., executes a deed with a blank in it, which is afterwards filled up with his assent in his presence, and he subsequently recognizes the deed as valid, the filling up of the blank will not void it; for, till the blank is duly supplied, it is incomplete and *in fieri*. *Hudson v. Revett*, 5 Bing. 368; *Hall v. Chandless*, 4 Bing. 123. See also *Crediton, Bp. of v. Exeter, Bp. of*, (1905) 2 Ch. 455. It is essential, however, that the instrument, in its complete state, should have been seen by A., or that he should have known the state in which it was when he is taken to have re-delivered it. *Société Générale de Paris v. Tramways Union Co.*, 14 Q. B. D. 424, C. A. affirm. in D. P. *sub nom. Id. v. Walker*, 11 Ap. Ca. 20; *Powell v. L. & Provincial Bank*, (1893) 1 Ch. 610; 2 Ch. 555, C. A. For generally a deed executed in blank and left to be filled by another, who has no authority under seal, is void at law; S. C.; *Hibblewhite v. M'Morine*, 6 M. & W. 200; *Tayler v. Gt. Indian Peninsular Ry. Co.*, 4 De G. & J. 559; 28 L. J. Ch. 709; but if given for good consideration, it may be valid in equity. *In re Queensland Land, &c., Co.*, (1894) 3 Ch. 181. See *Marchant*



v. *Morton Down & Co.*, *infra*. While the deed is still in the hands of the party executing it, another name may be inserted, and it may be re-executed, without avoiding it as to the first parties, or requiring a new stamp. *Spicer v. Burgess*, 1 C. M. & R. 129; and in similar circumstances a clause may be struck out; *Jones v. Jones*, 1 Cr. & M. 721. A deed was executed by a son of the defendant, T. F., thus: "J. W. F. for T. F.;" and the defendant, when subsequently shown the deed so executed, said his son had authority to execute it for him, and that he adopted his son's act; this was held to be a re-delivery by the defendant. *Tupper v. Foulkes*, 9 C. B., N. S. 797; 30 L. J., C. P. 214. A deed executed by a marksman may be proved by a person who has seen the party make his mark, and can speak as to its peculiarities. *George v. Surrey*, M. & M. 516.

When a subscribing witness is dead, proof of the handwriting of such witness is evidence of everything on the face of the paper which imports to be sealed by the party. *Per Buller, J.*, *Adam v. Kerr*, 1 B. & P. 361. And where the "signing and sealing" are alone noticed in the attestation, yet this is evidence of the delivery also. *Semb. Hall v. Bainbridge*, 12 Q. B. 699. Where the party named has acted under the deed, it will be presumed as against him to have been executed by him, although the seal has no signature annexed, nor any attestation; *Cherry v. Heming*, 4 Exch. 631; for signature is not necessary to the execution of a deed, unless it be under a power which requires it; and it also seems that neither wax nor wafer are necessary, and that if a stamped impression be made on the paper in place of a seal as commonly used, it is a sufficient sealing, even under a power which requires a seal. *Sprunge v. Barnard*, 2 Bro. C. C. 585. And it has been held that "to constitute a sealing neither wax nor wafer, nor a piece of paper, nor even an impression is necessary." *In re Sandilands*, L. R., 6 C. P. 411. See also Sugden on Powers, 8th ed. 232. But there must in such case be circumstances from which it may be inferred that the document was in fact sealed. See *National Provincial Bank of England v. Jackson*, 33 Ch. D. 1, C. A.

In the delivery of a deed no particular form is necessary. Throwing it upon a table with the intent that the other party shall take it up, is sufficient. Com. Dig. Fait (A. 3). See *Tupper v. Foulkes*, *supra*.

If the deed after sealing be tendered to the covenantee, and he expressly reject it, and refuse to take any benefit from it, the execution is incomplete. This defence was formerly admissible in evidence under *non est factum*. *Whelpdale's case*, 5 Rep. 119 a; *Xenos v. Wickham*, 13 C. B., N. S. 435; 33 L. J., C. P. 13; Ex. Ch. reversed on another ground; L. R., 2 H. L. 296. It must not, however, be pleaded specially. Rules, 1883, O. xix. r. 15, *ante*, p. 77.

[*Execution under power of attorney or order of court.*] Where a deed is executed by virtue of a power of attorney, the power should be produced; *Johnson v. Mason*, 1 Esp. 89; and proved; 1 Phillipp's Ev., 7th ed. 104, 466. See *In re Airey*, (1897) 1 Ch. 164. In some instances a general agent has been presumed to have such authority. *Doe d. Macleod v. E. London Waterworks*, M. & D. 149. See *Tupper v. Foulkes*, *supra*. But, in general, the agent must be authorized by deed. *Berkeley v. Hardy*, 8 D. & Ry. 102; *Hibblewhite v. M'Morine*; *Powell v. L. and Provincial Bank*, *ante*, p. 136. So must a partner in order to bind his co-partner by deed. *Marchant v. Morton Down & Co.*, (1901) 2 K. B. 829, 832.

By the Conveyancing and Law of Property Act, 1881 (44 & 45 V. c. 41, s. 40, a married woman, whether an infant or not, may, as if she were unmarried and of full age, by deed, appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do. By sect. 46, the donee of a power of attorney, whenever

granted, may execute any instrument thereunder with his own signature and seal. Sect. 47 (1) protects the attorney in respect of acts done by him under the power, notwithstanding its revocation, without his knowledge. By sect. 48 (1, 6), an instrument creating a power of attorney (whenever executed) may, with an affidavit of verification, be deposited in the central office (*vide ante*, p. 97), and (4) "an office copy of an instrument so deposited shall without further proof be sufficient evidence of the contents of the instrument, and of the deposit thereof in the central office." Sufficient evidence is probably equivalent to *prima facie* evidence. See *Barraclough v. Greenhough*, L. R., 2 Q. B. 612, Ex. Ch., cited *post*, p. 151.

A power of attorney is in general revocable by the grantor, *Bromley v. Holland*, 7 Ves. 28; unless executed for valuable consideration, S. C.; or coupled with an interest, *Gaussen v. Morton*, 10 B. & C. 731; but even in this case it is revoked by the death of the grantor. *Watson v. King*, 4 Camp. 272. See further *Frith v. Frith*, (1906), A. C. 254, J. C. Now however by the Conveyancing Act, 1882 (45 & 46 V. c. 39), s. 8, if a power of attorney given after Dec. 31st, 1882 (sect. 8), for valuable consideration is therein expressed to be irrevocable, then, in favour of a purchaser, (i.) the power shall not ever be revoked by the donor, or by his death, &c.; (ii.) any act done by the donee of the power shall not be prejudiced by any act done by the donor, or by his death, &c.; (iii.) neither the donee of the power nor the purchaser shall be affected by notice of anything done by the donor, or by his death, &c. By sect. 9, if such power, given for valuable consideration or not, is therein expressed to be irrevocable for a fixed period not exceeding one year, then, in favour of a purchaser, *during that period*, the above results shall take effect. As to a deed being binding on an agent who executed it as such, as well as on his principal, see *Young v. Schuler*, 11 Q. B. D. 651, C. A., cited *ante*, p. 18.

By the J. Act, 1884, s. 14, when any person neglects or refuses to comply with a judgment or order directing him to execute any document, or to indorse a negotiable instrument, the court may order it to be executed or indorsed by a person nominated by the court, and when so executed or indorsed it "shall operate and be for all purposes available as if it had been executed or indorsed by the person originally directed to execute or indorse it." See *Howarth v. Howarth*, 11 P. D. 95, C. A. In order to prove a deed so executed, it would seem necessary, in an action by or against a third party, to prove the original judgment or order (*vide ante*, pp. 107, 112), the neglect or refusal to comply therewith, the order authorizing execution *vide ante*, pp. 111, 112, and the execution by the nominee of the court. But proof only of the last-mentioned order, and of the execution, would probably be sufficient in an action against the person who failed to execute the deed, brought by the person who obtained that order.

*Signature, whether necessary.—Indenture.*] Signature forms no part of the execution of a deed, but as the Stat. of Frauds, by sects. 1, 3, and 4, requires interests in land to be created, surrendered, or assigned by instrument in writing, and certain contracts to be evidenced by writing, *signed*, the question has arisen whether an unsigned deed satisfies this statute or not. The better opinion now is that the statute operates on parol contracts only, and does not affect deeds; *Shep. Touchst.* by Preston, c. 4, p. 56 (24); *Aveline v. Wlaison*, 4 M. & Gr. 801; *Cherry v. Heming*, 4 Exch. 631, and that therefore an unsigned deed will be good notwithstanding the statute. The opinion of Blackstone was the other way. 2 Bl. Com. 307. A similar question arises under the Sale of Goods Act, 1893, s. 4, *post*, p. 526. By stat. 8 & 9 V. c. 106, s. 5, a deed executed after Oct. 1st, 1845, "purporting to be an indenture, shall have the effect of an indenture, although not actually indented."

*Escrow.*] “Where by express declaration, or from the circumstances, it appears that the delivery of a deed was not intended to be absolute, but that the deed was not to take effect until some contemplated event should have happened, the deed is not a complete deed and perfect deed until that event has happened.” *Kidner v. Keith*, 15 C. B., N. S. 35, 43, *per Williams, J.*; *Bowker v. Burdekin*, 11 M. & W. 128, 147, *per Parke, B.* A condition previously expressed, though not introduced into the act of delivery, is sufficient to make it a delivery as an escrow. *Per Abbott, C.J., Johnson v. Baker*, 4 B. & A. 441; and see *Murray v. Stair, El. of*, 2 B. & C. 82. Where a person delivers a deed in the presence of a witness, but retains it in his own possession, there being nothing to show that it was not intended to operate immediately, it will take effect as a deed and not as an escrow; *Doe d. Garnons v. Knight*, 5 B. & C. 671; *Xenos v. Wickham*, L. R., 2 H. L. 296. The delivery of a deed to a third person for the use of the party in whose favour the deed is executed, has the same effect. *Doe d. Garnons v. Knight, supra.* But the delivery by the grantor of a grant executed by him, to the solicitor of the grantee, may be shown to have been conditional only; *Watkins v. Nash*, L. R., 20 Eq. 262; even although the solicitor be one of several grantees. See *L. Freehold, &c., Co. v. Suffield, Ltd.*, (1897) 2 Ch. 608, C. A. In a case where a debtor executed a mortgage to his creditor unknown to the latter, and kept it 12 years in his own custody till he died, the deed was held valid from the date, in the absence of evidence to show that it was an escrow. *Exton v. Scott*, 6 Sim. 31. Where A. executes an instrument and delivers it to B. as an escrow to be delivered to C. on a certain event, possession by C. is *primâ facie* evidence against A. of the performance of the condition. *Hare v. Horton*, 5 B. & Ad. 715. And delivery to a third person is not essential to a delivery as an escrow. *Gudgen v. Besset*, 6 E. & B. 986. Where the delivery as an *escrow* is proved by a letter sent with the instrument, it is for the court to construe its effect; *aliter* if proved by oral evidence of extrinsic facts. *Furness v. Meeke*, 27 L. J., Ex. 34. The defence that the alleged deed was delivered as an escrow only, on a condition which has not been performed, was formerly raised by the plea of *non est factum*; *Millership v. Brookes*, 5 H. & N. 797; 29 L. J., Ex. 369; but it would now require to be specially pleaded. See Rules, 1883, O. xix. r. 15, *ante*, p. 77.

*Proof of attested deed by secondary evidence.*] It has been sometimes contended that, if the original document has been attested, the attesting witnesses must be called. But where the plaintiff declared on a deed which he averred to be in the possession of the defendant, who pleaded *non est factum*, and at the trial the deed was proved to be in the hands of the defendant, who had been served with notice to produce, it was held, that, on the non-production of the deed, the plaintiff might give oral evidence of the contents without calling the subscribing witness, although his name was known to the plaintiff, and he was actually in court. *Cooke v. Tunswell*, 8 Taunt. 450. So in debt by landlord for double value; plea “no demand”; the plaintiff, having given notice to produce, offered to prove the original demand by a copy in which an attestation had been also copied, and to show that the original was signed by him: held, that the production of the attesting witness (though known to the plaintiff) was unnecessary. *Poole v. Warren*, 8 Ad. & E. 583. So where notice was given to produce a deed in the defendant’s possession, and the defendant at the trial refused to do so, the plaintiff was allowed to prove it by a copy without calling any attesting witness, and it was held that the defendant could not put the plaintiff to a strict proof by afterwards producing the attested original. *Jackson v. Allen*, 3 Stark. 74; *Edmonds v. Challis*, 7 C. B. 413. Where the plaintiff declared on a lost deed, and a witness stated that there were subscribing witnesses,

but he did not know their names, it was ruled by Ld. Kenyon that the plaintiff might recover without calling them. *Keeling v. Ball*, Peake, Ev., App. 82. But he said that "had it appeared who they were, the plaintiff must certainly have called them." If in such a case the witnesses are dead, and the execution by the party to the instrument is proved, it is questionable whether proof of the handwriting of the witnesses is in any case necessary; at all events, if the attesting witness can be identified with a deceased person, this will dispense with further proof of his handwriting; for the only object of such last-mentioned proof is to establish his identity. *R. v. St. Giles's, Camberwell*, 1 E. & B. 642; 22 L. J., M. C. 54.

*Proof and comparison of handwriting.*] The result of the various cases on this head is thus stated by Patteson, J., in *Doe d. Mudd v. Suckermore*, 5 Ad. & E. 730, 731, where references to all the authorities will be found. "That knowledge" [*i.e.*, of handwriting] "may have been acquired either by seeing the party write, in which case it will be stronger or weaker according to the number of times and the periods and other circumstances under which the witness has seen the party write, but it will be sufficient knowledge to admit the evidence of the witness (however little weight may be attached to it in such cases), even if he has seen him write but once, and then merely signing his surname; or the knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers producing further correspondence or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness, which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party; evidence of the identity of the party being of course added *aliunde*, if the witness be not personally acquainted with him."

To prove the handwriting of a member of Parliament, the opinion of a clerk employed to inspect franks, who never had occasion to verify his handwriting, was held insufficient. *Batchelor v. Honeywood*, 2 Esp. 714; *Cary v. Pitt*, Peake, Ev., App. 84. And where an attorney acted on a written retainer, purporting to be signed by A., B., and C., being acquainted with the handwriting of A. and B. only, his testimony to that effect is insufficient to prove the signature of C. *Drew v. Prior*, 5 M. & Gr. 264. A witness cannot be permitted to give his opinion of the handwriting from extrinsic circumstances, such as his knowledge of the party's character and habits. *Da Costa v. Pym*, Peake, Ev. App. 85.

In the case of ancient documents, where it is impossible for any witness to swear that he has seen the party write, it is sufficient if the witness has acquired his knowledge of the handwriting by the inspection of other ancient writings bearing the same signature, and preserved as authentic documents. B. N. P. 236; *Taylor v. Cook*, 8 Price, 652; and see other cases cited, *Doe d. Mudd v. Suckermore*, *supra*; also *Fitzwalter Peerage case*, 10 Cl. & Fin. 193; *Crawford & Lindsay Peerages*, 2 H. L. C. 557. Ancient writings (as a receiver's account 100 years old) may be laid before a witness at the trial for his inspection; and upon his judgment of their character, so formed, his belief as to the handwriting of the document in question may be inquired into. *Doe d. Tilman v. Tarver*, Ry. & M. 143; and see *Roe d. Brune v. Rawlings*, 7 East, 282. A copy of a parish register purporting to be signed by the curate eighty years ago, may be received with no other proof of handwriting than the evidence of the present parish clerk, who

speaks from his having seen the same handwriting attached to other entries in the register. *Doe d. Jenkins v. Davies*, 10 Q. B. 314. In these cases the question often becomes one of skill; the character of the writing varying with the age, and the discrimination of it being assisted by antiquarian study. *Per Coleridge, J., Doe d. Mudd v. Suckermore*, 5 Ad. & E. 718.

It has been a question how far, and under what circumstances, handwriting in *modern* instruments can be proved or disproved by the testimony of a witness, founded on the mere comparison of different signatures. In the case of *Doe d. Mudd v. Suckermore*, *ante*, p. 140, the K. B. judges were equally divided on the question whether, after a witness had sworn to the genuineness of his signature, another witness (a bank inspector) could be called to prove that in his judgment the signature was not genuine, such judgment being solely founded on a comparison pending the trial with other signatures admitted to be those of the witness. It has also been doubted whether a person practised in the examination of handwriting can be called to state his opinion whether a writing is in a feigned or a genuine hand. *Gurney v. Langlands*, 5 B. & A. 330; *Doe d. Mudd v. Suckermore*, 5 Ad. & E. 751. It has, however, been held that, under certain circumstances, the court and jury may be permitted to institute a comparison between documents for the purpose of verifying handwriting when a witness called expressly for that purpose would be rejected. Thus, in *Griffith v. Williams*, 1 C. & J. 47, it was held that the rule as to the comparison of handwriting does not apply to the court or jury, who may compare two documents when they are both properly in evidence. But the documents with which the handwriting is compared must be such as are in evidence for *other* purposes in the cause, and not put in or selected by the party merely for comparison. *Doe d. Perry v. Newton*, 5 Ad. & E. 514, 534; *Griffiths v. Ivery*, 11 Ad. & E. 322. To put such selected documents into the hands of the witness, merely for the purpose of shaking his credit by subsequent independent evidence contradicting his testimony as to those documents, would tend to raise collateral issues. *Hughes v. Rogers*, 8 M. & W. 123. This course has, however, been held admissible where the object was to show that the plaintiff was the author of an anonymous letter, by putting in evidence other letters in which he had misspelt defendant's name in the same way as in the anonymous letter. *Brookes v. Tichborne*, 5 Exch. 929.

Some of the questions discussed above are now disposed of by the Crim. P. Act, 1865, ss. 1, 8 (replacing the C. L. P. Act, 1854, s. 27), which provides, that "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute."

This section allows documents proved to be genuine, but not relevant to the issue, to be put in for the purpose of comparison. *Birch v. Ridgway*, 1 F. & F. 270; *Cresswell v. Jackson*, 2 F. & F. 24. For this purpose the disputed writing must be produced in court; and the section does not therefore apply to documents which are not produced, and of which it is sought to give secondary evidence. *Arbon v. Fussell*, 3 F. & F. 152, *cor. Wilde*, B. Where the question is as to the handwriting of a witness, and the witness in cross-examination was induced to write on a piece of paper, this writing may be used for comparison under the section. *Cobbett v. Kilminster*, 4 F. & F. 490. It may, of course, be a question how far writing so obtained is a fair test of the ordinary handwriting of the witness. If the genuineness of the document sought to be put in is disputed, a collateral question is raised which must first be decided (*Cooper v. Dawson*, 1 F. & F. 550), like all other collateral issues, by the judge. *Bartlett v. Smith*, 11 M. & W. 483;

*Boyle v. Wiseman*, 24 L. J., Ex. 284. It seems that a person may be a witness under this section although he has not acquired his skill in the comparison of handwriting in the course of his business. *R. v. Silverlock*, (1891) 2 Q. B. 766. The evidence of a solicitor who had given study and attention to handwriting, and "had on several occasions professionally compared evidence in handwriting" was admitted. S. C.

*Proof of execution, when dispensed with.*] When a deed is thirty years old, it proves itself, and no evidence of execution is necessary. B. N. P. 255. So, with regard to a steward's books of receipts, without proof of his handwriting, if they come from the proper custody. *Wynne v. Tyrwhitt*, 4 B. & A. 376; private letters, *Doe d. Thomas v. Beynon*, 12 Ad. & E. 431; a will produced by the officer of the Ecclesiastical Court, *Doe d. Howell v. Lloyd*, Peake, Ev., App. 41; a bond, *Chelsea Waterworks Co. v. Cowper*, 1 Esp. 275; and other old writings, *Fry v. Wood*, 1 Selw. N. P., 13th ed. 495, n. Even in cases in which attestation is requisite, and it appears that the attesting witness is alive and able to attend, it is unnecessary to call him where the instrument is thirty years old. *Doe d. Oldham v. Wolley*, 8 B. & C. 22.

But where an old deed is offered in evidence without proof of execution, some account ought to be given of its custody; B. N. P. 255; or it should be shown that possession has accompanied it, at least where it purports to convey something which is the subject-matter of possession. See Gilb. Ev., 6th ed. 89. See *Custody of Ancient Writings*, ante, pp. 102, 103. Whether the custody is suspicious is a question for the judge. *Doe d. Shrewsbury*, El. of, v. *Keeling*, 11 Q. B. 884. It has, indeed, been held sufficient, on an appeal against a removal, for the respondent parish to produce a certificate thirty years old, without showing that it had been kept in the parish chest; *R. v. Ryton*, 5 T. R. 259; and see *R. v. Netherthong*, 2 M. & S. 337; but see on this point, *Evans v. Rees*, 10 Ad. & E. 151, and other cases cited, ante, pp. 102, 103. It was formerly considered that if there were any rasure or interlineation in an old deed, it ought to be proved in a regular manner by the witness, if living, or by proof of his handwriting and that of the party, if dead, in order to obviate the presumption which otherwise arises against the instrument. B. N. P. 255. See the rule as to alterations and interlineations in bills of exchange, *Actions on Bills of Exchange—Defence—Alteration*, post, p. 395. In documents of remote antiquity it is evidently impossible to supply such proof; and, accordingly, in such documents defects of this kind are, in practice, treated only as matter of observation to the jury, unless they are of sufficient importance to warrant the judge in excluding them altogether. *Accord. Roe d. Ld. Kimlestown v. Kemnis*, 9 Cl. & Fin. 774; and *Evans v. Rees*, supra. And the rule now is, that interlineations, &c., in a deed are presumed to have been made before execution. *Doe d. Tatum v. Catmore*, 16 Q. B. 745; 20 L. J., Q. B. 364. It is otherwise in the case of wills. S. C., 16 Q. B. 747; vide post, p. 145.

Where a party, producing a deed upon a notice, claims a beneficial interest under it, it is not necessary for the party calling for the deed to prove the execution of it; for in such a case the defendant, by claiming under it, accredits it as against him, though not to the extent of estopping him. *Pearce v. Hooper*, 3 Taunt. 60. Thus proof was unnecessary where assignees produced the assignment of the bankrupt's effects. *Orr v. Morice*, 3 B. & P. 139. So, in an action by a lessee against the assignee of the lease for breach of a covenant in the original lease, the plaintiff having proved a counterpart of the lease and the defendant having put in the original, it was held unnecessary for the plaintiff to prove the execution of it, though the defendant had assigned over the lease before action. *Burnett v. Lynch*, 5

B. & C. 589. So in an action against the vendor of an estate to recover a deposit on a contract for the purchase, if the defendant on notice produce the contract, the plaintiff need not prove its execution. *Bradshaw v. Bennett*, 1 M. & Rob. 143. And where, in ejectment, the attorney for the lessor of the plaintiff obtained from one of the defendants a subsisting lease of the premises to prevent its being set up by the defendants, it was held that this was a recognition of the lease as a valid instrument; and that, when produced in pursuance of notice from the defendants, it might be read by them without proof of execution, though the attorney had furnished them with the names of the attesting witnesses, and though the plaintiff's title was independent of the lease. *Doe d. Tyndale v. Heming*, 6 B. & C. 28. It is immaterial that the party calling for it denies its validity: as where the defendant produces an assignment of a bankrupt's goods which the plaintiff (trustee of the bankrupt) impugns as fraudulent. *Curr v. Burdiss*, 1 C. M. & R. 782. Where notice was given to defendant to produce a feoffment under which he was in possession of land, the plaintiff proved by secondary evidence (the feoffment not being produced) that it had livery indorsed, and was witnessed; held, that it was unnecessary, as against defendant, to call the witness, or to prove livery. *Doe d. Rowlandson v. Wainwright*, 5 Ad. & E. 520. In an action against a sheriff for taking insufficient pledges in replevin, the replevin bond, produced by the defendant, is admissible in evidence against him, without proof of execution. *Scott v. Waithman*, 3 Stark. 169. So, where the sheriff has assigned it to the plaintiff. *Barnes v. Lucas*, Ry. & M. 264; *Plumer v. Brisco*, 11 Q. B. 46.

Where the party producing the deed does not claim an interest under it, the party calling for it must prove it in the regular manner. *Gordon v. Secretan*, 8 East, 548; *Doe d. Wilkins v. Cleveland, Mqs. of*, 9 B. & C. 864. So, if the party producing it claim an interest in it, but an interest *unconnected with the cause*; as where the action is for commission for procuring an apprentice for defendant, and the instrument produced is the deed of apprenticeship; *Rearden v. Minter*, 5 M. & Gr. 204, 206, *per Cur.* And a party producing at the trial of a cause a deed which has been some months in his possession is not excused from proving the execution, merely because he received such deed from the adverse party who formerly claimed a beneficial interest in it. *Vacher v. Cocks*, 1 B. & Ad. 145. As the principle of the cases is that the party who claims an estate or interest under the instrument in his possession impliedly affirms its due execution, the rule is inapplicable to instruments that merely testify contracts under which no permanent interest passed. Therefore, where defendant wished to show himself to be a partner with A., under whom plaintiff sued, it was held that a contract in the plaintiff's possession to do some works for the firm, produced on notice by the plaintiff, must be proved by the defendant. *Collins v. Bayntun*, 1 Q. B. 117; *Rearden v. Minter*, *supra*.

It seems that when an executor showed payment of a bond under *plene administravit*, he must have proved the bond in the regular way, except, perhaps, in an action on a simple contract. B. N. P. 143. See Part III., *Actions against Executors*, *post*, p. 1161.

A deed may be given in evidence without proof of execution, if its execution or the handwriting of the witness be one of the admissions in the cause (*ante*, pp. 72-4), or admitted on the pleadings (*ante*, pp. 74-5), or if the party be estopped to dispute it, as by recital, &c. (*ante*, p. 75). But the estoppel is confined to the part recited; and if the party wishes to prove more, he must prove it in the usual way. *Gillett v. Abbott*, 7 Ad. & E. 783.

[*Deeds enrolled or registered.*] Where a deed, to the efficacy of which enrolment is essential (as a bargain and sale under 27 H. 8, c. 16), is

accordingly enrolled, proof of the enrolment by an examined copy will dispense with evidence of the execution by any of the parties to the original deed. *Thurle v. Madison*, Styles, 462; *Smartle v. Williams*, 1 Salk. 280. And this is also provided in the case of deeds of bargain and sale, enrolled *and pleaded*, by stat. 10 An. c. 28, s. 3. So where a deed, to which enrolment is not essential, is enrolled on the acknowledgment of one of the parties, to is evidence of execution *against that party*. B. N. P. 255, 256. But it should seem that, unless such enrolment be rendered evidence by force of an Act of Parliament, it will not dispense with proof by a subscribing witness (where a subscribing witness is necessary), or otherwise as the case may be. *Gomersall v. Serle*, 2 Y. & J. 5; *Giles v. Smith*, 1 C. M. & R. 470.

The enrolments in the chancery of Crown grants and the enrolments in the duchy office of leases, &c., of the possessions of the Duchy of Cornwall (and *at semb.* of the Duchy of Lancaster), are primary evidence of the grants, and may be proved by examined copies, or copies otherwise authenticated. See *Roue v. Brenton*, 3 M. & Ry. 218, *ante*, p. 111. An enrolment of a lease in the Land Revenue Office was indeed rejected as evidence of the lease in *Jenkins v. Biddulph*, Ry. & M. 339; but this seems to have turned on the wording of an Act of Parliament. Several statutes have since facilitated the proof of deeds and grants of Crown lands and those of the Royal Duchies; as 2 W. 4, c. 1, s. 26, in respect of lands in the survey of the Office of Woods, &c., which makes the memorandum indorsed on the deed to be proof of the making of it and of the due enrolment, without proof of the officer's signature; so 11 & 12 V. c. 83, s. 6, as to the proof of enrolments in the Duchies of Lancaster and Cornwall.

The official indorsement of enrolment or registration on deeds which are by statute required to be enrolled or registered, is of itself *prima facie* evidence of the enrolment or registration. *Kinnersley v. Orpe*, 1 Doug. 56; *Doe d. Williams v. Lloyd*, 1 M. & Gr. 671; *Grindell v. Brendon*, 6 C. B., N. S. 698; 28 L. J., C. P. 333; *Wuddington v. Roberts*, L. R., 3 Q. B. 579. See *Mason v. Wood*, 1 C. P. D. 63, *ante*, p. 43. The date of enrolment indorsed by the clerk of enrolments is conclusive evidence of the date. *R. v. Hopper*, 3 Price, 495. The memorial of a conveyance registered in a county register is presumed to be correct against those who claim through a person who registered the deed; *Wollaston v. Hakewill*, 3 M. & Gr. 297; but not against other persons; *Hare v. Waring*, 3 M. & W. 379; *per Parke*, B.

#### *Proof of Wills of Personality.*

A will relating to personalty is scarcely ever used in evidence in a court of law, and, therefore, it is rarely necessary to prove it. The probate granted by the proper court is the proper evidence of such a will. See *Proof of Probate*, *ante*, pp. 118, 119. But for the purpose of construing a will, the court will look at the original will, as well as the probate copy. *In re Harrison*, 30 Ch. D. 390, *per* Ld. Esher, M.R., and Baggallay, L.J.

#### *Proof of Wills of Land.*

*Production of the Will.*] At common law, in order to prove a devise of lands, the will itself must be produced, for probate of the will is not even secondary evidence; as the Spiritual Court had no power to authenticate a will *quoad* anything but personalty. *Doe d. Ash v. Calvert*, 2 Camp. 389; B. N. P. 246. But where the will is lost, the register or ledger-book of the Ecclesiastical Court, or an examined copy of it, has been admitted as secondary evidence. B. N. P. 246. It is presumed that in such case the will must have been of personal as well as real estate, otherwise the court would



then have had no jurisdiction to register the will. The same principle applied to the jurisdiction of the Probate Division. *In re Bootle*, L. R., 3 P. & M. 177.

Now, however, by the Land Transfer Act, 1897 (60 & 61 V. c. 65), ss. 1, 2 (1, 2), 25, real estate (other than copyholds and customary freeholds where admission, &c., is required) in the case of a person dying after Dec. 31st, 1897, vests in his executor or administrator as if it were a chattel real; in such case, therefore, the probate, &c., will be the only evidence admissible to prove the will, *vide Proof by Probate, ante*, p. 118. The remainder of this heading as to proof of wills of land applies, therefore, to ordinary freeholds, only in the case of a person dying before Jan. 1st, 1898, and to copyholds and customary freeholds.

A lost will may be proved by a copy otherwise authenticated; *Sly v. Sly*, 2 P. D. 91; or by oral evidence; *Brown v. Brown*, 8 E. & B. 876; 27 L. J., Q. B. 173; see also 2 Camp. 390, n.; even though given by an interested witness; *Sugden v. S. Leonards, Ltd.*, 1 P. D. 154, C. A. It may also be proved by written or oral declarations of the testator made before or after the execution of his will. S. C. Effect has been given to a lost will so far as its contents were proved. S. C. See, however, the observations in *Woodward v. Goulstone*, 11 Ap. Ca. 469, D. P. Such declarations have been held admissible to show what papers constitute the will; *Gould v. Lakes*, 6 P. D. 1. The execution of the will, whether singly or in duplicate, cannot be proved by subsequent declarations of the testator; *Atkinson v. Morris*, (1897) P. 40, C. A.; *Eyre v. Eyre* (1903) P. 131, 137. An interlineation or alteration in a will is presumed to have been made after the execution of it; *Cooper v. Bockett*, 4 Moo. P. C. C. 419; *Doe d. Tatum v. Catmore*, 16 Q. B. 745, 747; *Doe d. Shallcross v. Palmer, Id.* 47; 20 L. J., Q. B. 367; declarations made after execution cannot be used to rebut this presumption. S. C. Secus as to declarations made before execution. = S. C., *In re Sykes*, L. R., 3 P. & M. 26; *Dench v. Dench*, 2 P. D. 60. And in the case of the interlineation of mere words required to complete the sense of the will, if they are written apparently at the same time with the same ink, the presumption that they were inserted after execution is not a necessary one. *In re Culge*, L. R., 1 P. & M. 543. The declarations of the testator made before execution are admissible to support his will, if disputed on the ground of fraud, circumvention, or forgery. *Doe d. Ellis v. Hardy*, 1 M. & Rob. 525; *Doe v. Stevens*, Q. B., E. T., 1849, MS. So they are admissible to impeach the will by proving such fraud; *Doe d. Small v. Allen*, cited *ante*, p. 20.

*Proof of Execution—Statutes.*] The following are the statutory provisions severally relating to the execution of wills before Jan. 1st, 1838, and on and since that date.

By the Stat. of Wills (32 H. 8, c. 1), s. 1, a will of lands was required to be in writing. By the Stat. of Frauds (29 C. 2, c. 3), s. 5, all devises and bequests of any lands or tenements, "shall be in writing and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect." This section is still in force as to wills made before Jan. 1st, 1838.

By the Wills Act (1 V. c. 26), s. 9, "no will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned (that is to say), it shall be signed at the foot or end thereof by the testator or by some other person in his presence, and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses

shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." By sect. 13, "every will executed in manner hereinbefore required shall be valid without any other publication thereof." This Act, by sects. 1, 34, applies to any will, codicil or appointment in exercise of a power made or re-executed, or re-published or revived by any codicil on or after Jan. 1st, 1838.

The signing required by sect. 9 is to be "at the foot or end" of the will. As this provision gave occasion to some very inconvenient decisions upon the precise situation of the signature, it was enacted, by 15 & 16 V. c. 24, s. 1, that the will shall be valid if the signature be so placed at, or after, or following, or under, or beside, or opposite to the end of the will that it shall be apparent that the testator intended to give assent by such signature to the writing signed as his will. But no signature under the Act is to give effect to any disposition which is underneath it, or follows it, or is written after the signature shall be made. By sect. 2, these provisions are in general retroactive.

The following decisions under the Stat. of Frauds, s. 5, *ante*, p. 145, are retained, as being often applicable to the proof of wills made since the Wills Act. Most of the decisions under the Wills Act are collected *post*, p. 147.

*Signing.*] Notwithstanding some earlier cases to the contrary, it is now the better opinion that sealing, without signing, is not a sufficient execution within the Stat. of Frauds. *Smith v. Evans*, 1 Wils. 313; *Wright v. Wakeford*, 17 Ves. 458. It is sufficient under that statute, if the testator sign his name at the beginning of the will. *Lemoigne v. Stanley*, 3 Lev. 1; S. C. Freem. 538. If the will be written on several sheets, and the testator sign some and intend to sign the rest, but do not, this is not a sufficient execution; *Right v. Price*, 1 Doug. 241; *Sweetland v. Sweetland*, 4 Sw. & Tr. 6; 34 L. J., P. M. & A. 42; but where a will, written on three sides of a sheet of paper, concluded by stating that the testator had signed his name to the first two sides and had put his hand and seal to the last, and in fact he had put his hand and seal to the last, but had omitted to sign the two other sides, the execution was held good, the signing of the last sheet showing that the former intention had been abandoned. *Winsor v. Pratt*, 2 B. & B. 650.

Where a codicil was duly executed and attested by three witnesses and written on the same paper with an unexecuted will to which it expressly referred: it was held, that such execution gave effect to the will, and that it thereby became a good will of lands. *Doe d. Williams v. Evans*, 1 Cr. & M. 42; S. C., 3 Tyr. 56. So, a codicil whereby the testator confirms his will, gives validity to an unattested alteration in a devise made after the execution of the will; *Tyler v. Merchant Taylors' Co.*, 15 P. D. 216; and to a testamentary paper purporting to be a devise unattested and unannexed to the will, if distinctly referred to by such codicil. 1 Wms. Exors. 10th ed., pp. 74, 141. See *In re Smith*, 45 Ch. D. 632, and *In re Hay*, (1904) 1 Ch. 317. The existence and identity of such paper must be proved by parol evidence. *In re Heathcote*, 6 P. D. 30. But a codicil may operate as a partial republication only. *Monyppenny v. Bristow*, 2 Russ. & Myl. 117. Where the testator is blind, it is not necessary to read over to him the will in the presence of the attesting witnesses previously to execution. *Longchamp d. Goodfellow v. Fish*, 2 N. R. 415. A signature by mark or initials is sufficient. *Baker v. Dening*, 8 Ad. & E. 94; see *In re Blewitt*, 5 P. D. 116. Where a testator requested another person to sign his will for him, which the other did in his own name, that is sufficient. *In re Clark*, 2 Curt. 329.

Under the Wills Act (1 V. c. 26), s. 9, *ante*, p. 145, the will must be signed at the foot or end thereof; see also 15 & 16 V. c. 24, *supra*.

Where the signature is in the middle of the will, it does not give effect even to the part which precedes it. *Sweetland v. Sweetland*, ante, p. 146; *Margary v. Robinson*, 12 P. D. 8.

*Attestation.*] The Statute of Frauds does not direct that the witnesses shall see the testator sign; therefore, it is enough if the testator acknowledge to the witnesses, either separately or all together, that the will or handwriting is his. *Stonehouse v. Eeelyn*, 3 P. Wms. 254; *Johnson v. Johnson*, 2 Cr. & M. 140. But where the attestation purported that the will had been signed in the presence of the three witnesses who, in his presence and that of each other, signed the attestation, it was held insufficient to call one of them, who stated that he and another saw the testator sign, but that the third, whose signature was proved, was not then present. *Doe v. Lewis*, 7 C. & P. 574. It is sufficient, though the witnesses do not know the paper to be the testator's will. *Wright v. Wright*, 7 Bing. 457. If the witnesses set their marks to the will, it is enough; *Harrison v. Harrison*, 8 Ves. 185; *Harrison v. Elvin*, 3 Q. B. 117; and they may attest it at several times; *Cook v. Parsons*, Prec. in Chanc. 185; but in that case one witness alone will not be able to prove the due execution of the will. The witnesses need not attest every page, but all the will should be in the room at the time of attestation; whether it was so or not is a question for the jury. *Bond v. Seawell*, 3 Burr. 1773; *Lea v. Libb*, 3 Mod. 262. The witnesses must attest and subscribe the will in the presence of the testator; but it is enough if the testator was in such a position that he might see the witnesses attest; as where he was in one room and the witnesses in another, and he might have seen them through a window. *Shires v. Glascock*, 2 Salk. 688. So where the testator was in bed, and the witnesses retired through a short passage into another room, and attested the will opposite to the door, which was open, as well as the door of the testator's room. *Davy v. Smith*, 3 Salk. 395; *Todd v. Winchelsea*, *El. of*, M. & M. 12. So where the testatrix sat in her carriage opposite the window of the attorney's office in which the will was attested. *Casson v. Dade*, 1 Bro. Ch. C. 99. But where the will was attested in an adjoining room, and the jury found that in one part of the room in which the testator was, a person inclining forward with his head out of the door might have seen the witness, but that the testator was not in such a situation, the execution was held invalid. *Doe d. Wright v. Manifold*, 1 M. & S. 294. The test in these cases seems to be "whether the testator might have seen, not whether he did see, the witnesses sign their names." *In re Trimmed*, 11 Jur., N. S. 248, Feb., 1865, per Wilde, J.O. Making a mark is a sufficient subscription. *Doe d. Davies v. Davies*, 9 Q. B. 648. The attesting witnesses may subscribe their names in any part of the will, and not exclusively at the end of it; nor is any *testimonium* clause, or form of attestation necessary. *Roberts v. Phillips*, 4 E. & B. 450; 24 L. J., Q. B. 171. It seems, however, that where there is no such clause to show whether they sign as attesting witnesses there must be extrinsic proof of it. S. C. *per Cur.* And this decision has been applied to the Wills Act. *In re Streetley*, (1891) P. 172.

Under the Wills Act (1 V. c. 26), s. 9, ante, p. 145, the witnesses must both be present at the same time when the signature is made or acknowledged by the testator. And they must attest in the presence of the testator, but not necessarily of each other. *Cooper v. Bockett*, 3 Curt. 659, per Sir H. Jenner Fust; assumed *per Cur.* on appeal, 4 Moo. P. C. C. 419; *Faulds v. Jackson*, 6 Notes of Cas. Suppl. i. (14th June, 1845). In *Case-ment v. Fulton*, 5 Moo. P. C. C. 130 (argued June 17th—19th; judgment 25th July, 1845), it was held on the construction of a similar clause in the corresponding section of the Indian Wills Act (which however omits the

words "shall attest and"), without reference to *Faulds v. Jackson*, ante, p. 147, that the witnesses must also subscribe in the presence of each other. This decision, which was based on the words "such witnesses," has not been followed: see 1 Wms. Exors., 10th ed. 68, n. (s); *Ld. S. Leonards' Handy Book of Property Law*, 8th ed. 244. "In the presence of" means actual visual presence. *Brown v. Skirrow*, (1902) P. 3. See cases cited ante, p. 147. The testator must sign or acknowledge his signature to both witnesses present together, before either of them attests. *Cooper v. Bockett*, supra; *Wyatt v. Berry*, (1893) P. 5; *Hindmarsh v. Charlton*, 8 H. L. C. 160. If a witness sign before the testator an acknowledgment by him of his signature after execution by the testator is insufficient. S. C.; *Moore v. King*, 3 Curt. 243. It is sufficient if the witnesses sign with their initials. *In re Blewitt*, 5 P. D. 116. As no form of attestation is necessary, the mere subscription of two names, without calling themselves witnesses, will be *primâ facie* sufficient. *Bryan v. White*, 2 Rob. Ecc. Rep. 315. An acknowledgment by a testator of his signature previously affixed is sufficient, if the will bearing his signature, visibly apparent on the face of it, be produced to two witnesses present together, and they are asked by him, or in his presence to subscribe the same. *Gaze v. Gaze*, 3 Curt. 451; *In re Ashmore*, *Id.* 756; *Inglesant v. Inglesant*, L. R., 3 P. & M. 172; *Daintree v. Fusulo*, 15 P. D. 67, 102, C. A. But where the witnesses neither see nor have the opportunity of seeing the signature, the acknowledgment is insufficient, even although the testator declares the paper to be his will. *Blake v. Blake*, 7 P. D. 192, C. A. See further, generally as to the signature and attestation requisite under the Wills Act, 1 Wms. Exors., 10th ed. 63 *et seq.*

Where after a will has been duly executed S. signed his name under those of the attesting witnesses, it may be proved that he did not sign for the purpose of attestation. *In re Sharman*, L. R., 1 P. & M. 661; *In re Smith*, 15 P. D. 2.

[*What witness must be called.*] To prove a will of land it is sufficient to call one of the witnesses, if he can speak to all the requisites of attestation. B. N. P. 264; *Longford v. Eyre*, 1 P. Wms. 741; *Belbin v. Skeates*, 1 Sw. & Tr. 148; 27 L. J., P. M. & A. 56; following *Wright v. Doe d. Tatham*, post, p. 148.

It was held that on an issue of Chancery all the witnesses ought to be called. *Bootle v. Blundell*, 19 Ves. 494. Though this was the general rule in cases where the suit was instituted by the devisee to establish the will, yet where the suit was by the heir against the devisee for the purpose of setting aside the will, the devisee was not required to produce all the witnesses. *Tatham v. Wright*, 2 Russ. & Myl. 1. Upon the trial of an ejectment brought by the heir for the recovery of the same lands as those mentioned in the last case, one of the attesting witnesses who proved the will on the issue out of Chancery, having died, the defendant proved his testimony from the shorthand writer's notes, which were held to be sufficient evidence of the execution of the will, though another attesting witness was present at the trial. But the previous proceedings in the Court of Chancery upon which an issue had been found for the devisee, were held not to be in evidence of the execution. *Wright v. Doe d. Tatham*, 1 Ad. & E. 3, Ex. Ch.

[*Proof where the witnesses are dead, or deny their attestation.*] Where the witnesses are dead, this fact and their handwriting should be proved. "Where the attestation clause recites a compliance with all the requisite ceremonies in respect of all the witnesses, it is enough, in order to make a *primâ facie* case, to prove the death of all, and the handwriting of one of them; because it will be presumed that everything the witness thus declared

by his attestation to have been done, was really done." *Andrew v. Motley*, 12 C. B., N. S. 527, 532; 32 L. J., C. P. 128, 130, *per Williams*, J. Though the attestation does not express that the witnesses subscribed the will in the presence of the testator, yet a jury may presume that fact in favour of the will. *Croft v. Pawlett*, Stra. 1109; *Hands v. James*, 2 Comyn, 531; *Doe d. Davies v. Davies*, *Vinnicombe v. Butler*, *infra*. And it seems that a general form of attestation must be taken as affirming that all has been done in the presence of the witnesses which is stated in the body of the instrument. *Buller v. Burt*, *coram Leach*, M.R., cited 4 Ad. & E. 15. The principle of these decisions seems to be fully recognized in *Doe d. Spilsbury v. Burdett*, *Id.* 1; and S. C. in D. P., 6 M. & Gr. 386; 10 Cl. & F. 340 (see this case *infra*). And *In re Pevelev*, (1902) P. 205, the principle was further extended to an informal holograph will to which there was no attestation clause. See also *Wright v. Sanderson*, *infra*.

Even although the witnesses to a will should swear that the will was not duly executed, evidence may be adduced in support of the will. *Lowe v. Jolliffe*, 1 W. Bl. 365; *Bowman v. Hodgson*, L. R., 1 P. & M. 362; see *Wright v. Rogers*, *Id.* 678. Where one witness gives evidence against due execution, the party supporting the will must call the other witness; *Owen v. Williams*, 32 L. J., P. M. & A. 159; *Coles v. Coles*, L. R., 1 P. & M. 70; or account for his absence. See *Pilkington v. Gray*, (1899) A. C. 401, J. C. A will was attested by three witnesses, one (standing second) being a marksman and the other two being dead, the handwriting of these two was proved, but the marksman being produced, recollected nothing of his signature; he was very old, and had known the testator; the will was uncontested for 16 years; held, that the jury might presume the due execution of the will under the circumstances. *Doe d. Davies v. Davies*, 9 Q. B. 648. So although neither of the two witnesses can remember when the testator signed, it may be inferred from the circumstances that he signed before them. *Vinnicombe v. Butler*, 3 Sw. & Tr. 580; 34 L. J., P. M. & A. 18; *Wright v. Sanderson*, 9 P. D. 149, C. A. And in the case of a lost will acted on for 8 years, where no attestation clause was proved, but the names of C. D. and E. F. followed the signature of the testator A. B., due execution was presumed on proof of the deaths of C. D. and E. F., and the handwriting of A. B. and C. D. *Harris v. Knight*, 15 P. D. 170, C. A., *diss.*, Cotton, L.J.

Where two of the witnesses are dead, and the surviving witness charges them with fraud in the attestation of the will, evidence of their good character is admissible. *Doe d. Stephenson v. Walker*, 4 Esp. 50; *Provis v. Reed*, 5 Bing. 435.

[*Proof of wills thirty years old.*] A will 30 years old, coming from the proper custody, will be presumed, in the same way as a deed, to have been duly executed, although it bear some marks of cancellation. *Andrew v. Motley*, *supra*. As to proper custody, see *Custody of ancient writings*, *ante*, pp. 102-3.

In *Doe d. Spilsbury v. Burdett*, *supra*, it was considered by the Q. B. that, where the instrument creating a power requiring it to be executed by will, to be "signed, sealed, and published in the presence of, and attested by three or more credible witnesses," the will, although 30 years old, must bear an attestation that it was regularly executed according to the power (see 4 Ad. & E. 19). But this strictness as to the attestation clause applied only to wills executed under powers; in other cases of wills, as in the case of deeds, the attestation clause was by no means conclusive as to what was done. Even the oral testimony of the attesting witnesses is not so; *Lowe v. Jolliffe*, and *Bowman v. Hodgson*, *supra*; and the decision in *Andrew v. Motley*, *supra*, would be strong to show that the admissibility of

a will 30 years old without proof of execution was not affected by such a defect in the clause of attestation. See further, *post*, p. 152. The execution of powers by will on and since Jan. 1st, 1838, has been much simplified by 1 V. c. 26, s. 10, *post*, p. 152.

Under the old law it was held that 30 years were to be reckoned from the date of the will being executed. *Doe d. Oldham v. Wolley*, 8 B. & C. 22. The fact that under sect. 24, a will, *with reference to the estate comprised therein*, now speaks from the death of the testator would not seem to alter this principle.

*Interested attesting witness.*] Formerly if a will were attested by a person who, or whose wife, or husband took any interest thereunder, the will was void because it could not be proved; this was remedied as to an interested witness himself, by stat. 25 G. 2, c. 6, s. 1, which made such witness competent to prove the will, but avoided the devise to him; sect. 2 made creditors competent witnesses, although the will charged the debts on the real estate. This Act still applies to wills made before Jan. 1st, 1838. As to the competency of the husband of a devisee, see *Hatfield v. Thorp*, 5 B. & A. 589.

By the Wills Act (1 V. c. 26), s. 14, if the attesting witness to a will be incompetent to prove it at the time of execution or afterwards, the will shall not be invalid on that account; and by sect. 15, if the attesting witness, or the wife or husband of the witness, be a beneficial devisee, &c., the devise shall be void, and the witness competent; and by sect. 16, in the case of a will charging real or personal estate with debts, a creditor, or the wife or husband of one, may attest the will, and prove its execution; and by sect. 17, the executor is admissible to prove the execution, or the validity or invalidity of a will. This Act, by sects. 1, 34, applies to all wills made or re-executed on or after Jan. 1st, 1838.

A devise to an attesting witness is void though there are three other attesting witnesses. *Doe d. Taylor v. Mills*, 1 M. & Rob. 288. Where a will attested by A. contains a devise to A. and is confirmed by a codicil not attested by A., the devise is good, for the codicil incorporates the will, and they form one instrument. *Anderson v. Anderson*, L. R., 13 Eq. 381. And the benefit is not lost by A. having attested a second codicil which confirmed the will and first codicil. *In re Trotter*, (1899) 1 Ch. 764. The marriage, after attestation, of the attesting witness to a devisee does not affect the devise. *Thorpe v. Bestwick*, 6 Q. B. D. 311.

The Act for making interested witnesses competent (6 & 7 V. c. 85), provides that it shall not affect the new Wills Act; but the Statute of Frauds is not referred to in it.

*Proof by probate.*] Under the Land Transfer Act, 1897, *ante*, p. 145, the probate is the evidence by which the will of a person dying after Dec. 31st, 1897, is proved in the case of freeholds. In the case of persons dying before Jan. 1st, 1898, and in the case of copyhold and customary freeholds, it is also admissible in evidence under the Probate Court Act (20 & 21 V. c. 77), which after providing by sect. 61, that where a will affecting real estate is proved in solemn form, or is the subject of any contentious proceeding, the heir and persons interested in the real estate shall be cited, enacts by sect. 62, that "where probate of such will is granted after such proof in solemn form, or where the validity of the will is otherwise declared by the decree or order in such contentious cause or matter as aforesaid, the probate, decree, or order respectively shall enure for the benefit of all persons interested in the real estate affected by such will, and the probate copy of such will, or the letters of administration with such will annexed, or a copy thereof

respectively, stamped with the seal of her Majesty's Court of Probate" (*vide infra*), "shall in all courts, and in all suits and proceedings affecting real estate of whatever tenure (save proceedings by way of appeal under this Act, or for the revocation of such probate or administration), be received as conclusive evidence of the validity and contents of such will, in like manner as a probate is received in evidence in matters relating to the personal estate; and where probate is refused or revoked on the ground of the invalidity of the will, or the invalidity of the will is otherwise declared by decree or order under this Act, such decree or order shall enure for the benefit of the heir-at-law, or other persons against whose interest in real estate such will might operate, and such will shall not be received in evidence in any suit or proceeding in relation to real estate, save in any proceeding by way of appeal from such decrees or orders." Sect. 63 provides, "that the probate, decree, or order of the court shall not in any case affect the heir or any person in respect of his interest in real estate, unless such heir or person has been cited or made party to the proceedings, or derives title under or through a person so cited or made party." The heir B. is bound by the judgment in a probate action in which the will was established, though B. was a party as next-of-kin only. *Beardsley v. Beardsley*, (1899) 1 Q. B. 746.

By sect. 64, in any action "where, according to the existing law, it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, it shall be lawful for the party intending to establish in proof such devise or other testamentary disposition, to give to the opposite party, ten days at least before the trial or other proceeding in which the said proof shall be intended to be adduced, notice that he intends at the said trial or other proceeding to give in evidence, as proof of the devise or other testamentary disposition, the probate of the said will, or the letters of administration with the will annexed, or a copy thereof stamped with any seal of the Court of Probate" (*vide infra*); "and in every such case such probate or letters of administration, or copy thereof respectively, stamped as aforesaid, shall be sufficient evidence of such will, and of its validity and contents, notwithstanding the same may not have been proved in solemn form, or have been otherwise declared valid in a contentious cause or matter, as herein provided, unless the party receiving such notice shall, within four days after such receipt, give notice that he disputes the validity of such devise or other testamentary disposition." By sect. 65, "In every case in which, in any such action or suit, the original will shall be produced and proved, it shall be lawful for the court or judge before whom such evidence shall be given, to direct by which of the parties the costs thereof shall be paid."

The jurisdiction of the Court of Probate is now transferred by the J. Act, 1873, s. 16, to the High Court of Justice, and is by sect. 34 assigned to the Probate, Divorce, and Admiralty Division. Probates are therefore now sealed with the seal of that division.

If the party receiving the ten days' notice under the above section give the four days' counter-notice that he disputes the validity of the devise, the probate will not be admissible in evidence; but if he do not give the counter-notice, he may nevertheless at the trial dispute the validity of the will, for "sufficient evidence" here means only *prima facie* evidence. *Barracrough v. Greenhough*, L. R., 2 Q. B. 612, Ex. Ch. *Seem*, that the notice should be given to the solicitor of the opposite party. S. C. Where the notice has not been given under the Act the judge may adjourn the cause to allow of the notice being given or to allow proof of the will *per testes*. See *Hilliard v. Eiffe*, L. R., 7 H. L. 39, 49, *per* Ld. Cairns, C.

## Proof of Execution of Powers.

As a general rule, all the circumstances required by the creator of a power, however otherwise unimportant, must be observed, and cannot be satisfied but by a strict and literal performance. *Per* Ld. Ellenborough, C.J., *Hawkins v. Kemp*, 3 East, 440. And when the power directs *attestation* and other formalities the attestation must notice the compliance with the formalities. Thus where it was to be executed "by any deed or writing under the *hands* and seals of the parties, to be by them duly executed in the presence of, and *attested* by two or more witnesses;" it was held that as the attestation stated only a sealing and delivery, and omitted the *signing*, the power was not duly executed; *Doe d. Mansfield v. Peach*, 2 M. & S. 576; and a subsequent correct attestation, indorsed upon the instrument after the death of one of the parties, would not remedy the defect; S. C.; *Wright v. Wakeford*, 2 Taunt. 214. So if the power is to be executed by an appointment to be signed and *published* in the presence of, and attested by two witnesses, and the attestation omits to mention the publication. *Moodie v. Reid*, 7 Taunt. 355. But where the attestation mentioned "delivery," this has been held equivalent to publication. *Ward v. Swift*, 1 Cr. & M. 171.

The cases above referred to assume, however, rather than expressly decide, that, if the attestation be deficient, the deficiency cannot be supplied by evidence *aliunde* that the formalities were all gone through. But this is directly contrary to the law in the analogous case of formalities required by statute; and perhaps after the language of Ld. Lyndhurst, in *Burdett v. Doe d. Spilsbury*, 6 M. & Gr. 461, and of Ld. Campbell, *Id.*, pp. 468 *et seq.*, it will be held, if the question should arise, that the attestation clause is not conclusive. Indeed, Ld. Campbell, in *Newton v. Ricketts*, 9 H. L. C. 262; 31 L. J., Ch. 247, says that the *ratio decidendi*, in *Burdett v. Doe d. Spilsbury*, *supra*, was that such extrinsic evidence might be given. This was certainly not so. But still this expression of opinion gives to the view under discussion the full weight of Ld. Campbell's authority. On the other hand we have, in *Burdett v. Doe d. Spilsbury*, *supra*, Ld. Brougham's express refusal to overrule the cases which lay down the very strict rule requiring all the formalities to be noticed in the attestation. See 6 M. & Gr. 465.

When the instrument creating the power does not require attestation, an informal or imperfect one will not invalidate. *Sugd. Pow.* 8th ed., 235, 247. The defect of omitting to state in the attestation the signing of the instrument was cured by stat. 54 G. 3, c. 168, with regard to powers *theretofore* executed; but the Act was only retrospective. Leases defectively executed under powers may now be confirmed by acceptance of rent under the circumstances provided for in statutes 12 & 13 V. c. 26, and 13 & 14 V. c. 17.

The Wills Act, 1 V. c. 26, abrogated the necessity of following the formalities prescribed by the donor of a power to be exercised by a will or appointment in the nature of a will; for it provides (sect. 10) that "no appointment *made by will*, in exercise of any power, shall be valid, unless the same be executed in manner *hereinbefore required*; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity." Hence the execution of wills in virtue of powers must hereafter conform to the regulations pointed out in sect. 9, *ante*, p. 145. A will executed with only the formalities prescribed in this section will not satisfy the condition of a power to be exercised



“by any instrument in writing to be by her signed, sealed and delivered in the presence of and attested by two or more credible witnesses.” *Taylor v. Meads*, 4 D. J. & S. 597; 34 L. J., Ch. 203. Such a power is, however, satisfied by a will expressed to be “signed, sealed, acknowledged, and declared” in the presence of the attesting witnesses. *Smith v. Adkins*, L. R., 14 Eq. 402.

The stat. 22 & 23 V. c. 35, provides a like remedy for the relief of donees of powers to be exercised otherwise than by will; for by sect. 12, a deed executed after Aug. 13th, 1859, in the presence of and attested by two or more witnesses in the ordinary manner, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or instrument in writing not testamentary, although some other execution, attestation, or solemnity may have been prescribed by the donor; provided that this shall not dispense with any requirement prescribed by him other than the manner of execution or attestation, nor prevent the donee from executing the power in the manner prescribed by the donor.

There is, however, a notable difference between this and the Act relating to wills under powers, viz., that a will under a power *must* conform to the provisions of 1 V. c. 26, whereas an appointment made since 22 & 23 V. c. 35, may be executed in the manner prescribed either by that Act or by the donor of the power. The last Act is retrospective so far as regards the instrument creating the power.

#### *Proof of Awards.*

As to proof of awards generally, *vide Action on an award, post*, p. 498.

As to proof of awards made by commissioners under Inclosure Acts, &c., it is provided by 3 & 4 W. 4, c. 87, s. 2, that the original award, or a copy of the enrolment signed by the proper officer of the court or the clerk of the peace or his deputy, and purporting to be a true copy, shall be admitted in all courts as legal evidence; see also sect. 4, as to the production of the award in evidence. In a collateral proceeding in which it may be necessary to give it in evidence, it will be presumed that the award has been regularly made, and that the commissioners were duly qualified, and had given the proper notices, &c.: but this presumption may be rebutted: *R. v. Haslingfield*, 2 M. & S. 559; *Doe d. Nanny v. Gore*, 2 M. & W. 320; *acc. Williams v. Eyton*, 2 H. & N. 771; 27 L. J., Ex. 176; 4 H. & N. 357; 28 L. J., Ex. 146, Ex. Ch.; and excess of authority may be shown; *Wingfield v. Tharp*, 10 B. & C. 785. Awards made under 6 & 7 W. 4, c. 115, or 3 & 4 V. c. 31, are, by sect. 1 of the last Act, made conclusive evidence of a compliance with all the provisions of those Acts, and of all necessary consents, and no other evidence of title under the inclosure shall be requisite.

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#### ORAL PROOF BY WITNESSES.

THE J. Act, 1875, s. 20, provides that “nothing in this Act or in the first schedule hereto, or in any rules of court to be made under this Act, save as far as relates to the power of the court for special reasons to allow depositions or affidavits to be read, shall affect the mode of giving evidence by the oral examination of witnesses in trials by jury or the rules of evidence, or the law relating to jurymen or juries.” By Rules, 1883, O. xxxvii. r. 1, “In the absence of any agreement in writing between the solicitors of all

parties, and subject to these rules, the witnesses at the trial of any action or at any assessment of damages shall be examined *vivâ voce* and in open court;” but the court or a judge may in certain cases allow depositions or affidavits to be used, *vide post*, pp. 185 *et seq.* The J. (Procedure) Act, 1894 (57 & 58 V. c. 16), s. 3, “declared that the power to make rules conferred by the Judicature Acts, 1873 to 1891, includes power to make rules for regulating the means by which particular facts may be proved, and the mode in which evidence thereof may be given”—(b) “on any application upon summons for directions pursuant to such rules.” Under this power the following rule was made August, 1894, O. xxx. r. 7: “On the hearing of the summons, the court or a judge may order that evidence of any particular fact, to be specified in the order, shall be given by statement on oath of information and belief, or by production of documents or entries in books, or by copies of documents or entries or otherwise, as the court or judge may direct.”

#### Attendance of Witnesses.

*Subpœnâ, service of—Expenses.*] The process to compel the attendance of witnesses is the writ of *subpœnâ ad testificandum*. *Edgell v. Curling*, 7 M. & Gr. 958. This writ will now, by stat. 17 & 18 V. c. 34, s. 1, issue out of the superior courts into any part of the United Kingdom on the special order of the court or judge. It is, however, provided by sects. 5 and 6, that this provision is not to affect the power of the court to issue commissions to examine, or to affect the admissibility of evidence heretofore admissible by reason of a witness being beyond the jurisdiction:—in other words, Scotland and Ireland are still, for these last-mentioned purposes, to be regarded as out of the jurisdiction of the superior courts of England. By 52 & 53 V. c. 49, s. 18, the power is extended to *subpœnâ* a witness to appear before a referee or arbitrator. Either the writ, or a copy of it, must be personally served on the witness; and where a copy only is delivered, the original must be shown whether the witness require it or not; otherwise he cannot be attached. *Wadsworth v. Marshall*, 1 Cr. & M. 87. It must be served so as to give witnesses “reasonable time to put their own affairs in such order that their attendance may be with as little prejudice to themselves as possible.” *Hammond v. Stewart*, Stra. 510. But urgent domestic business is no excuse for disobedience. *Goff v. Mills*, 2 D. & L. 23. Notice to a witness in London at two in the afternoon, requiring him to attend the sittings at Westminster in the course of the same evening is too short. S. C. But where a person is present in or attending near the court, service on the day of trial may be sufficient under the circumstances. *Maunsell v. Ainsworth*, 8 Dowl. 869. Whether the service be sufficient is for the judge, not the jury. *Barber v. Wood*, 2 M. & Rob. 172. If the cause be made a *remanet*, the *subpœnâ* must be re-sealed and re-served. *Sydenham v. Rand*, 3 Doug. 429. Though the writ only requires attendance on the commission day, the witness must attend for the whole assizes till the cause comes on. *Scholes v. Hilton*, 10 M. & W. 15.

A witness in a civil suit is not bound to attend unless the reasonable expenses of going to and returning from the place of trial, and of his stay there, are tendered to him at the time of serving the *subpœnâ*; nor, if he appears, is he bound to give evidence before such expenses are paid or tendered. *Chapman v. Paynton*, 13 East, 16, n. The reasonableness depends on the situation and circumstances of the witness; *Dixon v. Lee*, 1 C. M. & R. 645; *Vice v. Anson*, Ly., M. & M. 96; and where a witness has already been paid by one side, this may be taken into account when he is *subpœnâ*d by the other side. *Betteley v. M'Leod*, 3 N. C. 405. Within the bills of mortality the usual tender is one shilling in a town

cause. Tidd. Prac. 9th ed. 806. Where a witness has come to and stayed at the assizes on subpœna without requiring payment, he may refuse to appear till payment of the expense of returning. *Newton v. Harland*, 1 M. & Gr. 956. A witness subpœnaed to give evidence on a matter of personal opinion or professional skill, and not to depose to the facts of the case, may insist on being paid compensation for loss of time before he is examined. *Webb v. Puge*, 1 Car. & K. 23, cor. Maule, B. And it seems that any witness is now entitled to be paid for his expenses and loss of time before giving evidence. *In re Working Men's Mutual Society*, 21 Ch. D. 831. *Sed quære*, whether he had not waived his right in that case, by allowing himself to be sworn before payment?

A party who is a necessary or (*ut semb.*) a material witness in his own cause, and who attends the trial only for that reason, may be entitled to his expenses like any other witness; *Hoves v. Barber*, 18 Q. B. 588; 21 L. J., Q. B. 254; *Dowdell v. Australian Mail Co.*, 3 E. & B. 902; 23 L. J., Q. B. 369; but if about to attend on his own account, he is not entitled to conduct money when subpœnaed by the other side. *Reed v. Fairless*, 3 F. & F. 958.

Before the jury was sworn, the counsel of the party may have an absent witness called on his subpœna; *Hopper v. Smith*, M. & M. 115. This course, when adopted by the plaintiff, avoids the additional expenses of an adverse verdict and judgment, and of an application for a new trial, if the judge will allow the plaintiff to withdraw the record (*vide post*, pp. 156, 291); *Mullett v. Hunt*, 1 Cr. & M. 752. But it is not absolutely necessary to call a witness on his subpœna in order to entitle the party to proceed against him. *Lamont v. Crook*, 6 M. & W. 615; *Goff v. Mills*, 2 D. & L. 23.

By the Bankers' Books Evidence Act, 1879 (42 & 43 V. c. 11), s. 6, a banker or officer of a bank is not, in any legal proceedings to which the bank is not a party, compellable to appear as a witness to prove the matters and accounts recorded in the banker's books, unless by order of a judge made for special cause. For definitions, see sect. 9, *ante*, p. 123.

*Habeas corpus.*] If the witness be in custody, his attendance must be produced by a writ of *habeas corpus ad testificandum*; or by warrant or order under 16 & 17 V. c. 30, or 61 & 62 V. c. 41, *infra*. A judge may award a writ of *habeas corpus* to bring up a prisoner from any gaol or prison in which he is confined under civil process for the purpose of giving evidence at the trial. Tidd. Prac. 9th ed. 809. A *habeas corpus* also lies to bring a witness from a lunatic asylum, on an affidavit that he is fit for examination and not dangerous. *Fennell v. Tuit*, 1 C. M. & R. 584. By 16 & 17 V. c. 30, s. 9, a judge may issue a warrant or order to bring up any prisoner, not confined on civil process, to be examined as a witness, and this shall have the same effect as a *hab. corp. ad test.* By 52 & 53 V. c. 49, s. 18 (2), the court or a judge may issue a *hab. corp. ad test.* to bring up a prisoner for examination before a referee or arbitrator. By 61 & 62 V. c. 41, s. 11, a secretary of state may, by writing under his hand, order a prisoner to be taken to any place required in the interest of justice, or for the purpose of any public inquiry.

*Protection from arrest.*] During the time consumed by a witness in going to the place of trial, in his attendance there, and in his return, he is protected from arrest on civil process; even though he has consented to attend without a subpœna. *Arding v. Flower*, 8 T. R. 536. As to what is civil process against a solicitor, see *In re Freston*, 11 Q. B. D. 545, C. A., and *In re Dudley*, 12 Q. B. D. 44, C. A.

*Absence of material witness.*] In some cases an application on affidavit

may be made to put off the trial on account of the absence of a material witness. An application to put off the trial beyond the existing sittings, or from sittings to sittings, was not generally allowed on the part of the plaintiff; because he might at any time withdraw the record if he was not prepared to try. *Per* Ld. Ellenborough, *Ansley v. Birch*, 3 Camp. 333. As now, however, by Rules, 1883, O. xxvi. r. 1, *post*, p. 291, a plaintiff cannot withdraw the record without the leave of the court or a judge, this reason fails, and these applications on the part of plaintiffs are more frequent than they were prior to that rule. And where, from the sudden indisposition of a witness who might be able to attend in the course of a day or two, or for other temporary reason, the plaintiff was prevented from trying his cause in its order in the paper, yet had ground to believe he should be able to try it before the sittings were over, a judge at N. P. would make an order for the trial to stand over till the witness was likely to attend. And a similar order was made if it appeared that the absence of the witness was owing to the conduct of the defendant's attorney. *Tarquand v. Dawson*, 1 C. M. & R. 709. When a motion is about to be made to a judge at N. P. for putting off the trial on account of the absence of a witness, notice should first be given to the opposite solicitor, with a copy of the affidavit intended to be used in support thereof. Where expenses have been incurred by the other party in bringing up witnesses, the application will only be granted on the terms of paying them. No affidavit of merit is required. *Att.-Gen. v. Hull*, 2 Dowl. 111; *Hill v. Prosser*, 3 Dowl. 704. The affidavit may be made by the party, or by his solicitor; *Duberly v. Gunning*, Peake, 97; or by the solicitor's clerk, if he have the management of the cause. *Sullivan v. Magill*, 1 H. Bl. 637. A common form of affidavit for this purpose will be found in the APPENDIX, *post*, p. 1228.

*Production of documents under subpoena duces tecum.*] Documents brought into court by a witness served with a writ of *subpoena duces tecum* are produced by him to the court only, and he may insist that they should not be handed to the parties; the court may order the document to be read if it be relevant. *Burchard v. Macfarlane*, (1891) 2 Q. B. 241, 247, 248, *per* Ld. Esher, M.R. The witness is bound to bring into court any document proved to be in his possession, though he may have a valid excuse for not showing it in evidence; and the validity of the excuse is matter for the judgment of the court, and not of the witness. *Amey v. Long*, 9 East, 473.

The court will excuse production if the disclosure would subject the party to a criminal charge or penalty; *Whitaker v. Izod*, 2 Taunt. 115; but not unless the party from whom disclosure is sought will pledge his oath that to the best of his belief the production would tend to criminate him. *Webb v. East*, 5 Ex. D. 108, C. A. It seems, however, that production will not be enforced in an action for penalties. *Hunnings v. Williamson*, 10 Q. B. 459, 462. An action for liquidated sums, recoverable for infringement of dramatic copyright, is not within this exception. See *Adams v. Batley*; *Cole v. Francis*, 18 Q. B. D. 625, C. A.

With the above exceptions, no document relevant to the issue, not being a title deed (as to which *vide post*, p. 157), is privileged from disclosure, unless it be a confidential communication professionally made between counsel or solicitor and client, or information obtained by the solicitor, or an agent employed by him, or by the client on his recommendation. *Bustros v. White*, 1 Q. B. D. 423, C. A.; *Anderson v. Bank of British Columbia*, 2 Ch. D. 664, C. A.; *M'Corquodale v. Bell*, 1 C. P. D. 471; *Friend v. L. Chatham & Dover Ry. Co.*, 2 Ex. D. 437, C. A.; *Lyell v. Kennedy*, 27 Ch. D. 1, C. A. Information voluntarily given by a third person to the solicitor is privileged. *Young v. Holloway*, 12 D. P. 167, C. A. So it seems is the proof of a

witness's evidence which the solicitor has prepared for insertion in counsel's brief. *Per Bovill, C.J., Tichborne v. Lushington*, 23 Feb., 1872, shorthand notes, pp. 5101, 5102, cited 1 Taylor Evid. 10th ed. § 932, p. 662, n. So, information obtained by the client for the purpose of obtaining the opinion of the solicitor thereon, and although the purpose was not carried out. *Southwark & Vauxhall Water Co. v. Quick*, 3 Q. B. D. 315, C. A. See also *Bristol, Mayor, &c. of, v. Cox*, 26 Ch. D. 678, and *Learoyd v. Halifax, &c. Banking Co.*, (1893) 1 Ch. 686. The privilege is not confined to the action in respect of which the communication was made. *Pearce v. Foster*, 15 Q. B. D. 114; *Calcraft v. Guest*, (1898) 1 Q. B. 759, C. A.

Professional communications of a confidential character between solicitor and client for the purpose of getting legal advice are privileged; *O'Shea v. Wood*, (1891) P. 286, C. A.; even though made before any litigation was in contemplation; *Minet v. Morgan*, L. R., 8 Ch. 361; *Lowden v. Blakey*, 23 Q. B. D. 332; but communications obtained by the solicitor from third persons are not privileged unless prepared confidentially after a dispute had arisen for the purpose of obtaining information, evidence, or legal advice with reference to litigation existing or contemplated between the parties. *Wheeler v. Le Marchant*, 17 Ch. D. 675, C. A. The transcript of a shorthand note of evidence and arguments taken at a reference (*Rawstone v. Preston Cor.*, 30 Ch. D. 116) or of proceedings in open court (*Nicholls v. Jones*, 2 H. & M. 588; *In re Fletcher*, 38 Ch. D. 370) is not privileged, even although the note be taken by the party's solicitor. *Id.* 373, *per North, J.* In *Nordon v. Defries*, 8 Q. B. D. 508, where such transcript was held privileged, *Nicholls v. Jones*, *supra*, was not cited. *Vide* 38 Ch. D. 372, 373. The privilege as to documents is not lost by their being referred to in depositions which are not privileged. *Goldstone v. Williams*, (1899) 1 Ch. 47. See further, *post*, pp. 169 *et seq.*

A party will not be compelled to produce his title deeds. *Pickering v. Noyes*, 1 B. & C. 263. But he must pledge his oath that, to the best of his belief (*Minet v. Morgan*, *supra*), they relate solely to his own title and not to the case of the other party, nor do they tend to support it, or the deeds will not be privileged. See *Budden v. Wilkinson*, (1893) 2 Q. B. 432, C. A., following *Ind v. Emmerson*, 12 Ap. Ca. 300, 307, *per* Ld. Selborne; *Morris v. Edwards*, 15 Ap. Ca. 309, D. P. It is not however necessary to state further, that the deeds do not tend to impeach his own title. S. CC.; *A.-G. v. Newcastle-upon-Tyne Cor.* (1899) 2 Q. B. 378, C. A. A solicitor will not be compelled to produce his client's title deed. *Harris v. Hill*, 3 Stark. 140. So a defendant cannot compel the production of deeds of the plaintiff by serving a subpoena on his steward in whose possession they are; for his possession is that of his employer; *Falmouth, El. of v. Moss*, 11 Price, 455; and see *Crowther v. Appleby*, L. R., 9 C. P. 23; nor can a clerk in a public office be compelled to bring official papers without leave of the principal; *Austin v. Evans*, 2 M. & Gr. 430. An attorney was not obliged by subpoena to disclose a deed of the defendant, his client, though he had been improperly compelled by commissioners of bankrupt (under whom the plaintiff claimed) to undertake to produce it. *Nixon v. Mayo*, 1 M & Rob. 76.

The solicitor must produce the documents of a client in his possession which the client would himself be bound to produce. *Doe d. Courtail v. Thomas*, 9 B. & C. 288; *Bursill v. Tanner*, 16 Q. B. D. 1, C. A. So in an action by a *cestui que trust* against her trustee, a communication made by the defendant to an attorney relating to the matter of the trust was, on the ground that the real interest was in the plaintiff, held to be not privileged. *Shcan v. Philips*, 1 F. & F. 449, Erle, J. See also *In re Mason*, 22 Ch. D. 609; *In re Postlethwaite*, 35 Ch. D. 722. Where an attorney had received

from his client, a former rector (who was also patron), a book to collect tithes by and also a map of the glebe, with a view to a sale of the advowson: in an action by the succeeding incumbent (who was presentee of the purchaser of the advowson) for land claimed as glebe, it was held that the attorney might be called upon to produce both, as evidence against him. *Doe d. Marriott v. Hertford, Mqs. of*, 19 L. J., Q. B. 526. Where an attorney, employed by a client, B., to negotiate an exchange of land with A., which went off, obtained an abstract of title from A., he might produce it in a suit by A., for recovery of the land from a defendant claiming under A.'s ancestor, as secondary evidence against the plaintiff of the original deeds, although he had not had B.'s permission. *Doe d. Ld. Egremont v. Langdon*, 12 Q. B. 711. The attorney and steward of the lord of a borough was held bound to produce certain presentments and precepts touching the appointment of officers in the borough, as being of a public nature. *R. v. Woodley*, 1 M. & Rob. 390. In an action by a reversioner to recover the land, the executor of the previous tenant for life is bound to produce a steward's book of his testator showing receipt of rent for the land, in order to prove the plaintiff's title; and it is immaterial that the witness is interested in defeating the action. *Doe d. El. of Egremont v. Date*, 3 Q. B. 609. A mortgagor could not, after the mortgage had become absolute, compel the production, by the mortgagee, of the title deeds of the mortgaged property, without payment of principal, interest, and costs. *Chichester, El. of, v. Donegall, Mqs. of, L. R.*, 5 Ch. 497. But this rule is now altered as to mortgages made after Dec. 31st, 1881, by the Conveyancing, &c., Act, 1881 (44 & 45 V. c. 41), s. 16, which entitles a mortgagor to inspect and make copies of the deeds, so long as his right to redeem exists.

Where the witness declines to produce an instrument on the ground of professional confidence, the judge should not inspect it to see whether it was one which he ought to withhold; *Doe d. Carter v. James*, 2 M. & Rob. 47; *Volant v. Soyer*, 13 C. B. 231; 22 L. J., C. P. 83; and it seems that the mere assertion on oath by the solicitor that it is a title deed or other privileged document, is conclusive. S. C. And if the document be brought into court by a witness, who says that he is instructed by the owner to object to the production of it, this is enough to justify secondary proof without subpoenaing the owner himself to make the objection in person. *Phelps v. Prew*, 3 E. & B. 430; 23 L. J., Q. B. 140. It seems to be sufficient if one only of several interested parties object. *Per Maule, J., Newton v. Chaplin*, 19 L. J., C. P. 374. See also *Kearsley v. Phillips*, 10 Q. B. D. 465, C. A. When the production is excused, secondary evidence is admissible. *Marston v. Downes*, 1 Ad. & E. 31; *Doe d. Gilbert v. Ross*, 7 M. & W. 102. See other cases cited, *ante*, p. 5. An attorney who was allowed to withhold a title deed of his client, was obliged to show another witness, who produced a copy of a deed which he believed to be the deed withheld, the indorsement on the outside of the original, so as to enable him to identify it with the one copied. *Phelps v. Prew, supra*. If the solicitor produce his client's deed without objection, the evidence is admissible; see *Hibberd v. Knight*, 2 Exch. 11. And the verdict will not, it seems, be endangered by the reception of it; for it is the privilege of the witness and not of the party in the action to withhold it. *Phelps v. Prew, supra*. The witness is not entitled to have his liability to produce argued by counsel. *Doe d. Rowcliffe v. Egremont, El. of*, 2 M. & Rob. 386. As to the non-production of documents on the ground of their being official communications or in the hands of a public officer, *vide post*, p. 173.

A person merely subpoenaed to produce, and not to testify, need not be sworn. *Perry v. Gibson*, 1 Ad. & E. 48. And if sworn by mistake, he is not liable to cross-examination. *Rush v. Smith*, 1 C. M. & R. 94.

By Rules, 1883, O. lxi. r. 28, "No affidavit or record of the court shall be taken out of the central office without the order of a judge or master, and no *subpœna* for the production of any such document shall be issued." Nor in any action to which the bank is not a party, can a banker, except by judge's order, be compelled to produce any of his books the contents of which can be proved under the Bankers' Books Evidence Act, 1879 (42 & 43 V. c. 11), *ante*, pp. 123-4; sect. 6.

## EXAMINATION OF WITNESSES.

*Ordering witnesses out of court.*] During a trial the court will, on the application of either of the parties, order all the witnesses in the cause, except the one under examination, to go out of court. But if the solicitor in the cause be a witness, he will, in general, be suffered to remain, his assistance being necessary to the proper conduct of the cause. *Pomeroy v. Baddeley*, Ry. & M. 430. This, however, is a matter entirely for the discretion of the judge. If the witness remain after being ordered to withdraw, it will not necessarily prevent his being examined; *Parker v. M'William*, 6 Bing. 683; *R. v. Colley*, M. & M. 329; and the better opinion is that, although the witness may be fined for disobedience, the judge cannot refuse to hear him under such circumstances; *Chandler v. Horne*, 2 M. & Rob. 423; *Cobbett v. Hudson*, 1 E. & B. 14; except in Exchequer causes, where the witness is peremptorily excluded on trials between the Crown and a subject. *A.-G. v. Bulpit*, 9 Price, 4; *Parker v. M'William*, *supra*. It is not the practice to order either of the parties out of court so long as their conduct there is unobjectionable. *Charnock v. Dewings*, 3 Car. & K. 378. But as a party can now be a witness, as such he is perhaps liable to be ordered out of court. See *Outram v. Outram*, (1877) W. N. 75, Malins, V.-C. As, however, a party may conduct his own cause in court, examine his witnesses, and give evidence as one himself (*Cobbett v. Hudson*, 1 E. & B. 11; 22 L. J., Q. B. 11), it follows that the party in such a case has a right to remain in court.

*Oath of witness.*] By the common law of England every witness must be sworn according to some religious ceremony or other, and if it be dispensed with, it can only be by the authority of an Act of Parliament. *Maden v. Catanach*, 7 H. & N. 360; 31 L. J., Ex. 118, *per* Pollock, C.B. There is, however, no prescribed form of oath; it is to be that which the witness himself declares to be binding upon his conscience, and he is always allowed to adopt the ceremonies of his own religion. 1 Phill. & Arn. Ev., 10th ed. 14; *Omichund v. Barker*, Willes, 547; 1 Smith's L. C.; *Atcheson v. Everitt*, Cowp. 382; *Miller v. Salomons*, 7 Exch. 534, 558; 21 L. J., Ex. 186, 196, *per* Alderson, B., and Pollock, C.B.

A Christian witness has from time immemorial been sworn by "a corporall oath," so called "because he toucheth with his hand some part of Holy Scripture;" 3 Inst. 165. The usual ceremony is now as follows: he takes a copy of the Holy Gospels or of the whole of the New Testament into his *naked* right hand, and the officer of the court whose duty it is to administer the oath addresses him thus: "The evidence which you shall give between the parties shall be the truth, the whole truth, and nothing but the truth, so help you God;" and the witness then kisses the book. Strong objection has of late years been made to this modern addition of kissing the book, not mentioned by Coke, *vide supra*, on sanitary grounds. See Best Ev., 10th ed. § 162. Now, by the Oaths Act, 1888 (51 & 52 V. c. 46), s. 5, "If any person to whom an oath is administered desires to swear with uplifted hand, in the

form and manner in which an oath is usually administered in Scotland, he shall be permitted so to do, and the oath shall be administered to him in such form and manner without further question." A witness who stated that he believed both the Old and New Testament to be the word of God, yet, as the latter prohibited, and the former countenanced, swearing, he wished to be sworn on the former, was permitted to be so sworn. *Edmonds v. Rowe*, Ry. & M. 77. In Ireland it is the practice to swear a Roman Catholic witness upon a copy of the Douay Version of the New Testament, if he so request.

A Jew is sworn upon the Pentateuch, with his head covered; 2 Hale, P. C. 279; *Omichund v. Barker*, Willes, 543; the wording of the oath being changed from "God" to "Jehovah." But a Jew who stated that he professed Christianity, but had never been baptized, nor had even formally renounced Judaism, was allowed to be sworn on the New Testament. *R. v. Gilham*, 1 Esp. 285. A Mahomedan is sworn on the Koran. The form in *R. v. Morgan*, 1 Leach, C. C. 54, was as follows: the witness first placed his right hand flat upon the book, put the other hand to his forehead, and brought the top of his forehead down to the book, and touched it with his head. He then looked for some time upon it, and being asked what effect that ceremony was to produce, he answered that he was bound by it to speak the truth. The deposition of a Gentoo (*i.e.*, Hindoo) has been received, who touched with his hand the foot of a Brahmin. *Omichund v. Barker*, 1 Atk. 21.

By stat. 1 & 2 V. c. 105, s. 1, "in all cases in which an oath may lawfully be and shall have been administered to any person, either as a jurymen or a witness, or a deponent in any proceeding, civil or criminal, in any court of law or equity in the United Kingdom, . . . or on any occasion whatever, such person is bound by the oath administered, provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding." Under this Act, Buddhists have been sworn by "the three Holy Existences—Buddha, Dhamma and Pro Sangha, and the Devotees of the twenty-two firmaments;" and a Parsee on the *Zend-Avesta*, or by binding a "Holy Cord" round his body. *Encycl. of the Laws of England, title, Oath* 251. A Chinaman is thus sworn: on entering the box the witness immediately kneels down, and a china saucer having been placed in his hand, he breaks it; the officer of the court then addresses him thus: "You shall tell the truth, and the whole truth; the saucer is cracked, and if you do not tell the truth, your soul will be cracked like the saucer." *R. v. Entrehman*, 1 Car. & M. 248. If the witness do not understand the English language he must of course be addressed through an interpreter.

A witness may be asked whether he considers the form of administering the oath to be such as will be binding on his conscience. The proper time for asking him this question is before the oath is administered; but as it may happen that the oath may be administered in the usual form, by the officer, before the attention of the court, or party, or counsel, is directed to it, the objection is not, in such a case, to be precluded; but the witness may nevertheless be afterwards asked whether he considers the oath he has taken as binding upon his conscience. If he answer in the affirmative, he cannot then be further asked whether there be any other mode of swearing more binding upon his conscience. *The Queen's case*, 2 B. & B. 284. So, where a Jew was sworn on the Gospels as a Christian, it was held that the oath, as taken, was binding on the witness, both as a religious and moral obligation. *Sells v. Hoare*, 3 B. & B. 232; S. C., 7 B. Moore, 36.

By the Oaths Act, 1888, s. 3, "where an oath has been duly administered and taken, the fact that the person to whom the same was administered had, at the time of taking such oath, no religious belief, shall not for any purpose effect the validity of such oath," *vide post*, p. 161.



*Affirmation in lieu of oath.*] Formerly it was considered necessary, in all cases, that an oath, that is, a direct appeal to a divine power, should be made by the witness. Numerous sects have, however, arisen, the members of which allege conscientious objections to take an oath. In order to prevent the difficulty which arose from certain classes of the community being thus rendered unavailable as witnesses, various statutes have, from time to time, been passed, exempting such persons from the necessity of taking an oath, and allowing them to substitute a solemn affirmation in its stead. Thus, by the 3 & 4 W. 4, c. 49, s. 1 (extending the provisions of 9 G. 4, c. 32, s. 1), Quakers and Moravians are permitted, whenever an oath is required, instead of taking an oath, to make an affirmation or declaration in the words following:—"I, A. B., being one of the people called Quakers (or one of the persuasion of the people called Quakers, or of the united brethren called Moravians, as the case may be), do solemnly, sincerely, and truly declare and affirm." And by 1 & 2 V. c. 77, any person who has been a Quaker or a Moravian may affirm in lieu of taking an oath, as fully as if he still remained such, in the following form:—"I, A. B., having been one of the people called Quakers (or one of the persuasion of the people called Quakers, or of the united brethren called Moravians, as the case may be), and entertaining conscientious objections to the taking of an oath, do solemnly, sincerely, and truly declare and affirm."

It is now provided generally by the Oaths Act, 1888 (51 & 52 V. c. 46), s. 1 (replacing the C. L. P. Act, 1854, s. 20), that "Every person upon objecting to being sworn, and stating as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath." Sect. 2. "Every such affirmation shall be as follows:—'I, A. B., do solemnly, sincerely, and truly declare and affirm,' and then proceed with the words of the oath prescribed by law, omitting any words of imprecation or calling to witness." The judge must before allowing a witness D. to affirm under these sections, ascertain whether D. objects to take the oath because he has no religious belief, or because the taking of an oath is contrary to his religious belief. *R. v. Moore*, 17 Cox, 458; 61 L. J., M. C. 80.

So, again, formerly persons who, from defective education, did not understand the religious obligation of an oath, and also persons who did not acknowledge an absolute divine power, or, acknowledging such a power, did not believe it would punish perjury, were equally incapable of giving evidence; but all objections on these grounds have been removed by the last-cited sections which replace the stats. 32 & 33 V. c. 68, and 33 & 34 V. c. 49 (repealed by sect. 6), and for the old law on this head it suffices to refer to the leading case of *Omichund v. Barker*, Willes, 538, and the notes thereto in 1 Smith's Lead. Cases.

The Oaths Act, 1888, s. 3, *ante*, p. 160, seems to apply equally, whether the alleged absence of religious belief arise from defect of education or perversion of intellect.

*Incompetency.*] The objection to witnesses on the ground of incompetency has been very much narrowed by recent enactments, and now all persons whose mental power of distinguishing and relating the truth can be relied on are competent, though not always compellable, witnesses.

As to the former objection to witnesses who were ignorant of or did

not acknowledge the religious obligation of an oath, *vide ante*, p. 161, and *supra*.

As to the objection on the ground of interest, *vide post*, pp. 163 *et seq.*

The objection on the ground of defective understanding still remains, and this objection, and how and when it is to be decided, we will now consider.

[*Incompetency from defective understanding.*] A person whose understanding is manifestly and egregiously defective will not be allowed to give evidence. This defect may arise from immaturity of intellect, or some species of insanity. Such a witness would not be competent, because his mental power of distinguishing and relating the truth could not be relied on.

As a general rule insane persons, idiots, and lunatics during their lunacy, are incompetent witnesses. But lunatics in their lucid intervals are competent. Com. Dig. Testm.—Witness (A. 1). It may be observed that here the question of competency will always turn solely on whether or no the witness will be likely to give truthful evidence, and if he is likely to do this he may be received, notwithstanding considerable defects of intellect, or even aberration of mind on certain subjects. *R. v. Hill*, 2 Den. C. C. 254; 20 L. J., M. C. 222. It makes no difference, whether the defect of understanding arises from imperfect education, from natural imbecility, or from failure of the mental powers. It is for the judge by examination of the lunatic on the *voir dire*, and of witnesses called for that purpose, to ascertain and decide on his competency, and if the judge allow him to give evidence the jury must decide on the credit to be attached to his testimony. S. C. *Id.*, following *R. v. Anon.*, cited *per Parke, B.*, in *A.-G. v. Hitchcock*, 1 Exch. 95.

Deaf and dumb persons were formerly presumed to have understandings so defective as to be in all cases incompetent; a presumption entirely contrary to experience, and one not likely now to be made. See *Harrod v. Harrod*, 1 K. & J. 9. The state of the intellect of such a witness might, of course, be reasonably inquired into before taking his testimony, as, the usual channels of information being cut off, the education of such persons is more than usually difficult. See 2 Taylor, Evid., 10th ed. § 1376. A deaf and dumb person may give evidence through an interpreter by signs; *Ruston's case*, 1 Leach, C. C., 4th ed. 408; or by writing. *Per Best, C.J.*, *Morrison v. Lennard*, 3 C. & P. 127. Where such a person has been examined on the *voir dire*, and pronounced to be a competent witness, and it afterwards appears during the examination in chief that the witness is incompetent, his evidence may be withdrawn from the jury. *R. v. Whitehead*, L. R., 1 C. C. 33.

Children not able to apprehend the obligation of an oath or promise cannot be examined; Com. Dig., *supra*; B. N. P. 293; but tender age alone is no objection. *Brazier's case*, 1 East, P. C. 443. And a child who was wholly destitute of religious education has been allowed to be made a competent witness by being taught the nature of an oath before the trial, with a view to qualify him. *R. v. Murphy*, 1 Leach, 4th ed. 430, n. The ruling of Pattenon, J., in *R. v. Williams*, 7 C. & P. 320, is too broadly expressed, though in that case the child was rightly rejected. Although the objection of the absence of religious knowledge as to the binding effect of an oath seems to be removed by stat. 51 & 52 V. c. 46, s. 1, *ante*, p. 161, yet this would hardly make a child, who has no idea of the moral obligation to speak the truth, a competent witness. Where a child is tendered as a witness, the practice in criminal cases is for the judge to examine him with a view to ascertain his competency; *vide supra*.

Where the child cannot be admitted to give evidence, an account of the transaction which it has given to others is, of course, inadmissible. *R. v. Tucker*, 1 Phill. & Arn. Ev., 10th ed. 10.

It is evident that in any of the above cases, if a witness who has been examined by the judge on the *voir dire*, and pronounced competent, should afterwards manifestly appear to him to be in such a mental condition as to be incompetent to give evidence, the evidence must be withdrawn from the jury: *vide R. v. Whitehead, ante*, p. 162. The earlier cases on the question of when counsel must take the objection of the incompetency of a witness were almost all cases where the objection was founded on interest in the subject-matter of the action, and hardly apply to the case of defect of intellect.

[*Incompetency on the ground of interest.*] Formerly all persons having an interest in the suit were on that ground disqualified, as were also their husbands and wives; but these qualifications have been entirely abolished, although with regard to certain matters the witness may refuse to give evidence, and in one case the uncorroborated evidence of the plaintiff will not suffice to obtain a verdict.

The following are the statutory provisions on this subject:—

By the 6 & 7 V. c. 85, s. 1, it is provided, "that no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having by law, or by consent of parties, authority to hear, receive, and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or *injury*" (*sic; qq. inquiry?*), "or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence."

This section contained a provision that it should not render the actual parties to the suit, or any person for whose immediate benefit the action was brought or defended, or the husband or wife of any such person, competent as witnesses. This exception was, as regards the parties themselves, and those for whose immediate benefit the action was brought or defended, repealed by the 14 & 15 V. c. 99, s. 1, and by sect. 2 the parties are rendered competent; except in any proceeding "instituted in consequence of adultery, or to any action for breach of promise of marriage," sect. 4. Sect. 3 provides that nothing therein contained "shall render any person compellable to answer any question tending to criminate himself or herself." It was held under sect. 4, that a co-respondent in a divorce suit was not a competent witness so long as he remained a party to the record. *Robinson v. Robinson*, 1 Sw. & Tr. 382; 27 L. J., P. M. & A. 91. See *Blackborne v. Blackborne, post*, p. 164. It was also decided that sects. 1, 2, did not have the effect of making a husband or wife competent or compellable to give evidence for or against the wife or husband in civil cases, except where the wife was a party to the record. *Barbat v. Allen*, 7 Exch. 609; 21 L. J., Ex. 155; *Stapleton v. Croft*, 18 Q. B. 367; 21 L. J., Q. B. 247.

But now, by the Evidence Amendment Act, 1853 (16 & 17 V. c. 83), s. 1, on the trial of any issue joined, or of any matter, &c., arising in any

suit, action, &c, "the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit," &c., may be brought or opposed, "shall, except as hereinafter excepted, be competent and compellable to give evidence." By sect. 2, "Nothing herein shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband," . . . "in any proceeding instituted in consequence of adultery."

By sec. 3, "No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage." See cases hereon, *post*, p. 169.

Under this Act the wife may prove her own adultery in an action against her husband for goods supplied to her. *Cooper v. Lloyd*, 6 C. B., N. S. 519. As to proof of non-access, see tit. *Action for recovery of possession of land by heir*.—*Proof of Illegitimacy*, *post*, p. 1047.

As in a suit instituted by the wife for the dissolution of her marriage by reason of her husband's adultery coupled with wilful desertion, she was not, by reason of the exceptions in the above Acts, a competent witness to prove the desertion (*Pyne v. Pyne*, 1 Sw. & Tr. 178; 27 L. J., P. M. & A. 54), it was enacted by the 22 & 23 V. c. 61, s. 6, that on any petition presented by a wife in the Divorce Court for dissolution of marriage "by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery coupled with desertion, the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion."

Where the suit was by the husband against his wife on the ground of her adultery, and the wife in her answer alleged the cruelty and desertion of the petitioner, the evidence of the parties was excluded; *Whittall v. Whittall*, 30 L. J., P. M. & A. 43; even though the wife in her answer prayed relief under 29 & 30 V. c. 32, s. 2. *Bland v. Bland*, L. R. 1 P. & M. 513. If, however, the suit were instituted by the husband for the restitution of conjugal rights, and the wife in her answer alleged the husband's adultery, and prayed for a judicial separation, she was a competent witness. *Blackborne v. Blackborne*, *Id.* 563.

The Evidence Further Amendment Act, 1869 (32 & 33 V. c. 68), s. 1, repeals the 14 & 15 V. c. 99, s. 4, and so much of 16 & 17 V. c. 83, s. 2, as is contained in the words "or in any proceeding instituted in consequence of adultery;" *vide supra*; and by sect. 3, "the parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding: provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."

By sect. 2, "The parties to any action for breach of promise of marriage shall be competent to give evidence in such action; provided always, that no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise."

It seems that "any proceeding instituted in consequence of adultery" in sect. 3, includes only proceedings for divorce or judicial separation; *Nottingham, Guardians of, v. Tomkinson*, 4 C. P. D. 343; *Burnaby v. Baillie*, 42 Ch. D. 282; the section does not allow parents to prove non-access for the purpose of bastardizing their issue. S. CC. The proviso in sect. 3 seems to apply to such proceedings only. *M. v. D.*, 10 P. D. 175; *Evans v. Evans*, (1904) P. 378. See however *post*, p. 168.

Sect. 3 enables a person when called as a witness in such a cause, whether a party thereto or not, to refrain altogether from giving any evidence that may tend to show that he or she has been guilty of adultery; but does not exclude the evidence of the witness if he be willing to give it. *Hebblethwaite v. Hebblethwaite*, L. R., 2 P. & M. 29. The exemption extends to adultery of the witness committed at any time, and is not confined to the adultery in respect of which the proceedings were instituted. *Babbage v. Babbage*, *Id.* 222. If, however, the party deny the truth of some of the charges of adultery contained in the pleadings, and is asked no questions as to others, he is bound to answer questions in cross-examination respecting all the charges in the pleadings. *Brown v. Brown*, L. R., 3 P. & M. 198.

As to what is sufficient material evidence under sect. 2, see *Besselu v. Stern*; and *Wiedemann v. Walpole*, cited *post*, p. 495.

*Incompetency from infamy.*] This head of disqualification has been reduced within very narrow limits if not entirely abolished by 6 & 7 V. c. 85, s. 1, *ante*, p. 163. Before the passing of that Act conviction and judgment for felony, or any species of *crimen falsi*, rendered the party incompetent as a witness unless the competency were restored by a pardon, or by having undergone the punishment assigned to the offence. Whether the Act extends to the case of outlawry for felony is, perhaps, open to question. See 3 Inst. 212.

The offence and conviction may still be proved by the admission of the witness or otherwise, as before, for the purpose of impugning his credit. *R. v. Castell Careinion*, 8 East, 78. *Vide post*, 183.

*Judges, jurors, arbitrators, counsel, &c.*] A person, whose name is in the commission of assize, may be examined as a witness; so may a juror. Bac. Abr. Evid. A. 2.

In an action to enforce his award, the arbitrator may be called as a witness to prove what passed before him, what matters were presented for his consideration, and what claims admitted; but he cannot be asked as to what passed in his own mind when exercising his discretionary power on the matters submitted to him, nor can he be asked questions to explain, aid, or contradict his award. *Buckleugh, Dk. of, v. Metropolitan Board of Works*, L. R., 5 H. L. 418; *O'Rourke v. Commissioner for Railways*, 15 Ap. Ca. 371, J. C.

Counsel and solicitors in the cause may also be witnesses in it (subject to the rule respecting privileged communications, mentioned *post*, pp. 169 *et seq.*); but the practice is open to objection, and such evidence should, if possible, be dispensed with. Bac. Abr. Evid. (A. 3). See also Best, Evid., 10th ed. § 184.

*Inference from not calling the party.*] Since parties have been made competent witnesses, it has been a common practice to comment on their absence as witnesses, and to make observations on it as a suspicious suppression of unfavourable testimony. There seems to be no legitimate objection to such comments; and where a party is present in court, and testimony has been given which he must be able, if untrue, to contradict, and is interested in doing so, great weight will naturally be given to such comments. But the mere fact of his not being offered as a witness is not, *per se*, evidence against him, though it may turn the scale if his absence is unexplained and there is other slight evidence or some ambiguous admission by him out of court. See *M'Kewen v. Cotching*, 27 L. J., Ex. 41, and *Barker v. Furlong*, (1891) 2 Ch. 172, 182. The case bears some resemblance to that of admissions implied from a tacit acquiescence in statements made in the party's presence. See *ante*, p. 64.

*Examination in chief.*] On almost every trial a great deal of discussion arises as to putting leading questions. Leading questions are those which, from the form in which they are put, are likely to communicate to the witness a knowledge of what answer would be favourable to the person putting it; which would of course be dangerous with a dishonest witness. In some cases of critical inquiries also, it is very desirable to get the witness's own impression, which the most veracious witness might not, after another view had been once suggested to him, be able to recall.

The objections, therefore, to leading questions apply by no means with equal force to all witnesses and to all parts of an inquiry. Some witnesses will adopt anything that is put to them, whilst others scrupulously weigh every answer. Moreover, innumerable questions are put for a mere formal purpose, the facts not really being in dispute, or simply in order to lead the mind of the witness to the real point of inquiry.

As a great saving of time is effected by leading a witness, it would be extremely undesirable to stop it, where it is otherwise unobjectionable.

There is no distinction recognized by the law between questions which are and questions which are not leading. To object to a question as leading is only a mode of saying that the examination is being conducted unfairly. It is entirely a question for the presiding judge to say, in his discretion, whether or not the examination is being conducted fairly.

It is sometimes said that all questions capable of being answered by merely *yes* or *no*, are objectionable as leading. But this is a very fallacious test, even in the most critical parts of an inquiry. On the other hand, it is sometimes said that the objection that the question is leading may be got over by putting it in the alternative; but it is obvious that nothing would be easier than to suggest in this way a whole conversation to a dishonest witness.

A witness, produced to read or explain a series of ancient records brought into court, may be asked to state the result of them; and this is permitted for saving of time, and because the witness can be interrogated as to the particular entries on which he founds his general statement of their purport and effect, and may be called upon to point them out to the court. *Rowe v. Brenton*, 3 M. & Ry. 212.

It has been already shown (*ante*, pp. 1, 4, *et seq.*) that oral proof of a written document cannot be admitted on examination in chief, unless a proper foundation for it be laid by accounting for the non-production of the writing itself; and that where any agreement, communication or statement is the subject of inquiry, the opposite party may interpose the question—whether it was in writing? The circumstances and conditions under which oral evidence of written documents may be admitted are also explained, pp. 4 *et seq.*, *Secondary Evidence*.

Where a witness for the plaintiff, cross-examined as to the contents of a lost letter, swore that it did not contain a certain passage, and a witness was called by the defendant to contradict this statement, *Ld. Ellenborough* ruled that he might be asked if it contained a particular passage recited to him, which had been sworn to on the other side; for otherwise it would be impossible ever to come to a direct contradiction. *Courteen v. Touse*, 1 Camp. 43. And where, in cross-examination, a witness, being asked as to some expressions which he had used, denied them, and the counsel on the other side called a person to prove that the witness had used such expressions, and read to him the particular words from his brief, *Abbott, C.J.*, held that he was entitled to do so; *Edmonds v. Walter*, 3 Stark. 7; and this is now the common practice. But where a witness denied, on cross-examination, the use of certain expressions by him in a conversation at which both plaintiff and defendant were present, it was held that a witness, called to

prove that such expressions were used, could not have the very words suggested to him; the conversation being evidence in itself, and not proved for the mere purpose of discrediting the witness. *Hallett v. Cousins*, 2 M. & Rob. 238.

Where a witness, on his examination in chief, shows himself decidedly adverse to the party calling him, the judge may allow the party calling him to conduct the examination with the same latitude as we shall hereafter see a cross-examination may be conducted (*post*, pp. 178, 179); see *Coles v. Coles*, L. R., 1 P. & M. 70; but he must confine himself to matters material to the issue. The party calling a witness cannot cross-examine him merely to test his credit, as his opponent may. *Vide post*, p. 181. If a witness stand in a situation which of necessity makes him adverse to the party calling him, the presiding judge has a discretion as to the mode of examination in order best to answer the purposes of justice. *Per Abbott, C.J., Bastin v. Carew*, Ry. & M. 127; *Acc. Price v. Manning*, 42 Ch. D. 372, C. A. The party's counsel cannot cross-examine him without the leave of the judge, however hostile he may be. S. C., overruling *Clarke v. Saffery*, Ry. & M. 126. For the definition of a hostile witness, see *Coles v. Coles*, *post*, p. 175.

When a question is propounded, the opposite party may object that it is one which transgresses the rules of evidence. If not objected to, or if the objection be overruled, the witness must answer it, unless he can show that he has some privilege which enables him to refuse to do so. If he refuse to answer the question, and can show no privilege, he will be liable to be fined and imprisoned by the court. *Ex parte Fernandez*, 10 C. B., N. S. 11; 30 L. J., C. P. 321.

*Privilege.*] There are some questions which a witness is not compellable to answer, though, if he choose to answer them, his evidence is to be received. The following are such cases:—

*When a witness is privileged on the ground of injurious consequences of a civil kind.*] A witness is privileged from answering any question, the answer to which might directly subject him to forfeiture of estate. See *Pye v. Butterfield*, 5 B. & S. 829; 34 L. J., Q. B. 17. But it seems that where property is granted to a person subject to a conditional limitation over, that person may be compelled to state whether the condition on which the estate goes over has not been fulfilled. *Per Cur., Id.* And by stat. 46 G. 3, c. 37, "a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself or to expose him to penalty or forfeiture of any nature whatsoever, by reason only, or on the sole ground that the answering of such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his majesty or of any other person or persons." It will be seen that this statute recognizes the privilege when the witness is exposed to a penalty or forfeiture. "Forfeiture" in this statute does not apply to a person in possession of property and become liable to forfeit it by reason of a breach of covenant. *Per Cockburn, C.J., in Pye v. Butterfield, supra.*

As to privilege in an action for a penalty, or for statutory liquidated damages, see *Hunnings v. Williamson*, and *Adams v. Butley*, cited *ante*, p. 156.

*When a witness is privileged on the ground of injurious consequences of an ecclesiastical kind.*] It has generally been considered that a witness may decline answering questions, the answering of which would expose him to

ecclesiastical penalties; as on a proceeding under the 2 & 3 E. 6, c. 13, s. 2, for not setting out tithes; *Jackson v. Benson*, 1 Y. & J. 32; or for simony, *Brownsword v. Edwards*, 2 Ves. sen. 245; or incest, *Chetwynd v. Lindon*, *Id.* 450. But a judge, in deciding whether or no the witness is entitled to the privilege, would no doubt consider how far the danger suggested by the witness was real: *R. v. Boyes*, *infra*, and *post*, p. 169; and the mere chance of an obsolete jurisdiction being set in motion would probably not be considered a sufficient ground for refusing to answer.

With regard to questions tending to show that a witness called in proceedings instituted in consequence of adultery has been guilty of adultery, see 32 & 33 V. c. 68, s. 3, *ante*, p. 164. It seems that in other cases a witness is not privileged from answering as to whether he has committed adultery. *Evans v. Evans*, (1904) P. 378. See however *Redfern v. Redfern*, (1891) P. 147-9, *per* Bowen, L.J.

[*When a witness is privileged on the ground of injurious consequences of a criminal kind.*] That the witness may by answering be subjected to a criminal charge, however that charge may be capable of being prosecuted, is clearly a sufficient ground for refusing to answer. Thus a person could not be compelled to confess himself the father of a bastard child, so long as he was thereby subjected to the punishment inflicted by the 18 El. c. 3, s. 2. *R. v. St. Mary, Nottingham*, 13 East, 57, n. So a witness could not be compelled to answer a question which subjected him to the criminal charge of usury. *Cates v. Hardacre*, 3 Taunt. 424. But if the time for the recovery of the penalty had expired, the witness might be compelled to answer. *Roberts v. Allatt*, M. & M. 192.

The witness is compellable to answer when he has received, before or at the trial, a pardon under the Great Seal for the offence of which he fears to criminate himself. *R. v. Boyes*, 1 B. & S. 311; 30 L. J., Q. B. 301. In this case the court overruled the objection that the pardon was not, by reason of stat. 12 & 13 W. 3, c. 2, s. 3, pleadable to an impeachment by the House of Commons, because the danger to be apprehended must be real and appreciable, and an impeachment was, under the circumstances, too improbable a contingency to justify the witness in still refusing to answer on that ground.

Although the witness be not bound to answer questions of this nature, yet the question may be *put*, at least such appears on the whole to be the weight of authority. *The Queen's case*, 2 B. & B. 311; *R. v. Watson*, 2 Stark. 153. See *contra*, *Cundell v. Pratt*, M. & M. 108. With regard to questions *tending* only to criminate, it was said by Ld. Eldon that it was the strong inclination of his mind to protect the party, not only against any question that has a direct tendency to criminate him, but against one that forms a step towards it. *Paxton v. Douglas*, 19 Ves. 227; *Claridge v. Hore*, 14 Ves. 59; *Swift v. Swift*, 4 Hagg. Ecc. 154.

The objection is sometimes obviated by the express provision of the statute creating the offence, *e.g.*, 24 & 25 V. c. 96, s. 85, as to fraudulent bailees, &c.; 38 & 39 V. c. 87, s. 103, as to fraudulent statements, &c., to obtain entry of land on register.

[*Right to decline answering—how decided.*] It is now settled, after somewhat conflicting expressions of opinion, "that to entitle a party called as a witness to the privilege of silence, the court must see from the circumstances of the case, and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. If the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for



himself the effect of any particular question." *R. v. Boyes*, 1 B. & S. 311; 30 L. J., Q. B. 301. *Accord.*, *Ex pte. Reynolds*, 20 Ch. D. 294, C. A., where the earlier cases are collected and considered. Thus the judge is to use his discretion, whether he will grant the privilege upon the bare claim of the witness, or whether he will investigate the claim by further inquiry. Of course, the witness must always pledge his oath that he believes the answer to the question will tend to criminate him, and if he assigns a reason which in the opinion of the court will not criminate him, he is not privileged. See *Scott v. Miller*, John. 220; 28 L. J., Ch. 584; *Ex pte. Aston*, 4 De G. & J. 320; 28 L. J., Ch. 631.

Counsel interested in excluding the evidence will not be allowed to argue in support of the objection. *R. v. Adey*, 1 M. & Rob. 94. A witness is not compellable to answer questions put for the mere purpose of degrading his character; *Cook's case*, 13 How. St. Tr. 334; *Freind's case*, *Id.* 17; *Layer's case*, 16 How. St. Tr. 161; though such questions may legally be asked. *R. v. Edwards*, 4 T. R. 440; *R. v. Holding*, Arch. Cr. Law, 102; *Cundell v. Pratt*, M. & M. 108. See the cases collected, 1 Phillipps' Ev., 7th ed. 278 *et seq.* If the witness choose to answer, his answer is generally conclusive. *R. v. Watson*, 2 Stark. 149. *Vide Evidence of character, post*, p. 183, for those cases in which it is not conclusive.

*Privilege of husband and wife.*] In civil proceedings when the answer to a question put to a husband, H., would tend to criminate his wife, W., H. is competent to answer it. So when the answer to a question put to W. might incriminate H. *R. v. All Saints, Worcester*, 6 M. & S. 194; *R. v. Bathwick*, 2 B. & Ad. 647; *R. v. Williams*, 8 C. & P. 284. But though the husband and wife are, in such a case, competent, it seems to accord with principles of law and of humanity that they should not be compelled to give evidence which tends to criminate each other; and in *R. v. All Saints, Worcester, supra*, Bayley, J., said that, if in that case the witness had thrown herself upon the protection of the court, on the ground that her answer might tend to criminate her husband, he thought she would have been entitled to it. See 1 Phill. & Arn. Ev., 10th ed. 73; *accord.*

Communications made by the husband to the wife, or by the wife to the husband, during marriage, are expressly privileged by the 16 & 17 V. c. 83, s. 3, *ante*, p. 164. The communication must have been made *durante matrimonio*. It seems that the privilege lasts after dissolution of the marriage, *Mource v. Twisleton*, Peake, Add. Ca. 221; or the death of one of the parties, *O'Connor v. Majoribanks*, 4 M. & Gr. 435, which decisions were prior to the statute. See, however, the remarks in 1 Taylor, Ev., 10th ed. § 910 A.

*When a witness is privileged on the ground of confidence.*] Counsel, *Curry v. Walter*, 1 Esp. 456; and solicitor, *R. v. Kingston, Ds. of*, 20 How. St. Tr. 613; cannot be compelled to reveal communications made to them in confidence, as such. A person who acts as interpreter, *Du Barré v. Livette*, Peake, 78; S. C., 4 T. R. 756; or as agent, *Parkins v. Hawkshaw*, 2 Stark. 239; see also *Goodall v. Little*, 20 L. J., Ch. 132; between the solicitor and his client; or the solicitor's clerk, *Taylor v. Forster*, 2 C. & P. 195; *R. v. Upper Boddington*, 8 D. & Ry. 732; cannot be called upon to reveal such communications. So a barrister's clerk cannot be called to prove his retainer. *Foote v. Hayne*, Ry. & M. 165. But Parke, B., is said to have held, in *Forshaw v. Lewis*, 1 Jurist, N. S. 263, H. T. 1855, Ex., that the mere fact of retainer is not privileged from disclosure. See also *Levy v. Pope*, M. & M. 410, cited *post*, p. 171. Cases and the opinions of counsel thereon are

privileged. *Reece v. Trye*, 9 Beav. 316; *Penruddock v. Hammond*, 11 Beav. 59; and see *R. v. Woodley*, 1 M. & Rob. 390.

A solicitor will not be allowed to prove the contents of deeds or abstracts deposited with him as solicitor. *R. v. Upper Boddington*, 8 D. & Ry. 726. Where a solicitor is employed both by vendor and vendee to draw a conveyance, the draft of which is perused by another solicitor on behalf of the vendee, the former solicitor will not be allowed to produce the draft of the conveyance against the wishes of the party claiming under the vendee. *Doc d. Strode v. Seaton*, 2 Ad. & E. 171. And generally where two parties employ one and the same solicitor he cannot disclose the title of either. Thus, where a borrower applies for a loan to the solicitor of the lender, and delivers him an abstract of title, the solicitor cannot afterwards be called against the borrower to prove the abstract. *Doc d. Peter v. Watkins*, 3 N. C. 421. Nor can admissions in conversation between the solicitors of the two parties relating to the cause be disclosed, unless made expressly for dispensing with proof in court of the facts stated. *Petch v. Lyon*, 9 Q. B. 147. Where a private account book delivered by the defendant to the plaintiff as his solicitor, to prepare a case for counsel, was tendered to fix the defendant with an admission of liability on a note made by defendant to plaintiff, the court held it inadmissible. *Cleave v. Jones*, 7 Exch. 421; 20 L. J., Ex. 239, Ex. Ch.

Professional communications of a confidential character made by the client to his counsel, or solicitor, with a view to legal advice or assistance, even though not made with reference to legal proceedings either existing or in contemplation, are privileged from disclosure; *Clark v. Clark*, 1 M. & Rob. 3; *Walker v. Wildman*, Madd. & Geld. 47; *Greenough v. Gaskell*, 1 Myl. & K. 98; and see 4 B. & Ad. 876; *Carpmael v. Powis*, 1 Ph. 687; *Robson v. Kemp*, 5 Esp. 52; *Turton v. Barber*, L. R., 17 Eq. 329, following the principle laid down in *Minet v. Morgan*, L. R., 8 Ch. 361; see also *O'Shea v. Wood*, (1891) P. 286, and other cases collected *ante*, pp. 156 *et seq.* The privilege or obligation of a legal adviser to withhold the communications between himself and client does not rest simply on the ground of confidence, for such a ground would extend the rule to many other cases where no privilege exists, but on a regard to the interests of justice, which require unreserved information from clients to those who are necessarily employed by them in the conduct of legal business. *Greenough v. Gaskell*, *Minet v. Morgan*, *supra*. On this principle a solicitor cannot be called to prove that a lease shown to him by his client at a professional interview was then unstamped. *Wheatley v. Williams*, 1 M. & W. 533. And where the assignees of a bankrupt brought trover for a lease, they were not permitted to call the solicitor of the bankrupt to show that it had been deposited with the defendant as a security after the act of bankruptcy. *Turquand v. Knight*, 2 M. & W. 98. And it seems that where the solicitor is so employed as to give the court a summary jurisdiction over him, his character is confidential within the rule. *Per Alderson, B., S. C.* It is said, too, that a scrivener is on the same footing; at least where he is a solicitor also. *S. C., Id.* 100; *Awon., Skinner*, 404; *Lill. Pr. Reg.* 556. The same rule applies in an action for divorce, even when the Queen's Proctor has intervened. *Branford v. Branford*, 4 P. D. 72. The privilege continues in favour of the executors of their deceased testator who employed the solicitor. *Bullivant v. A.-G. for Victoria*, (1901) A. C. 196, D. P., except as against another person also claiming under the testator. *Russell v. Jackson*, *post*, p. 172.

The privilege is that of the client, and not of the solicitor; and formerly the court prevented the solicitor, though he were willing, from making the disclosure; *B. N. P.* 284; *Wilson v. Rastall*, 4 T. R. 759; unless the client waived the privilege, which, of course, he might do, at least in cases where

the privilege was for his benefit only. *Merle v. More*, Ry. & M. 390; and see *Id.* 391, n. It seems that the evidence of the solicitor, in relation to a privileged matter, will be received, if the solicitor be willing to give it. *Hibberd v. Knight*, 2 Exch. 11. The judge is the proper person to decide whether the communication is privileged, subject to revision by the Court. *Cleave v. Jones*, 7 Exch. 421; 20 L. J., Ex. 238, Ex. Ch. And he may hear witnesses to satisfy himself on this point. S.C.

It seems that no adverse presumption is to be drawn against a person refusing to allow his former solicitor to disclose statements he has made professionally to the solicitor. *Wentworth v. Lloyd*, 10 H. L. C. 589; 33 L. J., Ch. 688; *per* Ld. Chelmsford.

If the solicitor of one of the parties be called by his own client, and examined as to a matter which has been the subject of confidential communication, he may be cross-examined as to that matter, though not as to others. *Vaillant v. Dodemead*, 2 Atk. 524.

A party himself is not bound to disclose matters as to which his information is derived from privileged communications, the matters not being merely statements of fact patent to the senses. *Kennedy v. Lyell*, 23 Ch. D. 387, C. A.; 9 Ap. Ca. 81, D. P.

[*What matters may be disclosed.*] A solicitor must state the name of his client in respect of whom he claims privilege. *Bursill v. Tanner*, 16 Q. B. D. 1, C. A. Matters not communicated to a solicitor in his professional capacity, as where he acts as under-sheriff at the time, must be disclosed. *Wilson v. Rastall*, 4 T. R. 753; *Cobden v. Kendrick*, *Id.* 431. So, matters communicated before the retainer. *Cuts v. Pickering*, 1 Vent. 197. All matters not confidentially communicated must be disclosed, as well as all matters which the solicitor would have known without being intrusted as solicitor in the cause; B. N. P. 284; provided the information was obtained by him independently, and not in the course of his professional employment. See observations in *Wheatley v. Williams*, 1 M. & W. 540, 541; and in *Magrath v. Hardy*, 4 N. C. 782, 795. So where counsel has given an opinion otherwise than in a professional capacity it must be disclosed. *Smith v. Daniell*, L. R., 18 Eq. 649. And a person who is not a solicitor may be compelled to disclose communications which have been made to him under a mistaken idea that he was one. *Fountain v. Young*, 6 Esp. 113. This case was strongly commented on by Romilly, M.R., in *Calley v. Richards*, 19 Beav. 401, where it was held that communications made by A. to B., who had been A.'s solicitor, but who had then, without A.'s knowledge, ceased to practise, were privileged.

A solicitor may be called to prove a deed executed by his client, which he has attested; *Doe d. Jupp v. Andrews*, Cowp. 846; and when so called, he may be cross-examined as to what passed between him and his client at the time. *Cleve v. Powell*, 1 M. & Rob. 228. So, to prove the contents of a notice to produce; or an erasure in a deed belonging to his client; B. N. P. 284; or the delivery of a particular paper by his client; *Eicke v. Nokes*, M. & M. 304; or to prove who employed him to defend the cause; *Levy v. Pope*, *Id.* 410; or that he is in possession of a particular document belonging to his client, so as to let in secondary evidence of its contents after proof of notice to produce it. *Beran v. Waters*, *Id.* 235; *Coates v. Mudge*, 1 Dowl. N. S. 540. And the solicitor may be called upon to state whether he has not the document in court. *Dwyer v. Collins*, 7 Exch. 639. So, a communication between a solicitor and his client relative to a matter of fact only, where the character or office of solicitor is not called into action, is not privileged. *Bramwell v. Lucas*, 2 B. & C. 745. The defendant's solicitor may be called by the plaintiff to prove admissions made by his client, the

defendant, in a conversation between plaintiff and defendant in his presence; though he cannot be allowed to prove such admissions in a conversation between himself and his client. *Griffith v. Davies*, 5 B. & Ad. 502. *Accord. Shore v. Bedford*, 5 M. & Gr. 271; *Weeks v. Argent*, 16 M. & W. 817. And where two parties employ the same solicitor, a letter by one of them to the solicitor, containing an offer to be made to the other, may be given in evidence against the writer of it. *Baugh v. Cradocke*, 1 M. & Rob. 182. So an application by one for time to pay money to the other. *Perry v. Smith*, 9 M. & W. 681. In an action for work done as solicitor of the defendant, the defendant, in order to show the plaintiff was retained by B. and not by defendant, may prove admissions made by the plaintiff to the professional agent employed by him to sue out process in an action by B., which action was the work alleged to be done by the plaintiff for the defendant. *Gillard v. Bates*, 6 M. & W. 547.

In the case of testamentary instructions to the testator's solicitor for drawing his will, what passed on the subject of that will as to any secret trust will be admissible in a suit between executors and next of kin. In such a case, indeed, both claim under the testator, and it would seem arbitrary to hold that the privilege belongs to one of the claimants more than to the other. *Turner, V.-C., Russell v. Jackson*, 9 Hare, 387; 21 L. J., Ch. 146.

It is now settled that when an illegal purpose or a fraud is contemplated, a communication to a solicitor in furtherance thereof will not be privileged from disclosure; for it is no part of professional duty to be assisting in such cases. *R. v. Cox*, 14 Q. B. D. 153; *Williams v. Quebrada Ry., &c., Co.*, (1895) 2 Ch. 751. Thus, where A. applied to an attorney to advance money on a forged will, which the attorney refused to do, and he made no charge to A. for the interview, the communication was held *not* privileged. *R. v. Farley*, 1 Den. C. C. 197; *R. v. Jones*, *Ib.* 166. A counsel engaged for A. on a former inquiry on a criminal charge, may be called at a subsequent trial of an action wherein A. is a party, to prove as against him the state of a document produced and shown in evidence by A. on the former trial. *Brown v. Foster*, 1 H. & N. 736; 26 L. J., Ex. 249. The inquiry was, whether a certain entry was in a book when produced on the first occasion, which A. was suspected of having fraudulently made afterwards; and the counsel was called to negative the existence of it on the previous hearing. But the privilege prevails unless there be a definite charge or proof of illegality or fraud. *Bullivant v. A.-G. for Victoria*, (1901) A. C. 196, D. P.

Where the client is a witness he is liable to be cross-examined as to the instructions he had given his solicitor in another proceeding. *Maccann v. Maccann*, 3 Sw. & Tr. 142; 32 L. J., P. M. & A. 29. The client must answer as to matters communicated to him by his solicitor, as to which the solicitor himself could not claim privilege. *Foakes v. Webb*, 28 Ch. D. 287.

Communications made to a herald or pursuivant of Heralds' College employed in the conduct and support of a protest against the enrolment of a pedigree therein are not privileged. *Slade v. Tucker*, 14 Ch. D. 824. So physicians, surgeons, and divines are not privileged from compulsive disclosures of communications, however confidential. *R. v. Kingston, Ds. of*, 20 How. St. Tr. 573; *Gilham's case*, 1 Moo. C. C. 186. See also *Garnet's case*, Jardine's Gunpowder Plot, pp. 282 *et seq.*, ed. 1857, as to auricular confession, and Best, Evid., 10th ed. §§ 583-585.

[When a witness is privileged on the ground of public policy—disclosures by informers.] Questions on this branch of privilege arise generally in criminal and revenue cases. Such communications are undoubtedly to some extent privileged. *R. v. Hardy*, 24 How. St. Tr. 811; *R. v. Watson*, 2 Stark. 136;

*A.-G. v. Briant*, 15 M. & W. 169; *R. v. Richardson*, 3 F. & F. 693. Information given to the director of public prosecutions falls within this principle. *Marks v. Beyfus*, 25 Q. B. D. 494, C. A. See further *Rosc. Cr. Ev.*, 12th ed. 136, 157.

[When a witness is privileged on the ground of public policy—official communications.] There are some official communications relating to matters which affect the interests of the community at large, which may be withheld; such as communications between the governor and the law officers of a colony, *Wyatt v. Gore*, Holt, N. P. 299; between the governor of a colony and a secretary of state, *Anderson v. Hamilton*, 2 B. & B. 156, n.; between the governor of a colony and a military officer, *Cooke v. Maxwell*, 2 Stark. 183; between a military officer and a secretary of war, *Beatson v. Skene*, 5 H. & N. 838; 29 L. J., Ex. 430; the report of a military court of inquiry on the conduct of an officer, *Home v. Bentinck*, 2 B. & B. 130, Ex. Ch.; *Dawkins v. Rokeby, Ltd.*, L. R., 8 Q. B. 255, Ex. Ch. And where a minister of state appears and objects to the production of documents on the ground that it would be injurious to the public interests, he will not be compelled to produce them. *Beatson v. Skene, supra*. So on a trial for high treason, *Ld. Grenville* was called to produce a letter intercepted on its way through the post-office, but it was held that he was not bound to do so; *per Ld. Ellenborough* in *Anderson v. Hamilton, supra*. And the document may appear to be of such a public nature that the judge is bound to exclude it, without objection to its production having been taken. *Home v. Bentinck, supra*; *Chatterton v. India, Secretary of State for*, (1895) 2 Q. B. 189, 194, 195, *per C. A.* See also *Hennessy v. Wright*, 21 Q. B. D. 509, and *In re Joseph Hargreaves*, (1900) 1 Ch. 347, C. A. It seems that the objection to the evidence may be taken by the party interested in excluding it, although not taken by the witness himself. *Home v. Bentinck, supra*. The rule as to excluding evidence on the above ground is confined to communications made by and between ministers and officers of the government in the discharge of their public duty; and therefore a letter written by a private individual to the secretary of the postmaster-general complaining of the conduct of the guard of the mail is not privileged from disclosure. *Blake v. Pilfold*, 1 M. & Rob. 198. The speaker of the Irish House of Commons was held not to be bound to disclose what a member had there spoken; though he might be asked whether that member had spoken on a particular occasion. *Plunkett v. Cobbett*, 5 Esp. 136; 29 How. St. Tr. 71, *per Ld. Ellenborough*. A member of parliament cannot, without leave of the House, be compelled to answer questions respecting the votes of the members. *Chubb v. Salomons*, 3 Car. & K. 75; *per Pollock, C.B.* Confidential proceedings of the privy council cannot be divulged. *Layser's case*, 16 How. St. Tr. 224. In *R. v. Watson*, 2 Stark. 148, an officer of the Tower of London was allowed to refuse to say whether a plan of the Tower which was produced was accurate or not.

Where a document is privileged from production on the ground of public policy, secondary evidence of its contents is inadmissible. *Home v. Bentinck, supra*; *Stuce v. Griffith*, L. R., 2 P. C. 420.

Where for revenue or other similar purposes an oath of office has been taken by a person not to divulge matters which have come to his knowledge in his official capacity, he will not be allowed, if the interests of justice are concerned, to withhold his testimony. Thus, where the clerk to the commissioners of the property tax, being called to produce the books containing the appointment of a person as collector, objected on account of his oath, *Ld. Ellenborough* said that it did not protect him from giving evidence in a court of justice upon a writ of *subpœnâ*. *Lee v. Birrell*, 3 Camp. 337. As

to the obligation of a tax surveyor to produce income tax returns, see *Shaw v. Kay*, 5 Tax Cases, 74; 12 Sc. L. T. R. 495.

A grand juror is also compellable in furtherance of justice to prove what passed before him. *Anon.*, 4 Bl. Comm. 126, note by Christian; *Sykes v. Dunbar*, 2 Selw. N. P., 13th ed. 1015; but this has been questioned. *Starkie on Slander*, 3rd ed. 475, c.

As to the production of private telegrams by the postmaster-general, see 31 & 32 V. c. 110, s. 20; 32 & 33 V. c. 73, s. 23. In *Taunton*, 2 O'M. & H. 72, *cor.* Grove, J.; and *Stroud*, *Id.* 110, *cor.* Bramwell, B., an order for production was refused, on the officer who attended the trial with them declining to produce them, and *seemable* such documents are in the custody of the Crown, and their production cannot be enforced without the consent of the Crown. S. C., *per Id.*

*Privilege—how claimed.*] It is for the witness himself to claim or to waive the privilege, as he sees fit; the counsel in the cause cannot argue the question in favour of the witness. *Thomas v. Newton*, M. & M. 48, n.; *R. v. Adey*, 1 M. & Rob. 94. Except, perhaps, in the case of official communications, as to which *vide ante*, p. 173. See as to a solicitor waiving his privilege, *ante*, p. 171.

The witness may claim his privilege at any part of the inquiry, and he does not waive it altogether by omitting to claim it as soon as he might have done so. *R. v. Garbett*, 1 Den. C. C. 258, overruling *East v. Chapman*, M. & M. 46; S. C., 2 C. & P. 573. The time for the witness to make the objection is after he is sworn. *Boyle v. Wiseman*, 10 Exch. 647; 24 L. J., Ex. 160.

*Contradicting party's own witness.*] If a witness give evidence contrary to that which the party calling him expects, that party cannot give general evidence to show that the witness is not to be believed on his oath. *Ever v. Ambrose*, 3 B. & C. 749. And though it was always considered that a party might contradict the evidence of his own witness upon facts material to the issue, yet it was long a question whether it was competent to him to prove that the witness had previously given a different account of the transaction. S. C., *Id.*; *Wright v. Beckett*, 1 M. & Rob. 414; *R. v. Oldroyd*, R. & Ry. 88; *Dunn v. Aslett*, 2 M. & Rob. 122; *Holdsworth v. Dartmouth*, *Mayor of*, *Id.* 153; *Winter v. Butt*, *Id.* 357; *Allay v. Hutchings*, *Id.* 358, n.; *Melhuish v. Collier*, 15 Q. B. 878; 19 L. J., Q. B. 493. In the last case it was held that the witness may, at all events, be examined as to his former statements, and contradicted as to any *facts* that are relevant, although the direct effect may be to discredit him; and it has been the constant practice to call evidence to contradict the statements of other witnesses already called by the same party; as where attesting witnesses deny their own signature. See also *Friedlander v. London Assur. Co.*, 4 B. & Ad. 193. And now it is provided by the Crim. P. Act, 1865, ss. 1, 3 (replacing the C. L. P. Act, 1854, s. 22), that a "party producing a witness shall not be allowed to impeach his credit by *general* evidence of bad character, but he may, in case the witness shall, *in the opinion of the judge*, prove adverse, contradict him by other evidence or, *by leave of the judge*, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

It will be seen that leave of the judge is made a condition precedent to the proof of former inconsistent statements, and also premonition and pre-examination as to such statements. In one particular the Act seems to

limit the former admitted liberty of calling witnesses to contradict another witness called by the same party; for in such cases it had been the practice for counsel to consult only their own judgment in calling other witnesses to prove all relevant facts, although their testimony may incidentally contradict the testimony of one already called on the same side. This difficulty has been noticed by the court in *Greenough v. Eccles*, 5 C. B., N. S. 786; 28 L. J., C. P. 160; but it seems to have been the opinion of the court in that case, that the Act is not to be construed as limiting the former liberty to call other witnesses to contradict the testimony of the adverse witness. It was there decided also that "adverse" means hostile, and not merely unfavourable, and that the inconsistent statements of the witness are only admissible where the judge considers his *animus* to be hostile. "A hostile witness is a witness who, from the manner in which he gives his evidence, shows that he is not desirous of telling the truth to the court." *Coles v. Coles*, L. R., 1 P. & M. 71, *per* Wilde, J.O.

Where a witness gave evidence quite different from the proof in the brief which had been prepared in the usual way from the previous statements of the witness to the attorney, Bramwell, B., allowed him to be examined under this section as to his previous oral statements to the attorney; and also allowed the attorney to be called to contradict him. *Amstell v. Alexander*, 16 L. T. 830. But in a similar case it was held that the section was not meant to apply to the loose statements made by the witness to the attorney with a view to prepare the evidence, and granted a rule *nisi* for a new trial, on the ground that witnesses had been called at the trial to prove such statements. *Reed v. King*, 30 L. T. 290, H. T. 1858, Ex. Where a witness had given contrary evidence on his examination in bankruptcy, it seems that evidence was allowed to be used to contradict him. *Pound v. Wilson*, 4 F. & F. 301. See also *Dear v. Knight*, 1 F. & F. 433. A series of letters may be used for the purpose of contradicting the witness, although one only be indirectly inconsistent. *Jackson v. Thomason*, 1 B. & S. 745; 31 L. J., Q. B. 11. The opinion of the judge at the trial as to whether the witness is hostile is conclusive. *Rice v. Howard*, 16 Q. B. D. 681.

It has been held that where a party calls other witnesses to contradict his own witness as to a particular fact, the whole of the testimony of the contradicted witness is not therefore to be necessarily repudiated. *Bradley v. Richardo*, 8 Bing. 57. But in *Faulkner v. Brine*, 1 F. & F. 255, Ld. Campbell, C.J., intimated that the effect of such contradiction was to throw over the evidence of the witness altogether.

It was held that under the C. L. P. Act, 1854, s. 23 *post*, p. 182, it was not competent to a party to contradict his own witness by the witness's previous statements in writing. *Ryberg v. Ryberg*, 32 L. J., P. M. & A. 112. In this case, however, reference does not appear to have been made to *Id.* s. 22, *ante*, p. 174, which would, it seems, have led to an opposite conclusion.

[*Opinion of witness, when admissible.*] In general the mere opinion of a witness as to any of the facts in issue is not admissible as evidence. See *Payton & Co. v. Snelling, Lampard & Co.*, (1901) A. C. 308, 311, D. P. But it is admissible upon questions of science. Thus where the question was, whether a bank erected to prevent the overflowing of the sea had caused the choking up of a harbour, the opinions of scientific men as to the effect of such an embankment upon the harbour were held to be admissible. *Folkes v. Chadd*, 3 Doug. 157. And where the question is whether a seal has been forged, seal engravers may be called to show a difference between a genuine impression and that supposed to be false. *Id.* *per* Lord Mansfield, C.J. So a physician, who has not seen the particular patient, may, after hearing the evidence of others at the trial, be called to testify as to the general effects of

the symptoms described by them and their probable consequences in the particular case; Peake, Evid. 208; or he may be asked whether the facts proved are symptoms of insanity; *R. v. M'Naughten*, 10 Cl. & Fin. 200; but he cannot be asked, generally, whether, upon the evidence of the cause, he is of opinion that the party is insane or incapable of distinguishing between right and wrong; for this would leave him at liberty to find facts as well as to form an opinion on those facts, and in effect put him in the place of the jury. *R. v. Frances*, 4 Cox, C. C. 57; *R. v. Layton*, *Id.* 149. The opinion of a person conversant with the business of insurance, as to whether the communication of particular facts would have varied the terms of insurance, has been admitted in evidence on several occasions both in actions on the policy and against insurance brokers for negligence. *Berthon v. Loughman*, 2 Stark. 258; *Rickards v. Murdock*, 10 B. & C. 527; *Chapman v. Walton*, 10 Bing. 57. But in other cases the admission of this kind of evidence has been discontinued. *Carter v. Boehm*, 1 W. Bl. 594; and in *Campbell v. Rickards*, 5 B. & Ad. 840, a new trial was granted because such evidence had been admitted, and it was held that the materiality of a fact concealed was a question for the jury alone, and that "witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced if the parties had acted in one way rather than another;" see also *Lindenau v. Desborough*, 8 B. & C. 586; *Westbury v. Aberdeen*, 2 M. & W. 267. The evidence of a shipbuilder has been admitted on a question of seaworthiness, though he was not present at the survey; *Beckwith v. Sydebotham*, 1 Camp. 117; *Thornton v. R. Exchange Assur. Co.*, Peake, 25; and the opinion of a nautical witness on a question of skilful navigation, assuming the facts to be true; *Fenwick v. Bell*, 1 Car. & K. 312. The opinions of persons versed in the laws of a foreign country are also admissible; *Chaurand v. Angerstein*, Peake, 44; and see the cases on this point, *ante*, pp. 120-1. Persons conversant with old MSS. may be called to speak to the date of an old writing. *Tracy Peerage case*, 10 Cl. & F. 154. Where the question is, as to the correct judgment of a captain in abandoning his ship, a witness may be asked the result of his personal observation of the "general habits" of the captain as to sobriety. *Alcock v. R. Exchange Assur. Co.*, 13 Q. B. 292. To ascertain the value of a life annuity, an accountant, who stated he was conversant with the business of life assurance offices, was allowed to refer to the Carlisle Tables used by those offices, showing the expectation of life, and then state the sum required to purchase the annuity. *Rowley v. L. & N. W. Ry. Co.*, L. R. 8 Ex. 221, Ex. Ch.

As to calling persons skilled in handwriting to prove forgery or to establish the genuineness of ancient documents, see *ante*, pp. 140-1 *et seq.*

On the slight value to be attached to the evidence of expert witnesses, see *Abinger, Ltd. v. Ashton*, L. R., 17 Eq. 373 *et seq.*, *per Jessel*, M.R., and *Baily v. Clark*, (1902) 1 Ch. 670, *per Stirling*, L.J.

*Memorandum to refresh witness's memory.*] A witness will be allowed to refer to an entry, or memorandum, made by himself at the time of, or shortly after the occurrence of the fact to which it relates, in order to refresh his memory; although the entry or memorandum would not of itself be evidence. *Kensington v. Inglis*, 8 East, 289. Even a receipt on unstamped paper may be used for this purpose. *Maugham v. Hubbard*, 8 B. & C. 14. Nor does the use of such a memorandum by a witness make it evidence in itself. *Alcock v. R. Exchange Assurance Co.*, *supra*. But he cannot refresh his memory by extracts from a book, though made by himself; *Doe d. Church v. Perkins*, 3 T. R. 749; nor speak from having refreshed it out of court; at least unless he produces the memorandum in court; *Beech v. Jones*,



5 C. B. 696; nor by a copy of a book, unless the witness himself saw the copy made and checked it at the time by personal examination while the subject was fresh in his recollection; for then the copy is, in effect, an original entry by himself. *Burton v. Plummer*, 2 Ad. & E. 341; *Talbot de Malahide, Ld. v. Cusack*, 17 Ir. C. L. R. 213, Q. B. In *Burton v. Plummer*, *supra*, a sale was proved by a clerk who refreshed his memory from a ledger entered from a waste book, the waste book being kept by the clerk and the ledger copied by another person under the eye of the clerk. A surveyor may refer to a printed copy of a report made by himself to his employers, and compiled from his rough notes made on the spot. *Horne v. Mackenzie*, 6 Cl. & Fin. 628. So a witness may refresh his memory by reference to entries in a log-book, which he did not write with his own hand, but which he examined from time to time shortly after the events recorded. *Burrough v. Martin*, 2 Camp. 112. Where a witness, on seeing his initials affixed to an entry of payment, said, "I have no recollection that I received the money; I know nothing but by the book, but seeing my initials, I have no doubt that I received the money:" this was held sufficient evidence. *Maugham v. Hubbard*, *supra*; *R. v. S. Martin's*, 2 Ad. & E. 210. A printed form of lease, read over to a tenant as the terms of his tenancy, but not signed according to Statute of Frauds, may be used to refresh the memory of the witness who read it to him. *Bolton, Ld. v. Tomlin*, 5 Ad. & E. 856. If the witness be blind, the papers or memorandum may be read over to him in court. *Catt v. Howard*, 3 Stark. 4. A witness was permitted to refresh his memory from a deposition made and signed by him, shortly after the fact to be proved, on examination before commissioners of bankrupts. *Smith v. Morgan*, 2 M. & Rob. 257. In this case, Tindal, C.J., permitted it to be only so far used as to refresh the memory of the witness as to the date of a single transaction, on the authority of *Vaughan v. Martin*, 1 Esp. 440; but it is observable that in *Vaughan v. Martin*, the whole account of the act of bankruptcy seems to have been read to the witness, a very aged person, who was then asked "whether the matters there stated were true?" Such an examination was also allowed to be used by a witness in a like manner by Pollock, C.B., in *Wood v. Cooper*, 1 Car. & K. 645. The examination in both cases was taken recently after the facts, and this seems essential to the use of any memorandum or paper for refreshing memory. *Whitfield v. Aland*, 2 Car. & K. 1015.

[*Right to inspect memorandum.*] Where the witness gives his evidence after having referred to a book or other document, it must be produced; *Howard v. Canfield*, 5 Dowl. 417; *Beech v. Jones*, 5 C. B. 696; and the counsel on the other side has a right to inspect it, without being bound to read it in evidence; *Sinclair v. Stevenson*, 1 C. & P. 582; *R. v. Ramsden*, 2 C. & P. 603. He may cross-examine upon the entries referred to by the witness, without making the book evidence *per se* for the party who produces the witness; but if he cross-examines as to other entries in the same book, he makes them part of his own evidence. *Gregory v. Tavernor*, 6 C. & P. 281, *per* Gurney, B.; *Whitfield v. Aland*, 2 Car. & K. 1015, Wilde, C.J. Where a paper is put into a witness's hand only to prove the handwriting, and not to refresh his memory, the opposite party is not entitled to see it. *Sinclair v. Stevenson*, *supra*; see further, *post*, p. 181. And where the question founded on a document handed to witness to refresh his memory wholly fails in its object, it has been considered that the opposite party is not entitled to inspection. *R. v. Duncombe*, 8 C. & P. 369. The reason for permitting adverse inspection seems to be to check the use of improper documents;—to secure the benefit of the witness's recollection as to the whole facts;—and to compare his oral testimony with the written statement.

If it fail to refresh his memory, or is not used for that purpose, the right of inspection fails.

*Cross-examination.*] "The evidence of one party 'cannot' be received as evidence against another party without the latter having an opportunity of testing its truthfulness by cross-examination." *Allen v. Allen*, (1894) P. 248, 253, *per C. A.* One defendant has a right to cross-examine another co-defendant called as a witness. *S. C. Id.* 254. So a defendant may cross-examine a co-defendant's witnesses. *Lord v. Colvin*, 3 Drew, 222; 24 L. J. Ch. 517; cited, (1894) P. 253. Upon cross-examination, counsel may lead a witness so as to bring him directly to the point in his answer; but he cannot, if the witness shows an obvious leaning in his favour, go the length of putting into the witness's mouth the very words which he is to echo back again. *Hardy's case*, 24 How. St. Tr. 755. Indeed, in such a case, the usual latitude of cross-examination would perhaps not be allowed. It is not allowable for counsel, on cross-examination, to mislead the witness by assuming facts to be evidence which have not been proved, or to try to entrap him by misstatement. See cases before Abbott, C.J., *Hill v. Coombe*, Exeter Sp. Ass., 1818; *Handley v. Ward*, Lancaster Sp. Ass. 1818 (*qq.* 1819), cited in Stark. Ev., 4th ed. 197 (s). This is sometimes attempted in practice by handing wrong papers to a witness, in order to test his judgment in the proof of handwriting. It is not competent to counsel to question a witness concerning a fact irrelevant to the matter in issue for the mere purpose of discrediting him by calling other witnesses to disprove what he says; *Spenceley v. De Willett*, 7 East, 109; and should the witness answer such a question, evidence cannot be given to contradict; *Harris v. Tippett*, 2 Camp. 637; or to confirm his evidence. *Tolman v. Johnstone*, 2 F. & F. 66. See further, *post*, pp. 181-2.

By Rules, 1883, O. xxxvi. r. 38, "The judge may in all cases disallow any questions put in cross-examination of any party or other witness which may appear to him to be vexatious and not relevant to any matter proper to be inquired into in the cause or matter." It would seem, however, that this rule is either in accordance with the common law rule, or is *ultra vires* as infringing J. Act, 1875, s. 20, *ante*, p. 153.

Where a witness, not a party, produces on cross-examination a mass of correspondence not shown to be relevant to the issue between the parties, the judge may refuse to allow the documents to be put in and read *seriatim*, and the witness to be examined on each one, on the ground of the time this course would occupy: the proper course is to apply for an adjournment to examine the documents, and afterwards to examine the witness on such as are relevant. *In re Maylin Sands*, 71 L. T. 594, M. Sit. 1894, C. A.

In consequence of the general rule that the contents of a written document ought to be proved by the production of it, and not by oral testimony, it was held in *The Queen's case*, 2 B. & B. 287 *et seq.*, that it was not competent to ask a witness, even on cross-examination, respecting a statement formerly made by him in writing without showing to him the writing referred to, and putting it in evidence as part of the case of the cross-examining party either immediately or in the ordinary course of the cause; and this opinion of the judges has been since constantly acted upon, whether the question be put merely to discredit the witness by contradicting him, or as conducive to proof of the matter in issue. *Macdonnell v. Evans*, 11 C. B. 930; 21 L. J., C. P. 141.

It seems, however, that when the statement in writing is an affidavit or deposition filed in some court, the rule in *The Queen's case*, *supra*, is satisfied by the production of an examined or office copy at the trial, for in many

cases witnesses have been allowed to be cross-examined on examined or office copies of their previous depositions, and such copies have been allowed to be used to contradict them. Thus, on an issue out of Chancery, an examined copy of the deposition of one of the witnesses was allowed to be read for the purpose of contradicting the evidence of the same witness on the trial of the issue. *Highfield v. Peake*, M. & M. 109; *Burnand v. Nerot*, 1 C. & P. 578. So an examined copy of an answer, made by a defendant in Chancery, was admitted to contradict the evidence given by him in a subsequent action. *Ewer v. Ambrose*, 4 B. & C. 25. So an attested copy of an affidavit, made by the witness and filed in another cause, was held sufficient to contradict him, on proof being given of his identity; *Garvin v. Carroll*, 10 Ir. L. R. 323; and in *Davies v. Davies*, 9 C. & P. 252, Gurney, B., allowed a witness to be cross-examined on an office copy of his affidavit filed in the cause, a judge's order having, under the old practice, been obtained to admit it. As to the use of an office copy now, see Rules, 1883, O. xxxvii. r. 4, and observations thereon, *ante*, p. 97.

The only case which is cited in support of the proposition that the original must be shown to the witness is that of *Bastard v. Smith*, 10 Ad. & E. 213, 214, in which Tindal, C.J., is said, at N. P., not to have permitted a witness to be cross-examined as to the contents of his former deposition, without first refreshing his memory with the original; as, however, the original was in court, it seems clear that no attempt was made to use an office copy, and all that appears from the report of the case on the motion is, that the court would not interfere with the master's allowance of the costs of bringing down the original deposition. This case can therefore hardly be considered as overruling the numerous cases that have been above cited where the contrary rule was followed.

In *Henman v. Lester*, 12 C. B., N. S. 781; 31 L. J., C. P. 366, it was held by Willes and Keating, JJ., *diss.* Byles, J., that a plaintiff could be asked, on cross-examination, in order to test his credit, as to proceedings taken against him in the county court, without producing the record of the court; at the trial, Pollock, C.B., had admitted the question on the broad ground that the contents of a written document might be proved by the admission of a party to the cause, whether in or out of the witness-box; he did not, however, hold that the witness was *compelled* to answer the question; and the court said he could not be so compelled. In *Macdonnell v. Evans*, *ante*, p. 178, Cresswell, J., said that a witness could not be asked on cross-examination, in order to test his credit, whether he had been convicted of a crime, as that would appear by the record. This was denied by Willes and Keating, JJ. in *Henman v. Lester*, *supra*; *contra*, Byles, J.

By the Crim. P. Act, 1865, ss. 1, 5 (replacing the C. L. P. Act, 1854, s. 24), "a witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit." The effect is this. The witness, in the first instance, may be asked, whether he has made such and such a statement, without its being shown to him. *Sladden v. Serycant*, 1 F. & F. 322, *cor.* Willes, J. If he deny that he has made it, the opposite party cannot put in the statement without first calling his attention to it (showing it, or at least reading it, to him), and to any parts of it relied upon as a contradiction. If the witness,

instead of denying that he has made the statement, admit it, although the object of the cross-examining counsel has been attained, it may be very important for the party calling the witness to have the whole statement, which may not be in his possession, before the court and jury. If he be aware of the contents, he will, it would seem, in such case, be at liberty to re-examine the witness, as to the residue of the statement, without its being produced, on the general rule that if part of any connected conversation or statement be given, the whole may be used (*vide post*, p. 184); or he may ask the judge, under the latter part of the section, to require the production of the writing, for the last provision of the above section was probably introduced for the purpose of guarding against an unfair use of the power of cross-examining upon a document which either has no existence in fact, or may have been only partially brought before the jury and imperfectly understood. This provision would seem, however, not intended in any way to narrow the old practice (*vide ante*, pp. 178-9) as to the production of original documents filed in court, and would be substantially satisfied by the production of any copy on which a witness previously to this enactment could have been cross-examined. See 2 Taylor Evid., 10th ed., § 1448. If the statement be used to contradict the witness, the whole must be put in. *N. Australian Territory Co. v. Goldsborough, Mort & Co.*, (1893) 2 Ch. 381.

We have seen, *sub tit. Admissions, ante*, p. 78, that if a conversation be given in evidence to prove an admission, the *whole* of it must generally be laid before the jury, and this if omitted may be got out by cross-examination, subject, however, to the limitation laid down hereafter under the head of *Re-examination, post*, p. 184; 1 Taylor, Evid., 10th ed., § 725. So if any letter, written statement, or single document be given in evidence, the opposite party may insist on having the whole read and given in evidence as part of the case of the party adducing such evidence. But this rule will not generally justify a party in insisting that separate letters or documents, or even distinct and separate parts or entries in one entire collection of documents, as letter-books, court-rolls, &c., shall *all* be put in evidence by the party producing and reading any one of them, unless they are on the face of them connected with the one already in evidence; and this seems to be the rule whether the documents be of a public or a private nature. Where any such separate entries or distinct parts are favourable to the opposite party, he must put them in evidence as part of his own case. Thus, though the defendant is entitled to have the whole of a particular entry in an account-book read, he cannot insist upon reading distinct entries in different parts of the book unconnected with the one read. *Catt v. Howard*, 3 Stark. 6. See also *Kennie v. Hall*, Manning's N. P. Index, 376. Where the plaintiff called for the production of defendant's letter-book, and read letters of the defendant from it, the defendant was not therefore permitted to read from it, on his own behalf, other letters not referred to in the letters read by the plaintiff. *Sturge v. Buchanan*, 10 Ad. & E. 598. And where a book of bankruptcy proceedings was put in to prove certain depositions for the plaintiff, the defendant's counsel was not allowed to use other parts of the book to refresh the memory of a witness, unless he put it in as part of his own evidence. *Whitfield v. Aland*, 2 Car. & K. 1015, *per* Wilde, C. J.; *Gregory v. Tavernor*, 6 C. & P. 281, *per* Gurney, B. But the plaintiff could not read the examination of a defendant by commissioners of bankrupt taken on one day without also reading his continued examination on another day; *Smith v. Biggs*, 5 Sim. 391; nor the cross-examination of defendant without his examination in chief; S. C.; nor the examination in chief without the cross-examination. *Goss v. Quinton*, 3 M. & Gr. 825. Where an answer in Chancery by a witness was put in only to prove his

incompetency on the ground of interest, the adverse party could not thereupon read the whole in order to prove the issue. B. N. P. 238.

When a document is put into the hands of a witness under cross-examination merely to prove the signature, or identity, or general nature of it, the opposite party is not entitled to immediate inspection of it, except sufficiently to enable him to re-examine about the writing, and also to identify the document in case it should afterwards be put in evidence; he may not read the document through, or comment upon its contents, until it is put in on the other side, nor does it till then become evidence in the cause; but if any question be put as to its contents, or any further question be founded on it, there will be a right to inspect it. *Semb. Cope v. Thames Haven Dock*, 2 Car. & K. 757; *Collier v. Nokes*, Id. 1012; *Peck v. Peck*, 21 L. T., 670; H. T. 1870, C. P. See 2 Taylor Evid., 10th ed., § 1413. And, in general, mere proof of handwriting by a witness, whether on examination in chief or cross-examination, does not oblige the party to put it in evidence or entitle his opponent to use it as evidence, although its absence may, of course, be legitimate ground of comment by him. But the handwriting may of course be disputed if afterwards put in. *Vide ante*, p. 178.

A witness may be cross-examined as to his having omitted to mention a fact on a former examination, though that examination was in writing and not produced. *Ridley v. Gyde*, 1 M. & Rob. 197. As to discrediting witnesses on cross-examination, *vide infra*.

As to cross-examination of deponent where evidence is given by affidavit, *vide post*, p. 186.

Where a witness is brought into court merely for the purpose of producing a written instrument, which is to be proved by another witness, he need not be sworn; *Perry v. Gibson*, 1 Ad. & E. 48; and, unless sworn, the other party will not be entitled to cross-examine him. And where a person called to produce a document was sworn by mistake and was asked a question which he did not answer, it was held that the opposite party was not entitled to cross-examine him. *Rush v. Smith*, 1 C. M. & R. 94. So, if a wrong witness is called in consequence of a mistake in his name, and is dismissed on the discovery of the mistake, the other side has no right to cross-examine him. *Clifford v. Hunter*, 3 C. & P. 16. So, if he is called by error of the counsel and actually sworn, yet if dismissed before examination, he is not liable to be cross-examined. *Wood v. Mackinson*, 2 M. & Rob. 273.

Where a fresh witness is called and examined by the judge, it lies in his discretion whether he will allow either party to cross-examine the witness. *Coulson v. Disborough*, (1894) 2 Q. B. 316. *Semb.* he should give such leave to the party to whom the evidence is adverse, so far as relates to that evidence, but he should not allow a general cross-examination. S. C.

[*Contradicting opponent's witness.*] In order to impeach the credit of a witness, evidence may be given of statements made by him at variance with his testimony on the trial; but to lay a foundation for the evidence of such contradictory declaration or conversation, the witness must be asked, on cross-examination, whether he has made such declaration or held such conversation. *The Queen's case*, 2 B. & B. 301. Before he can be contradicted he must be asked as to the time, place, and person involved in the supposed contradiction. It is not enough to ask him the general question whether he has ever said so-and-so. *Per Tindal, C.J., Angus v. Smith*, M. & M. 474. Where the witness merely says that he does not recollect making the statement, the practice was not uniform as to whether the statement might be proved by the cross-examining party.

But the point is now settled; for the Crim. P. Act, 1865, ss. 1, 4 (replacing the C. L. P. Act, 1854, s. 23), provides that, "if a witness upon cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." See *Ryberg v. Ryberg*, 32 L. J., P. M. & A. 112, cited *ante*, p. 175. As to contradiction of witness by his previous statements in writing, *vide* sect. 5, and observations thereon, *ante*, pp. 179, 180.

Where the object in proving the statements of a witness is not merely to contradict him, but to impeach his moral character by proof of loose and unbecoming language, the evidence seems admissible without previous inquiry of himself. *Carpenter v. Wall*, 11 Ad. & E. 803. Where a document is offered in evidence to contradict the statement of a witness as to a material fact denied by him, it is admissible, though it also tends to prove the issue in the cause for which purpose alone it would have been inadmissible. *Watson v. Little*, 5 H. & N. 472; 29 L. J., Ex. 267.

It has been doubted whether to corroborate the testimony of the witness whose credit has been impeached, evidence *contra* is admissible that the witness affirmed the same thing before, on other occasions; Gilb. Ev., 6th ed., 135; B. N. P. 294; *Lutterell v. Reynell*, 1 Mod. 283; but the better opinion is that such evidence is generally inadmissible. *R. v. Parker*, 3 Doug. 242. *Acc. per* Ld. Redesdale in *Berkeley Peerage case*, as cited in 2 Phill. & Arn. Ev., 10th ed. 523, n. It has been observed, however, that the rule is subject to this exception, that where counsel on the other side impute a design to misrepresent, from some motive of interest or friendship, it may, in order to repel such an imputation, be proper to show that the witness made a similar statement at a time when the supposed motive did not exist, or when motives of interest would have prompted him to make a different statement of the facts. *Id.*, 523, 524. "If a witness speaks to facts negating the existence of a contract, and insinuations are thrown out that he has a near connection with the party on whose behalf he appears, that a change of market or any other alteration of circumstances has excited an inducement to recede from a deliberate engagement; the proof by unsuspecting testimony that a similar account was given when the contract alleged had every prospect of advantage, removes the imputation resulting from the opposite circumstance." Notes to Pothier on Oblig., by Sir W. D. Evans, vol. 2, p. 289.

An opponent's witness may be contradicted on all points material to the issue; but he cannot be contradicted upon any point not material to the issue, with a view of showing that his evidence, generally, is not worthy of credit. The case of *Palmer v. Trower*, 8 Exch. 247, is a strong illustration of the rule. There the plaintiff sued the executor of A. on a joint and several note of A. and B.; the defence being that the note was forged by the plaintiff: the defendant being called as a witness denied, on cross-examination, that he had ever heard B. admit that he had signed the note; it was held, that the plaintiff could not call a witness to prove that B. had made such an admission in the defendant's hearing. It should seem that if the admission of B. had been in A.'s presence, and the note had been sued upon in A.'s lifetime as a joint note, the question would have been material and relevant. A witness, being asked on cross-examination whether he had not said that a bribe had been offered to him to give particular evidence in the case, denied that he had said so: it was held, that no

evidence could be adduced to show that he *did* say so. *A.-G. v. Hitchcock*, 1 Exch. 91. The rule seems to be, that if the witness's answer to a question would, if truly made, tend to qualify, or contradict, or discredit some other relevant part of his testimony, then other evidence may be received to contradict him; and a fact may be considered as "relevant," though not part of the transaction in issue, if the truth or falsehood of it may fairly influence the belief of the jury as to the whole case; *Semb. Melluish v. Collier*, 15 Q. B. 878; 19 L. J., Q. B. 493; but a merely irrelevant inquiry cannot be allowed. It is true that by showing the levity or falsehood of a witness even on irrelevant matters, his testimony would in some degree be discredited, yet the expediency of confining the field of inquiry at N. P. within a reasonable compass has made it necessary to assign a limit to such collateral issues. Without such restraint the examination of each witness might give rise to different issues remote from the immediate issue on the record, which the parties have not come prepared to try, and by which both witnesses and parties might be unfairly prejudiced. On this sort of evidence the observations of the court in *A.-G. v. Hitchcock*, *supra*, are very instructive and important. See also *Hollingham v. Head*, 4 C. B., N. S. 388; 27 L. J., C. P. 241, cited *ante*, p. 79.

*Evidence of character.*] We have seen (*ante*, p. 86) that in actions unconnected with character, evidence of the character of the parties is inadmissible, as irrelevant to the issue. As, however, the veracity of the witness is always a point in issue, his character for veracity may be impugned by the party interested in discrediting him, by showing that he is unworthy of credit. If a witness's character for veracity be impeached, witnesses may be called in support of it.

Although evidence is admissible to show that a witness bears such a character and reputation that he is unworthy of credit, yet it is not allowed (with the exception of facts which go to prove that the witness is not an impartial one, *vide post*, p. 184) to prove particular facts in order to discredit him. *R. v. Watson*, 2 Stark. 152; *R. v. Layer*, 14 How. St. Tr. 285. The question as to the witness's character for credibility must be put in a general form. *Mauson v. Hartsink*, 4 Esp. 102. The usual form of the question is as follows:—"From your knowledge of the witness do you believe him to be a person whose testimony is worthy of credit?" See *R. v. Rowton*, Leigh & Cave, C. C. 520; 34 L. J., M. C. 57; and *R. v. Brown*, L. R. 1 C. C. 70. And although a witness's answer upon a collateral fact is usually conclusive; *R. v. Watson*, *supra*; yet where the object of the inquiry is to prove that the witness has endeavoured to corrupt another to give false testimony in the cause, his denial of the fact or refusal to answer will not prevent the party from proving it by other evidence. *The Queen's case*, 2 B. & B. 311.

But this can only be done by the opposite party; the person calling a witness, having once put him forward as a person worthy of belief, though he may contradict him, cannot afterwards discredit him, if the testimony of the witness should turn out unfavourable, or even should the witness assume a position of hostility towards the party calling him. *Ever v. Ambrose*, 3 B. & C. 749. This is the rule at common law, and is affirmed by the Crim. L. P. Act, 1865, ss. 1, 3, *ante*, p. 174.

By the Crim. P. Act, 1865, ss. 1, 6 (replacing the C. L. P. Act, 1854, s. 25), "a witness may be questioned as to whether he has been convicted of any felony or misdemeanor, and, upon being so questioned, if he either denies or does not admit the fact or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment

and conviction for such offence, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer," . . . "shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same." As to the signature to the certificate, see *R. v. Parsons*, L. R., 1 C. C. 24.

As to a party contradicting his own witness, see *ante*, p. 174. As to cross-examining him, see *ante*, p. 167.

*Evidence that a witness is not impartial.*] What has been said as to not giving evidence of particular facts merely for the purpose of impeaching the credit of a witness, does not apply where the facts sought to be proved go to show that the witness does not stand indifferent between the contending parties. Best Ev., 10th ed., § 644 (3). Thus, in *R. v. Yewing*, 2 Camp. 638, the witness was asked whether he had not said that he would be avenged upon the prisoner, and would soon fix him in gaol. This he denied, and Lawrence, J., allowed him to be contradicted. So also it may be proved that a witness has been bribed; *R. v. Langhorn*, 7 How. St. Tr. 446; or that he has endeavoured to suborn others; *R. v. Strafford, Id.*, *Id.* 400; both which cases were recognized in *A.-G. v. Hitchcock*, 1 Exch. 93; *ante*, p. 183.

*Recalling witness.*] It is in the discretion of the judge whether he will permit a witness to be recalled. *Adams v. Bankart*, 1 C. M. & R. 681; *The Queen's case*, 2 B. & B. 284; *Catlin v. Barker*, 5 C. B. 201.

*Re-examination.*] A re-examination, which is allowed only for the purpose of explaining any facts which may come out on cross-examination must be confined to the subject-matter of the cross-examination. The rule with regard to re-examination is thus laid down by Abbott, C.J., in *The Queen's case*, 2 B. & B. 297: "I think the counsel has a right, upon re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful; and also the motive by which the witness was induced to use those expressions: but I think he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness. . . . I distinguish between a conversation which a witness may have had with a party to the suit, whether criminal or civil, and a conversation with a third person. The conversations of a party to the suit, relative to the subject-matter of the suit, are in themselves evidence against him in the suit; and if a counsel chooses to ask a witness as to anything which may have been said by an adverse party, the counsel of that party has a right to lay before the court the whole which was said by his client in the same conversation, not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject-matter of the suit; because it would not be just to take part of a conversation as evidence against a party, without giving to the party at the same time the benefit of the entire residue of what he said on the same occasion." This statement of the rule was, however, qualified in *Prince v. Samo*, 7 Ad. & E. 627, where it was held that a witness of the plaintiff cross-examined as to the assertions of the plaintiff in a particular conversation, could not be examined as to other *unconnected* assertions of the plaintiff in the same conversation, although connected with



the subject of the suit. In that case the other part of the conversation was attempted to be shown for the plaintiff in order to prove plaintiff's case by his own assertion; and it was observed by the court that, if such proof were admitted, it ought to go to the jury, and might thus obtain a verdict for the plaintiff on his own unsupported assertion out of the court. It must not therefore be assumed that cross-examination on part of a conversation necessarily lets in proof of the whole of it.

As to re-examination of a witness after cross-examination under Crim. P. Act, 1865, s. 5, as to his previous statements in writing, *vide ante*, p. 179.

Where a witness of the plaintiff stated, on cross-examination, facts which were not strictly evidence, but might prejudice the plaintiff, it was held that, unless the defendant applied to strike them out of the judge's notes, the plaintiff was entitled to re-examine upon them. *Blewett v. Tregonning*, 3 Ad. & E. 554.

*Evidence in reply.*] When a party is taken by surprise he should be allowed to produce fresh evidence to meet the case against him. *Bigsby v. Dickinson*, 4 Ch. D. 24, C. A.

#### PROOF BY AFFIDAVITS OR DEPOSITIONS.

As has been already stated, proofs are usually, except by agreement between the parties, to be given at the trial by the oral evidence of witnesses, *ante*, pp. 153, 154; in certain cases, however, affidavits or depositions are allowed to be substituted for such oral evidence.

The following are the rules relating to the subject. By Rules, 1883, O. xxxvii. r. 1, ". . . the court or a judge may at any time, for sufficient reason, order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial on such conditions as the court or judge may think reasonable, or that any witness, whose attendance in court ought for some sufficient cause to be dispensed with, be examined by interrogatories or otherwise before a commissioner or examiner; provided that where it appears to the court or judge that the other party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit." By rule 3, "An order to read evidence taken in another cause or matter shall not be necessary, but such evidence may, saving all just exceptions, be read on" other than *ex parte* applications, "upon the party desiring to use such evidence giving two days' previous notice to the other parties of his intention to read such evidence." By rule 4, "Office copies of all writs, records, pleadings, and documents filed in the High Court of Justice shall be admissible in evidence in all causes and matters, and between all persons or parties, to the same extent as the original would be admissible." See observations on this rule, *ante*, p. 97. By rule 5, "The court or a judge may, in any cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before the court or judge, or any officer of the court, or any other person, and at any place, of any witness or person, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the court or a judge may direct." Rule 6 provides the form of order for a commission to examine witnesses, and of the writ of commission, and rule 6A for letters of request. By rule 16, the depositions authenticated by the

signature of the examiner are to be transmitted by him to the central office and there filed. By rule 18, "except where by this order otherwise provided, or directed by the court or a judge, no deposition shall be given in evidence at the hearing or trial of the cause or matter without the consent of the party against whom the same may be offered, unless the court or judge is satisfied that the deponent is dead, or beyond the jurisdiction of the court, or unable from sickness or other infirmity to attend the hearing or trial, in any of which cases the depositions certified under the hand of the person taking the examination shall be admissible in evidence, saving all just exceptions, without proof of the signature to such certificate." By rule 24, "No affidavit or deposition filed or made before issue joined in any cause or matter shall without special leave of the court or a judge be received at the hearing or trial thereof, unless within one month after issue joined, or within such longer time as may be allowed by special leave of the court or a judge, notice in writing shall have been given by the party intending to use the same to the opposite party of his intention in that behalf." By O. xxxviii. r. 3, "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted." By rule 16, "No affidavit shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used, or before any agent or correspondent of such solicitor, or before the party himself." By rule 17, "Any affidavit which would be insufficient if sworn before the solicitor himself shall be insufficient if sworn before his clerk or partner."

Affidavits or depositions so taken will, under O. xxxvii. r. 4, *ante*, p. 186, be proved at the trial by production of office copies; see also *Duncan v. Scott*, 1 Camp. 101; *Fleet v. Perrins*, L. R., 3 Q. B. 536; but the order so to take evidence must, it seems, be previously proved. See *Bayley v. Wylie*, 6 Esp. 85, *post*, p. 187. The judge cannot, under rule 1, at the trial, order an affidavit to be read, when the opposite party *bonâ fide* desires the witness to be produced for cross-examination; *Blackburn Union v. Brooks*, 7 Ch. D. 68; unless the witness cannot be found. See *Gornall v. Mason*, 12 P. D. 142. As to the admission in evidence of the depositions under rule 18, *supra*, *cf.* stat. 1 W. 4, c. 22, s. 10, and cases decided thereon *post*, p. 187.

By Rules 1883, O. xxxviii. r. 25, "Within 14 days after a consent for taking evidence by affidavit as between the parties has been given, or within such time as the parties may agree upon or the court or a judge may allow, the plaintiff shall file his affidavits and deliver to the defendant or his solicitor a list thereof." Rule 26: "The defendant within 14 days after delivery of such list, or within such time as the parties may agree upon, or the court or a judge may allow, shall file his affidavits and deliver to the plaintiff or his solicitor a list thereof." Rule 27: "Within 7 days after the expiration of the last-mentioned 14 days, or such other time as aforesaid, the plaintiff shall file his affidavits in reply, which affidavits shall be confined to matters strictly in reply, and shall deliver to the defendant or his solicitor a list thereof." Rule 28: "When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party, may serve upon the party by whom such affidavit has been filed a notice in writing, requiring the production of the deponent for cross-examination at the trial, such notice to be served at any time before the expiration of 14 days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the court or a judge may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the special leave of the court or a judge."

The consent under rule 25 must be a formal consent in writing. *New Westminster Brewery Co. v. Hannah*, 1 Ch. D. 278. It may be given by the guardian *ad litem* of an infant. *Knatchbull v. Fowle*, *Id.* 604. The plaintiff may use affidavits in reply which are confirmatory only of his evidence in chief, notwithstanding rule 27. *Peacock v. Harper*, 7 Ch. D. 649.

Unless the agreement has been that evidence should be given by affidavit *only*, the affidavits may be supplemented by the oral evidence of the deponents. *Glossop v. Heston, &c., Local Board*, 47 L. J., Ch. 536.

Where the defendant's evidence is given by affidavit, supplemented by the oral testimony of the deponent, the plaintiff is not entitled to cross-examine those deponents whose affidavits had not been read. *Massam v. Thorley's Cattle Food Co.*, W. N., 1879, p. 181, Malins, V.-C. As to the power of the judge to order a trial by witnesses, and to exclude the affidavits filed, see *Lovell v. Wallis*, W. N., 1883, p. 231, Mich. S., Kay, J.

The power of authorizing the examination of witnesses out of court was formerly given to the courts of common law by stat. 1 W. 4. c. 22. These provisions of the statute are no longer in force, but it is necessary shortly to state them, and the decisions thereon, as they may afford some guide to the practice under O. xxxvii. rr. 5, 18, *ante*, pp. 185, 186. Sect. 4 empowered a judge to order any witness within the jurisdiction to be examined orally before an officer of the court or other person named in the order, or to order a commission to issue to examine in places out of the jurisdiction; the same or a subsequent order was to give "directions touching the time, place, and manner of such examination." Sects. 5 *et seq.*, contained provisions for examination of witnesses on oath and for the production of documents. By sect. 10, the examination so taken could not be used "without the consent of the party against whom the same may be offered, unless it shall appear, to the satisfaction of the judge, that the examinant or deponent is beyond the jurisdiction of the court, or dead, or unable, from permanent sickness or other permanent infirmity, to attend the trial."

Except in the case of lost commissions of ancient date, the commission must have been proved at the trial, in order to make the examination evidence. *Bayley v. Wylie*, 6 Esp. 85; *Rowe v. Brenton*, 8 B. & C. 765. And on the same principle it seems that where the examination is taken by order, the order should be produced, though the certified examinations themselves require no proof, being made evidence by the 8 & 9 V. c. 113, s. 1, *ante*, p. 100, and may be proved by office copies under O. xxxvii. r. 4, *ante*, p. 185.

The inability of the witness to attend must have been proved by a witness who knew it otherwise than by hearsay. *Robinson v. Markis*, 2 M. & Rob. 375. The court would not interfere with the discretion of the judge exercised under this section, unless he had been misled by false evidence. *Beaufort, Dk. of v. Crawshay*, L. R., 1 C. P. 699. It appears that the affidavit of the witness's ordinary medical attendance was sufficient evidence. *Id.* Under O. xxxvii. r. 18, *ante*, p. 186, the sickness or infirmity of the examinant need not be *permanent*. Where the witness had actually sailed, the depositions were allowed to be read, though the vessel was, at the time of trial, driven back into port by contrary winds. *Fonsick v. Agar*, 6 Esp. 92. It was held not sufficient that the witness was a seafaring man, and that he lately belonged to a vessel lying at a certain place, without proving some effort had been recently made to procure his attendance. *Falconer v. Hanson*, 1 Camp. 172.

Where depositions on interrogatories are read on the part of the plaintiff, the whole, including the answers to the cross-interrogatories, must be read as part of his case. *Temperley v. Scott*, 5 C. & P. 341. The answers

to illegal questions put under the authority of a commission, might be objected to, and struck out at N. P.; but not by the party who put the question. *Hutchinson v. Bernard*, 2 M. & Rob. 1. The deposition might be read, though it appeared on the face of it that the deponent referred to papers not shown to the commissioners. *Steinkeller v. Newton*, *Id.* 372. So, where copies of documents and oral evidence relating to their contents were received by the commissioners without objection from the other party who joined in the commission, it was held that the latter could not, at the trial, object to the non-production of the originals. *Robinson v. Davies*, 5 Q. B. D. 26. Where the commission was issued irregularly, or the execution was against good faith, yet it seems the judge must have received the depositions at N. P., if there was due notice of execution to the other side; though the court might, under such circumstances, set aside the verdict and grant a new commission. *Steinkeller v. Newton*, as reported (variously) in 1 Scott, N. R. 148; 8 Dowl. 579; and 9 C. & P. 313. See *White v. Hallett*, 28 L. J., Ex. 208, where it seems to have been doubted whether notice of the execution was necessary, if there were notice of the commission. Where the commission directed the depositions to be returned, certified copies returned were inadmissible. *Clay v. Stephenson*, 7 Ad. & E. 185. The depositions could not be read if the order, on which the commission issued, did not pursue the statute; thus, if it omitted to name a place of examination, though one be inserted in the commission. *Greville v. Stulz*, 11 Q. B. 997. But if the order were not produced, it was presumed that it was in conformity with the commission. S. C. And the omission made the commission irregular only, and not void, and might therefore be waived by the conduct of parties; as by acting under it, or using the documents obtained under it and returned with it. *Hawkins v. Baldwin*, 16 Q. B. 375; 20 L. J., Q. B. 198. Where the order contained a clause as to the signature of the depositions which was omitted in the commission, and the depositions were not signed in this particular way, it was held that the clause was merely directory, and as the commission had been executed in conformity with the statute, "as to the time, place, and manner of examination," the depositions were receivable in evidence; *Hodges v. Cobb*, L. R., 2 Q. B. 652; and it appears that a mere irregularity in the execution of the commission could only be taken advantage of by an application to set aside the depositions, and if this had not been done they were admissible in evidence. S. C.; *Grill v. General Screw Collier Co.*, L. R., 1 C. P. 600. The commission was sufficient though the order did not name the commissioners. *Nicol v. Alison*, 11 Q. B. 1006. If the order and commission required witnesses to be examined apart, this was presumed to have been done, unless the contrary appeared by the depositions returned. *Sinms v. Henderson*, *Id.* 1015. Where the return was ordered to be made to the master's office, and a clerk of the office produced a commission, return, and examinations, delivered at the office by an unknown party, and it was proved that it was the same commission that issued, and the signatures of the commissioners to the return were identified, that was held enough to make the examinations admissible without proof that they were the identical examinations sent forth by the commissioners. S. C. Where the deponent refers in his deposition to a former deposition of his, thus:—"I hand you a legalized copy of a deposition D. which I made at the English consulate, and which I now confirm," and the paper D. was annexed and purported to have been produced to the witness, yet the paper D. was held inadmissible. *Alcock v. R. Exchange Assurance Co.*, 14 Q. B. 292. As to the jurisdiction of a court in India to examine witnesses, to which court had been transferred the jurisdiction of the court to which the commission was directed, see *Wilson v. Wilson*, 9 P. D. 8, C. A.

As to evidence of particular facts specified in an order made under Rules (Aug. 1894), O. xxx. r. 7, *vide ante*, p. 154.

As to the use in evidence of depositions taken by a British Consul abroad, *vide post*, p. 202.

As to proof under the Bankers' Books Evidence Act, 1879, ss. 4, 5, by affidavit that a book is a banker's book and verification of a copy thereof, *vide ante*, p. 123.

## EFFECT OF DOCUMENTARY EVIDENCE.

We have already seen in what manner various written instruments of a public or private nature are to be proved. *Ante*, pp. 96 *et seq.* Under the present head will be collected some of the principal cases relating to the effect and authority of such instruments when duly proved, and the circumstances under which they are admissible evidence of the facts which they purport to show.

Where a document, inadmissible as evidence, has been in part read at the instance of counsel, he cannot afterwards object to the admissibility of the whole of it. *Laybourn v. Crisp*, 4 M. & W. 320.

### *Effect of Acts of Parliament.*

The preamble of a public general Act of Parliament, reciting the existence of certain outrages, is evidence to prove that fact; because in judgment of law, every subject is privy to the making of it. *R. v. Sutton*, 4 M. & S. 532. But it seems that allegations of fact in a public statute are not conclusive; therefore, a place named as a borough or corporation in the Municipal Reform Act, may be proved not to be one. *R. v. Greene*, 6 Ad. & E. 548. Indeed, recitals in a private Act are not conclusive either of fact or law. *R. v. Haughton*, 1 E. & B. 501; 22 L. J., M. C. 89; *Mertteus v. Hill*, (1901) 1 Ch. 842, 852. And a private statute, though it contain a clause requiring it to be judicially noticed as a public one, is not evidence at all against strangers, either of notice or of any of the facts recited. *Ballard v. Way*, 1 M. & W. 520; *Brett v. Beales*, M. & M. 421; *Taylor v. Parry*, 1 M. & Gr. 604. But it may be evidence of reputation respecting a franchise as between lords and tenants of a manor. *Carnarvon, El. of v. Villebois*, 13 M. & W. 313. In *Beaufort, Dk. of v. Smith*, 4 Exch. 450, a general saving in certain Acts of the plaintiff's rights, including a right of toll on all coal exported within his manor, was considered to be inadmissible evidence of such claim in favour of the plaintiff. It is observable that in both the last cases, the rights saved were of a public nature; the Acts were local and personal, public Acts; and the savings were in the usual form in such Acts. In *Carnarvon, El. of v. Villebois, supra*, the Act was an inclosure Act, to which the lords and copyholders were, as it were, parties, and the claim was a free-warren over copyholds. In *Beaufort, Dk. of v. Smith, supra*, the Acts were harbour and canal Acts. As to the effect of the marginal notes, and title, *vide ante*, pp. 104, 105.

### *Effect of Proclamations, Gazette, State Papers, &c.*

The King's proclamation, being an act of state of which all ought to take notice (*per Treby, C.J., Wells v. Williams*, 1 Ld. Raym. 283), is evidence to prove a fact of a public nature recited in it, viz., that certain

outrages had been committed in different parts of certain counties. *R. v. Sutton*, 4 M. & S. 532.

The Gazette is evidence of all acts of state published therein; as where it states that certain addresses have been presented to the King, it is evidence to prove that fact. *R. v. Holt*, 5 T. R. 436. So proclamations may be proved by production of the Gazette. *Ibid.* 443; *A.-G. v. Theakstone*, 8 Price, 89; and see the Documentary Evidence Act, 1868, *ante*, p. 105. But the Gazette is not evidence (unless made so by statute) of matters therein contained which have no reference to acts of state, as a grant by the King to a subject of a tract of land or of a presentation; *R. v. Holt*, 5 T. R. 443; or of the appointment of an officer to a commission in the army; *Kirwan v. Cockburn*, 5 Esp. 233; *R. v. Gardner*, 2 Camp. 513. The statutory effect of the Gazette has been much extended by the Documentary Evidence Act, 1868 (31 & 32 V. c. 37), and subsequent statutes: *vide ante*, pp. 105 *et seq.*

A paper from the Secretary of State's office, transmitted by the British ambassador at a foreign court, and purporting to be a declaration of war by the government of that country against another foreign state, is evidence of the precise period of the commencement of that war. *Thelluson v. Cosling*, 4 Esp. 266. The existence of a war between this country and another requires no proof. *Fost. Cr. L.* 219; *R. v. De Berenger*, 3 M. & S. 67. The articles of war, printed by the King's printer, are evidence of such articles; *R. v. Withers*, cited 5 T. R. 446; of which, it seems, the court will take judicial notice. *Per Abbott, C.J., Brudley v. Arthur*, 4 B. & C. 304; *vide ante*, p. 83. By the Bankruptcy Act, 1883, s. 132, the Gazette is evidence, in some cases conclusive, of certain proceedings in bankruptcy stated therein. A certificate from the Foreign or Colonial Office, as the case may be, is conclusive as to the status of an independent foreign sovereign. *Mighell v. Sultan of Johore*, (1894) 1 Q. B. 149, C. A. See also *Foster v. Globe Venture Syndicate*, cited, *ante*, p. 79.

#### *Effect of Parliamentary Journals.*

The Journal of the House of Lords, containing an address of the Lords to the King, and the King's answer, in which certain differences were stated to exist between the Kings of England and Spain, was admitted to prove the fact of such differences. *R. v. Francklin*, 17 How. St. Tr. 627; *R. v. Holt*, 5 T. R. 445. But the resolutions of either Houses of Parliament are not evidence of extrinsic facts therein stated; thus the resolution of the House of Commons, stating the existence of the Popish Plot, was held to be no evidence of that fact. *Oates' Case*, 10 How. St. Tr. 1165, 1167.

#### *Effect of Judgments, &c., as Estoppels, or as Evidence.*

*Effect of judgments and verdicts in the superior courts, with regard to the parties.*] The judgment of a court of concurrent jurisdiction directly upon a point is, as a plea, a bar, and, as evidence, conclusive upon the same matter between the same parties; but it is also a general principle that a transaction between two parties in a judicial proceeding ought not to bind a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment which he might think erroneous. Therefore the depositions of witnesses in *another cause* in proof of a fact; the verdict of a jury finding a fact; and the judgment of the court on facts so found, although evidence against the parties and all claiming under them, are not in general to be used to the

prejudice of strangers. *Per De Grey, C.J., Kingston's (Ds. of) case*, 20 How. St. Tr. 538. The language of the judges on the first proposition enunciated above, has been thus explained, viz., that the judgment is conclusive (*i.e.*, an estoppel) if pleaded, where there is an opportunity of pleading it; but that where there is no such opportunity, then it is conclusive as evidence; but if the party forbear to rely upon an estoppel when he may plead it, he is taken to waive the estoppel, and to leave the prior judgments as evidence only for the jury. See 2 Smith's L. Cases, note on S. C. And this view is confirmed by the opinion of the court in *Freeman v. Cooke*, 2 Exch. 654; *Litchfield v. Ready*, 5 Exch. 939; *R. v. Blackmore*, 2 Den. C. C. 419; *R. v. Houghton*, 1 E. & B. 501; 22 L. J., M. C. 89. See further, as to the effect of a judgment as an estoppel, or as evidence only, *Outram v. Morewood*, 3 East, 365; and *Vooght v. Winch*, 2 B. & A. 662. The effect of a judgment is the same whether obtained by consent or otherwise. *Ex pte. Bank of England* (1895), 1 Ch. 37, C. A. Where the actual grounds of the judgment can be clearly discovered from the judgment itself it is conclusive as to the grounds, as well as with reference to the actual matter decided. *Alison's case*, L. R., 9 Ch. 1, 25; *Priestman v. Thomas*, 9 P. D. 70, 210, C. A.

In order to bind a party, he must have sued or been sued in the same character in both suits. Thus, in an action against an executor suggesting a devastavit, he is estopped by a prior judgment against him finding assets. *Jewsbury v. Mummery*, L. R., 8 C. P. 56, Ex. Ch. See further, *sub tit. Actions against executors, post*, p. 1166. But in an action by an executor on a bond, he will not be estopped by a judgment in an action brought by him as administrator on the same bond, but he may show the letters of administration recalled. *Robinson's case*, 5 Rep. 32 b. In considering the effect of judgments the court will, it seems, look to the real, and not only to the nominal, parties to the suit. Thus, a verdict in trespass against a person who justified as servant of J. S., was allowed to be given in evidence against the defendant, who also acted under J. S., J. S. being shown to be the real defendant in both causes. *Kinnersley v. Orpe*, 2 Doug. 517. Where, in a replevin suit between A. and the bailiff of B., it was found that A. was tenant of B., the judgment was received as conclusive evidence against A. of his tenancy in a suit by B. against A. for subsequent rent. *Hancock v. Welsh*, 1 Stark. 347. But where in trespass *q. c. f.*, the defendant pleaded *lib. ten.* in P., and it appeared that P. had sold and conveyed to plaintiff, and afterwards conveyed, without a covenant for title, to defendant, who had mortgaged to P.: it was held that P. was a competent witness for the defendant, because the verdict would not be evidence for him as between him and the plaintiff. *Simpson v. Pickering*, 1 C. M. & R. 527. A former judgment in ejectment was evidence on another ejectment, where the lessor of the plaintiff and the defendant were the same. *Doe d. Strode v. Seaton*, 2 C. M. & R. 728. In ejectment on the demise of a mortgagee, a verdict and recovery in a former ejectment brought by the defendant against the mortgagor since the mortgage is not evidence against the plaintiff. *Doe d. Smith, v. Webber*, 1 Ad. & E. 119. Where a party could not have been prejudiced by a verdict if it had gone against him, a verdict in his favour in a former action will not be available as evidence for him, even against one who was a party to it. *Wennan v. Mackenzie*, 5 E. & B. 447; 25 L. J., Q. B. 44.

A balance order to enforce payment of a call, due from a contributory of a company, is not in the nature of a judgment, and does not merge the right of action for the call. *Westmoreland, &c., Slate Co. v. Feildon*, (1891) 3 Ch. 15, C. A.

*Effect of judgments and verdicts in the superior courts with regard to privies.]* Privies stand in the same situation as to those to whom they are privy. Thus, a privy in blood, as an heir, may give in evidence a verdict for, and is bound by a verdict against, his ancestor. *Lock v. Norborne*, 3 Mod. 142; *Outram v. Morewood*, 3 East, 346; *Whittaker v. Jackson*, 2 H. & C. 926; 33 L. J., Ex. 181. So, of privies in estate; therefore, if there be several remainders limited by the same deed, a verdict for one in remainder may be given in evidence for one next in remainder. *Pyke v. Crouch*, 1 Ld. Raym. 730. See *Doe d. Ld. Teynham v. Tyler*, 6 Bing. 390; *Doe d. Harlow*, 12 Ad. & E. 42 (*d*). But a verdict against tenant for life or years is inadmissible for or against the reversioner. B. N. P. 232; *Rees v. Watts*, 3 M. & W. 527; see *Wenman v. Mackenzie*, *ante*, p. 191, and the proposition to the contrary in Com. Dig. Testm. (A. 5) cannot be maintained. A verdict for or against A. is admissible against a party claiming under A. where the claim originated since the verdict. *Semb. per* Littledale, J., in *Doe d. Foster v. Derby*, *El. of*, 1 Ad. & E. 790. But not otherwise, *Mercantile, &c., Co. v. River Plate, &c., Co.*, (No. 2), (1894) 1 Ch. 578. A verdict against one defendant, in case for a nuisance, is evidence of the plaintiff's right in a second action against the same and other defendants, if the latter claim under the first defendant. *Strutt v. Bovington*, 5 Esp. 58. A. and B. sued defendant for diverting water from their works; they were allowed to give in evidence a former recovery by A. alone against the same defendant for a similar injury, although B. had been a witness for A. in the first action; and it was held that the possession by A. and B. of the same works was evidence of privity of estate. *Blakemore v. Glamorgan Canal Co.*, 2 C. M. & R. 133. Privity in law is sufficient; thus, a verdict against an intestate or testator binds his representatives. *R. v. Hebden*, Andr. 389. In the same manner, a judgment against the schoolmaster of a hospital, concerning the rights of his office, is evidence against his successor. *Travis v. Chaloner*, 3 Gwill. 1237. The estoppel must be mutual. *Concha v. Concha*, 11 Ap. Ca. 541, D. P. As to the effect of judgment recovered under the Married Women's Property Act, 1882, see *Beck v. Pierce*, 23 Q. B. D. 316, C. A., cited *post*, p. 1170. Where A., though not a party to an action, knowing what is passing, stands by and sees his battle fought by B. in the same interest, A. may be bound by the result; *In re Lart* (1896), 2 Ch. 788. So where A. has expressly indemnified B., A. will as against B. be bound. *Parker v. Lewis*, L. R., 8 Ch. 1035, 1059, *per* Mellish, L. J.

*Effect of judgments and verdicts in the superior courts with regard to strangers.]* There are several exceptions to the general rule that no one shall be bound or prejudiced by judgment to which he is not party or privy. They are admissible where they relate to public matters. Thus, in the case of customs or tolls, verdicts, whether recent or ancient, respecting the same custom, or toll, are evidence between other parties. *London, City of v. Clerke*, Carth. 181; B. N. P. 233. So in the case of customary commoners, a verdict in an action for or against one is evidence for or against another claiming the same right. *Per* Ld. Kenyon, *Reed v. Jackson*, 1 East, 357. So a verdict with regard to a public right of way. *Id.* 355. And it seems that in all cases where general reputation is evidence, a verdict upon the right claimed will also be evidence, even as between strangers to the former record. *Id.* So also where judgment went by default for want of a plea. *Neill v. Devonshire*, *Dk. of*, 8 Ap. Ca. 135, D. P. See further *ante*, p. 50. And a verdict may be evidence, though not delivered according to modern forms, if the record be old. Thus, where the Bishop of L. was presented in the sheriff's tourn for not repairing a bridge, and the presentment,



being removed into K. B. by *certiorari*, was tried at N. P., 20 Edw. 3, the jury found that the bishop was not liable to repair, that the bridge was built by alms within 60 years, and that they knew of no one liable to repair: held that, although the only material finding was the non-liability of the then defendant, yet it was not to be assumed that the functions of the jury were so limited *tempore* Edw. 3 as now, and that the record was evidence in favour of the defendant (a stranger to the record), who was charged with a prescriptive liability to repair *ratione tenuræ*, especially when followed by a grant of pontage by the same king, reciting that no one was bound to repair the bridge. *R. v. Sutton*, 8 Ad. & E. 516. A judgment in favour of a lord of a manor on a *quo warranto* for usurping a franchise is evidence of the right even against copyholders of inheritance. *Carnarvon, El. of v. Villebois*, 13 M. & W. 313. So, allowances *in eyre* as against strangers. S. C. *per* Parke, B. The record of a former action of *indebitatus assumpsit* for work and labour by an officer, coupled with oral proof of the point in issue, is evidence of the customary rights of a public corporate officer. *Laybourn v. Crisp*, 4 M. & W. 320. But the verdict in such cases is not conclusive. *Biddulph v. Ather*, 2 Wils. 23. And a prosecution by the Crown for usurping tolls resisted, and not carried on to judgment, is not admissible on a trial of the same right. *Per* Tindal, C.J., *Lancum v. Lovell*, 6 C. & P. 437.

A judgment of ouster against a municipal officer is evidence *inter alios* upon issue joined in a *quo warranto* whether he was such officer at the time of defendant's election. *R. v. Hebden*, Stra. 1109; S. C., more fully in 2 Selw. N. P. 13th ed. 1136. And the record of ouster will be conclusive if the ouster avoid the election and the judgment was without fraud; *R. v. York, Mayor of*, 5 T. R. 66, 72; otherwise not. 2 Selw. *ubi supra*; *R. v. Grimes*, 5 Burr. 2598. Such judgments are in the nature of judgments *in rem*. See *post*, p. 194.

Where a judgment is produced merely for the purpose of proving the fact of such recovery and judgment, and not with a view to prove the truth of the facts upon which the judgment was founded, it may be evidence for or against a stranger. Thus, a verdict against a master in an action for the negligence of his servant is evidence in an action by the master against the servant to prove the *amount* of damages, though not of the fact of the injury. *Green v. New River Co.*, 4 T. R. 590. Plaintiff became surety for a collector on having an indemnity bond from defendant. In an action on it, the breach was, that the plaintiff had been forced to pay a large sum in consequence of the collector's default, and the issue was on a traverse of the plaintiff being forced to pay it. On the trial of a judgment for 500*l.* recovered without contest against the plaintiff as surety was given in evidence: held that the judgment could not be used as evidence to show the *amount* which the plaintiff had been forced to pay; the amount for which the collector was *liable* ought to have been shown as against the defendant. *King v. Norman*, 4 C. B. 884.

A judgment against one or two joint tortfeasors, although unsatisfied, is a bar to an action against the other. *Brown v. Wootton*, Cro. Jac. 73; *Yelv.* 67; *Moor*, 762. See also *The Bellcairn*, 10 P. D. 161, C. A.

So a judgment against one or two joint contractors. *Kendall v. Hamilton*, 3 C. P. D. 403, C. A.; 4 Ap. Ca. 504, D. P.; *Hammond v. Schofield* (1891), 1 Q. B. 453; *King v. Hoare*, 13 M. & W. 49.

*Secus*, where the debt is several as well as joint. S. C.

The proceedings and verdict of the jury in a suit in the Divorce Court are not admissible in evidence in an action *inter alios*, unless there has been a sentence altering the *status* of the parties to the suit. *Needham v. Bremner*, L. R., 1 C. P. 583. See *Anderson v. Collinson*, *post*, p. 206.

*Effect of judgments and verdicts with regard to the subject matter of the suit.*] A judgment between the same parties and upon the same cause of action is conclusive, although the form of action is different. Thus, a verdict in trover is a bar in an action for money had and received, brought for the value of the same goods. *Hitchin v. Campbell*, 2 W. Bl. 827. So a judgment in debt was a bar in an action of *assumpsit* on the same contract. *Shude's case*, 4 Rep. 94 b. So a judgment in trespass, in which the right of property is determined, is a bar to trover for the same taking. Com. Dig. Action (K. 3). But where the party mistook his form of action and failed on that account, the judgment in such action did not conclude him. *Ferrers v. Arden*, Cro. Eliz. 668; *Godson v. Smith*, 2 B. Moore, 157. If the plaintiff omitted to give any evidence under one of two distinct counts in a former action, under which he might have recovered the amount, he was not precluded from giving it in a subsequent action. *Seddon v. Tutoz*, 6 T. R. 607; and see *Eastmure v. Laws*, 6 N. C. 444; *Thorpe v. Corper*, 5 Bing. 116, Ex. Ch., and the observations of the court in *Henderson v. Henderson*, 3 Hare, 115. See also *Widgery v. Tepper*, 7 Ch. D. 423. So where separate injuries arise from the same wrongful act, recovery for one such injury is no bar to a recovery for another. *Brunsdon v. Humphrey*, 14 Q. B. D. 141, C. A.; *Darley Main Colliery Co. v. Mitchell*, 11 Ap. Ca. 127, D. P. So, although an order of removal quashed at the sessions, is evidence between the same parishes that there is no settlement in the appellant parish, yet a subsequent cause of removal may be shown. *R. v. Wick St. Lawrence*, 5 B. & Ad. 526. Judgment for the defendant in an action on part of one connected libel, is a bar to an action brought in respect of another part. *Macdougall v. Knight*, 25 Q. B. D. 1, C. A. Where the declaration in the second action was framed in such a manner that the causes of action might be the same as those of the first, it was incumbent on the party bringing the second action to show that they were not the same. *Bugot, Id. v. Williams*, 3 B. & C. 239.

It is a general rule that a judgment is only evidence where it is direct upon the point which it is offered in evidence to prove. It has been denied to be evidence of any matter which came collaterally in question; or of any matter incidentally cognisable; or of any matter to be inferred by argument from the judgment. *Kingston's (Ds. of) case*, 20 How. St. Tr. 533; *Blackham's case*, 1 Salk. 290. It seems, however, that this rule, as laid down in the above terms, has not been strictly adhered to, and requires qualification. Thus, in settlement cases, an order of removal, unappealed against or confirmed, has been always held to be conclusive evidence not merely of the fact directly denied, but also of those facts which are necessary to arrive at the decision; any fact on which the judgment of the court must have been based cannot be considered as merely collateral. *R. v. Hartington*, 4 E. & B. 780, 790; 24 L. J., M. C. 98, and the cases there referred to. A verdict with judgment is not evidence of an immaterial allegation, although included in a general traverse. *Shearm v. Burnard*, 10 Ad. & E. 593.

As to judgments *in rem*, and their effect as against strangers, see the next head.

#### *Effect of Judgments in rem.*

There are various legal proceedings, not being suits *inter partes* merely, which bind all mankind, until set aside in due course. The most remarkable examples occur in proceedings brought on the revenue side of the Court of Exchequer *in rem*; by revenue officers; in the Courts of Admiralty, in the Courts of Probate and Divorce, and in the Spiritual Courts. Instances

of some of those will be given under future heads. Judgments for the Crown on *scire facias* for the repeal of patents (*vide infra*), and informations in the nature of *quo warranto* for seizure of franchises, or ouster from offices, are also of the same nature. A judgment of condemnation of goods in the Exchequer, upon a proceeding *in rem*, is conclusive as to all the world; and therefore, after such judgment, trespass will not lie against the officer who seized the goods to try the point again. *Scott v. Shearman*, 2 W. Bl. 977. But if the proceeding were *in personam* merely, as a conviction for penalties, the judgment is not evidence (except of the fact of conviction) in any case in which the parties are different. *Hart v. McNamara*, 4 Price, 154, n. A conviction by commissioners of excise on an information for an offence against the excise laws, is conclusive; *Fuller v. Potch*, Carth. 346; and binds a stranger. *Roberts v. Fortune*, Hargr. Law Tracts, 468, n. It has been said that an acquittal in the Exchequer upon a seizure made for want of a permit is conclusive evidence in an action of trespass that the permit was regular; *per* Ld. Kenyon, *Cooke v. Sholl*, 5 T. R. 255; Vin. Ab. Evid. (A. b. 23); but this opinion has been questioned; for the acquittal does not, like a conviction, ascertain any precise fact, and may have proceeded on the ground of insufficient evidence. 1 Phill. & Arn. Ev., 10th ed., 48, 49. A conviction *in rem* was evidence, though obtained by the evidence of the very party who used it. *Davis v. Nest*, 6 C. & P. 167. A decree of the Court of Probate granting probate and declaring the domicile of the testator is not, as a judgment *in rem*, conclusive as to domicile, unless the declaration was essential to the grant. *Concha v. Concha*, 11 Ap. Ca. 541, D. P. See further, *post*, p. 204.

By the J. Act, 1873, s. 34, the jurisdiction of the revenue side of the Court of Exchequer was vested in the Exchequer Division of the High Court of Justice, and that of the Admiralty, and of the Probate and Divorce Courts in the Probate, Divorce and Admiralty Division. The Exchequer Division was merged in the Queen's Bench Division of the High Court by Order in Council made Dec. 16th, 1880, under the J. Act, 1873, s. 32.

The Patents, &c., Act, 1883 (46 & 47 V. c. 57), s. 26, now substitutes a petition to revoke letters patent for an invention, for proceedings by *scire facias*.

When a judge has, under the Parliamentary Elections Act, 1868 (31 & 32 V. c. 124), tried an election petition, his certificate under sect. 11 (13) as to who is duly elected, is a decision *in rem* and conclusive. *Waygood v. James*, L. R., 4 C. P. 361. But his report under sect. 11 (14, 15), has not this effect. *Stevens v. Tillett*, L. R., 6 C. P. 147.

A judgment *in rem* of a competent foreign tribunal is conclusive, and cannot, in the absence of fraud, be questioned in our courts. *Cammell v. Sewell*, 3 H. & N. 617; 27 L. J., Ex. 447; affirmed on another ground in 5 H. & N. 728; 29 L. J., Ex. 350, Ex. Ch.; *Castrique v. Imrie*, 8 C. B., N. S. 405; 30 L. J., C. P. 177, Ex. Ch.; L. R., 4 H. L. 414; *Castrique v. Behrens*, 3 E. & F. 709; 30 L. J., Q. B. 163. As to the effect of a decree of divorce by a foreign Court, see *Bater v. Bater*, (1906) P. 209, C. A., and other cases, cited *post*, p. 1048. A foreign sentence of condemnation is not evidence of capture, but after other proof of capture it is evidence to show the grounds of condemnation. *Marshall v. Parker*, 2 Camp. 69.

#### *Effect of Verdicts.*

The *postea* was evidence of a trial had. See cases cited *ante*, p. 110. But the N. P. record alone was no evidence of it without the *postea* indorsed. *Id.* As between co-plaintiffs and co-defendants for contribution, the *postea* was proof of the damages recovered without proof of the

judgment, but not of the costs of suit; *Foster v. Compton*, 2 Stark. 365; and if the verdict and damages be entered generally, oral evidence is admissible to explain on which count the damages were given. *Preston v. Peeke*, 27 L. J., Q. B. 424. And a *postea* has been received to prove a set-off to the extent of the verdict in a subsequent action between the same parties. *Garland v. Scoones*, 2 Esp. 648.

The analogous practice under the Rules, 1883, is stated *ante*, p. 110; from this it appears that the certificate of the associate or master will take the place of the *postea*.

#### Effect of Writs.

The production of a writ, with the sum indorsed, was evidence of the amount for which the arrest was made. *Brown v. Dean*, 5 B. & Ad. 848. When commissions of bankrupt used to be issued, a writ superseding the commission was held evidence both of the fact of the commission, and of the date of it as recited, in an action by the assignees. *Gervey v. Gd. W. Canal Co.*, 5 M. & S. 76; *Ledbetter v. Salt*, 4 Bing. 623, 626. So, in case of a *fiat*. *Wright v. Colls*, 8 C. B. 150. A writ of execution is evidence for the sheriff or his vendee, as against the execution debtor, without producing the judgment; but not against strangers. *Doe d. Batten v. Murlless*, 6 M. & S. 110. Nor is it evidence for the sheriff's vendee, if he be the execution creditor. *Doe d. Bland v. Smith*, Holt, N. P. 589.

#### Effect of Inquisitions, &c.

Although an inquisition taken before the coroner *super visum corporis* was formerly considered conclusive evidence of the fact found by it against the executors or administrators of the deceased; 3 Inst. 55; it is now held that everything done under it is traversable. *Per cur.* in *Garnett v. Ferrand*, 6 B. & C. 611; 1 Wms. Saund. 362 *et seq.* (1).

An inquisition finding lunacy is evidence of it against third persons, though not conclusive. *Sergeson v. Sealey*, 2 Atk. 412; *Faulder v. Silk*, 3 Camp. 126; *Frank v. Frank*, 2 M. & Rob. 314, 315, n. See *Harvey v. Rex*, *post*, p. 199. So inquests of office duly taken under legal commissions (*ante*, p. 112) are evidence between third parties. Thus, inquisitions *post-mortem* are admissible evidence of the facts found by them. *Rowe v. Brenton*, 3 M. & Ry. 141, 142. An inquisition *post-mortem* reciting a conveyance in *hæc verba* is evidence of it for a party who claims title under it. *Burridge v. Sussex*, *El. of*, 2 Ld. Raym. 1292: *Accord. per* Parke, B., in *Wood v. Morewood*, Derby Sum. Ass. 1841. So an inquisition taken after the attainder of A. finding of what lands he was seized, are evidence of A.'s seisin as against strangers. *Neill v. Devonshire*, *Dk. of*, 8 Ap. Ca. 135, D. P. So, an extent of Crown lands in the Exchequer, taken in pursuance of 4 E. 1, stat. 1, is evidence of the matters returned in it; *Rowe v. Brenton*, 3 M. & Ry. 164; or an extent of lands purchased by the Crown of a subject purporting to be made by a steward of the Crown and found in the Land Revenue Office. *Doe d. William 4 v. Roberts*, 13 M. & W. 520. So, the returns of inquisitions taken by special commissions, *temp.* Ed. 1, called the Hundred Rolls. S. C. *Id.* 140. Old returns by a bishop to a writ out of the Exchequer, inquiring of presentations and vacancies of livings in his diocese, are evidence, even in favour of his successors. *Irish Society v. Derry*, *Bp. of*, 12 Cl. & Fin. 641. But a document, *tempore* Eliz., produced from the office of the Duchy of Lancaster, purporting to be a survey of a duchy manor taken by the deputy surveyor-general by the oaths of twenty tenants of the manor whose names were subscribed, was held inadmissible evidence of the bounds

of the manor, there being no proof of the authority under which the survey was taken, and consequently no ground for presuming that any such survey was in fact made. *Evans v. Taylor*, 7 Ad. & E. 617. If, indeed, the document had been generally accepted as a general presentment, it would have been evidence of reputation, *semb.* S. C. An inquisition under a commission from the Court of Exch. to inquire whether a prior or the Crown, after the dissolution of the priory, was seised of certain lands as parcel of a manor, was held to be admissible, but not *conclusive*, evidence of the facts stated in the return. *Tooker v. Beaufort*, *Dk. of*, 1 Burr. 146; Sayer, 297. A survey and report of Crown lands made under the stat. 34 G. 3, c. 75, s. 8, prior to their sale, produced from the Land Revenue Office, is evidence. *Evans v. Merthyr Tydfil Council*, (1899) 1 Ch. 241. C. A. So, the surveys of the Church and Crown lands, taken by commissioners under the authority of Parliament during the commonwealth, are admissible in evidence. *Underhill v. Durham*, 2 Gwill. 542; *Rowe v. Brenton*, 3 M. & Ry. 359. And other surveys taken by commissioners during the same period may be evidence of reputation, even though not taken by competent authority. *Freeman v. Read*, 4 B. & S. 178; 32 L. J., M. C. 226.

But inquisitions or surveys made by private lords of manors are not evidence as such on behalf of those claiming under them. Thus a private survey by direction of Oliver Cromwell, A.D. 1650, of lands granted to him by the Parliament, in which commissioners named by him stated the substance of information received from presentments of the tenants as to manorial tolls and royalties, was not evidence either as reputation of tenants or a public document. *Beaufort, Dk. of v. Smith*, 4 Exch. 450. So a private survey was rejected on a question of parcel, or no parcel, of a lordship. *Daniel v. Wilkin*, 7 Exch. 429; 21 L. J., Ex. 236. So, where a manor formerly belonged to the Crown, an ancient grant, and survey of it recorded in the augmentation office, is not evidence for the tenants against their lord. *Semble, Phillips v. Hudson*, L. R., 2 Ch. 243, 247.

The *valor beneficiorum*, or Pope Nicholas's taxation, is a document of the same nature as the above-mentioned public documents, and is admissible to prove the rate and value at which the persons employed in that taxation thought fit, at that time, to estimate ecclesiastical benefices. *Bullen v. Michel*, 2 Price, 477. But it is of no value to show whether tithes were then taken in kind or by a modus. *Short v. Lee*, 2 J. & W. 486; 2 Eagle on Tithes, 409, 418. A new *valor beneficiorum* was made, 26 Hen. 8, by virtue of commissions under the great seal, and the surveys under these commissions are admissible to prove the value of the first-fruits and tenths of ecclesiastical promotions at that period, though they are not conclusive. *Drake v. Smyth*, 5 Price, 377; *Bullen v. Michel*, 4 Dow, 324. A return to inquiries sent by the bishop upon the augmentation of a living by Queen Anne's bounty is in the nature of a public inquisition, and admissible. *Carr v. Mostyn*, 5 Exch. 69.

Domesday-book, being a record compiled by the authority of the government and founded on official returns made *temp.* Will. 1, is admissible evidence of the tenure of land, &c.; and where a question arises whether a manor is "terra regis" or ancient demesne, the trial is by inspection of Domesday. Gilb. Ev., 6th ed., 69.

Sheriffs', bailiffs', receivers', and other ministers' accounts of Crown lands, deposited in the public record offices (as the Land Revenue Office or Exchequer), are evidence of the title of the Crown. *Doe d. William 4 v. Roberts*, 13 M. & W. 520, 523, 524. It has, indeed, been questioned whether they are admissible if the accountant be living. *Id.* 524, n. But such accounts seem to stand on a different footing from ordinary accounts (*ante*, pp. 59 *et seq.*), which are not admissible unless the accountant is dead. They are

rendered by officers of the Crown, and checked, audited, and enrolled or deposited among the public records, and their authority seems to be independent of the oral testimony of any officer, who, though he may be responsible to the Crown, would probably be personally unable to verify the details of his account.

On account of the interest of the Crown in the Duchy of Cornwall, records of acts affecting its possessions are considered as of a public nature; and on this ground a document, purporting to be a caption of seisin to the use of the first duke by persons assigned by the letters patent to take seisin, found in the Exchequer, and enumerating the possessions of which seisin was then given to the Black Prince, was admitted as evidence not only of seisin, but also of what things the prince had seisin. *Rowe v. Brenton*, 8 B. & C. 743; S. C., 3 M. & Ry. 156. A document purporting to be a survey of a manor while it was part of the possessions of the Duchy of Cornwall, and coming out of proper custody, is admissible as evidence of the boundaries and customs of the manor. *Smith v. Brownlow, Ltd.*, L. R., 9 Eq. 241.

An inquisition held under a Commission of Sewers issued under stat. 23 H. 8, c. 5, is evidence to prove whether certain lands are within a level or not. *New Romney, Mayor, &c., of v. Commissioners of Sewers of New Romney*, (1892) 1 Q. B. 840, C. A.

An inquisition by a sheriff's jury to ascertain the value of property for the information of the sheriff is not, as it seems, admissible evidence of property even against the sheriff; *Latkov v. Eamer*, 2 H. Bl. 437; nor is it evidence in his favour; *Glossop v. Pole*, 3 M. & S. 175; unless, perhaps, where the question is whether the sheriff had acted maliciously. S. C.

An inquisition by a sheriff's jury to assess compensation to a landowner under the Lands Clauses Consolidation Act, 1845, s. 68, is conclusive as to the amount of, but not as to the right to, such compensation. *R. v. L. & N. W. Ry. Co.*, 3 E. & B. 443; 23 L. J., Q. B. 185; *Chapman v. Monmouthshire Ry. and Canal Co.*, 5 H. & N. 267; 27 L. J., Ex. 97; *Read v. Victoria Station and Pimlico Ry. Co.*, 1 H. & C. 826; 32 L. J., Ex. 167; *Rickett v. Metropolitan Ry. Co.*, L. R., 2 H. L. 175; and see *Barber v. Nottingham and Grantham Ry. Co.*, 15 C. B., N. S. 726; 33 L. J., C. P. 193. If the jury give damages in respect of injury which does not entitle the claimant to compensation, their verdict is altogether bad. *Re Penny*, 7 E. & B. 660; 26 L. J., Q. B. 225. The objection must, however, be taken by *certiorari* and not in an action on the inquisition if the plaintiff is entitled to any damages. *Long Eaton, &c., Grounds Co. v. Midland Ry. Co.*, (1902) 2 K. B. 574, 580, 585, C. A.; following *Metropolitan Board of Works v. Howard*, 5 T. L. R. 732, Aug. 9, 1889, D. P. The verdict of the jury and the judgment thereon, on the trial of a question of compensation, before a judge and jury under 31 & 32 V. c. 119, s. 41, has the same effect only as the sheriff's inquisition. *In re East London Ry. Co.*, 24 Q. B. D. 507.

#### Effect of Rules or Orders of Court.

The allegation of a fact in an order (formerly called a rule) *nisi* is not evidence of it for a party at whose suggestion it is obtained. *Woodroffe v. Williams*, 6 Taunt. 19. A rule, making a judge's order a rule of court, was evidence of the order. *Still v. Halford*, 4 Camp. 17. A rule purporting to be granted on the motion of a certain counsel, has been admitted as evidence of the attendance of that counsel in court at the date of the rule. *Heath's case*, 18 How. St. Tr. 176. An allegation in a count that defendant procured a defective security which was set aside by a rule of court was held not proved by merely producing the rule without other proof of the security. *Compton v. Chandless*, 4 Esp. 18. By the Trustee Act, 1893, 56 & 57 V.

c. 53, s. 40, a vesting order made as to land under that Act or the Lunacy Act, 1890, 53 & 54 V. c. 5, is conclusive evidence of certain matters therein alleged on which the order is founded, upon any question as to the validity of the order. An order made by a Master in Lunacy under *Id.*, s. 116, for the management of the property of H., a person of unsound mind, not so found by inquisition, stating that fact and that he was incapable of managing his affairs, is *prima facie* evidence of H.'s insanity. *Harvey v. Rex*, (1901) A. C. 601, J. C.

#### *Effect of Proceedings in Chancery.*

*Bill in Chancery.*] Notwithstanding former opinions to the contrary, it is now settled that a bill in Chancery is not generally admissible in evidence, further than to show that such a bill did exist, and that certain facts were in issue between the parties. *Doe d. Rowerman v. Sybourn*, 7 T. R.<sup>2</sup>, 3; *Boileau v. Rullin*, 2 Exch. 665; *Banbury Peerage case*, 1 Selw. N. P. 13th ed. 677. The ground of this exclusion is that, together with statement of facts, a bill usually also contains allegations made with no other object than to obtain a discovery on the oath of the defendant. It is equally inadmissible as evidence, though read at the requisition of the opposite party; thus in a case in which the plaintiff gave in evidence the answer of defendant to a bill in equity filed by a third party, Tindal, C.J., ruled that although the defendant was entitled to have the bill also read as explanatory of the answer and as part of the plaintiff's case, the jury were not to consider the statements in the bill as evidence of the facts stated. *Pennell v. Meyer*, 2 M. & Rob. 98, *ante*, p. 113. So, where the lessor of the plaintiff in ejection, upon a notice to quit signed by a receiver in Chancery, put in the bill and answer in the suit in which the receiver was appointed, for the purpose of proving the regularity of the appointment, the court held that a statement in the bill admitted in the answer, could not be read by the defendant for the purpose of showing that the legal estate was not in the lessor of the plaintiff. *Parsons, Lessee of v. Purcell*, 12 Ir. L. R. 90. In an action of trespass to a several fishery brought by the lessee of a grantee, A., of the fishery, a bill and answer in a suit instituted long before by another grantee, B., against A., in which the limits of the fishery were described, were held admissible in evidence as part of the history of the fishery and of the claims to it. *Malcolmson v. O'Dea*, 10 H. L. C. 593.

*Answer.*] An answer in Chancery is good evidence against the defendant as an admission on oath, and must all be taken together. Therefore, if upon exceptions taken a second answer has been put in, that also must be read. B. N. P. 237. But it has been said that where one party reads part of the answer of the other party in evidence, he makes the whole admissible only so far as to waive any objection to the competency of the testimony of the party making the answer, and he does not thereby admit, as evidence, facts which may happen to be stated in it by way of hearsay only. *Obiter per Chambre, J., Roe d. Pellatt v. Ferrars*, 2 B. & P. 548; but see note, *Id.*; and *ante*, p. 78.

The answer of a guardian is no evidence against an infant. B. N. P. 237. As to the answer of a trustee as against a *cestui que trust*, and conversely, see *ante*, pp. 66-7. But an answer will be evidence against privies; thus, an answer in a suit for tithes instituted by a vicar against the owners of lands in the parish, in which answer the defendants declared the tithes to belong to the rector, will be evidence in an action for tithes by a succeeding rector against owners of the same lands. *Dartmouth, Ly. v. Roberts*, 16 East, 334. An answer by one who has sold an advowson, filed

after the conveyance, is not admissible against a party claiming under the grant. *Gully v. Exeter, Bp. of*, 5 Bing. 171. See cases, *ante*, p. 59. The answer of one defendant is not evidence against a co-defendant; *Wyeh v. Meal*, 3 P. Wms. 311: but after evidence has been given to connect two persons as partners, the answer of one will be evidence against the other. *Grant v. Jackson*, Peake, 203. In *Rooth v. Quin*, 7 Price, 193, 198, the Court held the answer to be inadmissible on the grounds of the practice in equity. See 53 & 54 V. c. 39, s. 15, and further *tit. Admissions, ante*, p. 70.

*Decree or decretal order.*] A decree in equity may be given in evidence between the same parties or any claiming under them. B. N. P. 243. It is evidence, but not conclusive, against the defendant of every fact stated, whether by way of assertion or denial. *Percival v. Caney*, 4 De G. & S. 610. Where the parties to an action respectively sue and defend on behalf of themselves and a multitude of others in the same interest on each side, a decision in the action binds them all as to the general right claimed in the action, *e.g.*, a right of common. *Sewers, Commissioners of v. Gellatly*, 3 Ch. D. 610. A decree is even evidence as against parties not privy to it for some purposes; thus, on a trial touching the title to land, decrees between former litigants were admitted for the defendant to show how, and in what character, he came into possession under them, although the plaintiff did not claim under any party to the suits. *Davies v. Lowndes*, 1 N. C. 606; S. C. on error, 6 M. & Gr. 471. So it is evidence where hearsay is inadmissible: thus, a decree in favour of a public officer, founded on an issue, is evidence of the right to exercise the office; and by such evidence the deputy oyster-meters of London established their exclusive rights within the port of London. *Laybourn v. Crisp*, 4 M. & W. 320. And a decree for payment of tithe in kind in a suit by the incumbent against the occupiers of land who set up a district modus, is evidence, but not conclusive evidence, for him in an issue (under 6 & 7 W. 4 c. 71) between him and the landowners to try a manorial modus. *Croughton v. Blake*, 12 M. & W. 205. In a suit for tithe by ecclesiastical impropiators, in which the defendant set up a district modus, the answer of the predecessors of the plaintiff in a suit to establish a *farm* modus, in which answer the defendants set up a *district* modus, was held evidence against them, although the suit was *inter alios*. *Whelpdale v. Milburn*, 5 Price, 485. A decree against the lord of a manor establishing customs, is evidence against a succeeding lord. *Price v. Woodhouse*, 3 Exch. 616. Where a decree in a possessory suit brought by C. was inconsistent with a public right of fishing, the proceedings were, in an action brought by C.'s successor in title, against strangers, held to be evidence to negative such right. *Neill v. Duke of Devonshire*, 8 Ap. Ca. 135, D. P. But an interlocutory order, made to quit possession *pendente lite*, is not evidence of reputation. *Pim v. Currell*, 6 M. & W. 234. The decree of an unauthorized court of equity is inadmissible either as an award (for want of submission) or as reputation. *Rogers v. Wood*, 2 B. & Ad. 245. See *ante*, p. 50. An order for an attachment for non-payment of the costs in a suit in equity is in itself *primâ facie* evidence that a suit has been pending there. *Blower v. Hollis*, 1 Cr. & M. 393.

As to the effect of issues out of Chancery, see *Robinson v. Dhuleep Singh*, 11 Ch. D. 798, C. A. As to the effect of a vesting order, *vide ante*, p. 199.

The jurisdiction of the Court of Chancery was transferred by the J. Act, 1873, s. 16, to the High Court of Justice.



*Effect of Depositions and Examinations in other Suits.*

Though evidence must generally be given *vivâ voce* on oath and in the very cause in which the witnesses are sworn, yet the testimony of witnesses so taken in another cause between the same parties, upon the same issue, is admitted where their personal attendance cannot be procured. Thus, where a witness was examined in a former action on the same point between the same parties, his testimony may be proved, if he be since dead; B. N. P. 242; or if he appear to be kept away by contrivance. *Green v. Gatewick*, B. N. P. 243. It seems to be enough if the parties to the two actions be substantially though not nominally the same; as where the lessor of the plaintiff in the second was joined with other lessors in the first action. *Wright v. Doe d. Tatham*, 1 Ad. & E. 18, 19; *A.-G. v. Davison*, M'Cl. & Y. 60, Ex. Ch. So if the parties and the title in issue be the same, the evidence is admissible, though the land sought to be recovered is different. *Doe d. Foster v. Derby*, *El. of*, 1 Ad. & E. 791, n. But where the parties are neither the same, nor in privity with each other, such testimony is not admissible, though the title and one of the parties may be the same. S. C. *Id.* 783; *Morgan v. Nicholl*, L. R., 2 C. P. 117. And this rule is not altered by O. xxxvii., r. 3, *ante*, p. 185, which only substitutes a notice for an order to read such depositions as are admissible in evidence. *Printing Telegraph, &c., Co. v. Drucker*, (1894) 2 Q. B. 801, C. A. The admissibility of this evidence seems to turn rather on the right to cross-examine than upon the precise identity, either of the parties or the points in issue in the two proceedings. See 1 Taylor, *Evid.*, 10th ed. § 467, and cases there cited. *Cf. Allen v. Allen*, (1894) P. 248, C. A., *ante*, p. 178. As to the proof of the former testimony, *vide ante*, p. 116. So, depositions in Chancery may be given in evidence in an action at law on the same matter between the same parties or their privies, where the witness is dead or cannot be found. B. N. P. 239; *Llanover, Ly. v. Honfray*, 19 Ch. D. 224, C. A. But they are not evidence of the facts contained in them against a person who does not claim under a party in the suit. B. N. P. 239. Where depositions were taken under a commission issued on a bill to perpetuate filed against the Att.-Gen. on a petition of right, they were admitted as evidence against the Crown on the trial of a traverse of the inquisition taken on such petition. *De Bode's case*, 8 Q. B. 208.

In some cases such depositions are evidence even *inter alios*. Thus, depositions relating to a question upon which hearsay would be good evidence, may be read against a person who was no party to the former suit. B. N. P. 239, *ante*, pp. 47, 51. So a deposition, taken in a cause between other parties, will be admitted to be read, to contradict what the same witness swears at a trial; B. N. P. 240; and it will, of course, be evidence in any cause against the deponent himself. The deposition of a witness, taken to perpetuate memory, was not admissible merely because he had since become interested; for it is taken only to prevent the loss of his testimony by death. *Tilley's case*, 1 Salk. 286. See further as to depositions taken on bills to perpetuate testimony and examinations, *de bene esse*, *ante*, p. 114; and *Evans v. Merthyr Tydfil Council*, *post*, p. 202.

In *Johnson v. Ward*, 6 Esp. 47, where the defendant moved to put off the trial upon an affidavit made by D., wherein D. swore that he had subscribed a policy for and on account of the defendant, this affidavit was received as evidence of the agency of D. In *Brickell v. Hulse*, 7 Ad. & E. 454, an action of trover against the sheriff, the affidavit of one W., used by the sheriff in order to obtain an interpleader rule, in which W. swore that he was the officer of the sheriff, was received. In *Gardner v. Moult*,

10 Ad. & E. 461, an action by the assignees of a bankrupt, the plaintiffs, in order to prove the act of bankruptcy, were allowed to put in evidence a deposition made by one H., whom the defendant had sent to prove the act of bankruptcy at the opening of the fiat. In *Pritchard v. Bagshaw*, 11 C. B. 459; 20 L. J., C. P. 161, an action of trover was brought against a company, who had previously filed a bill for specific performance of a contract of sale, and upon the suit being referred to the master the company had made use before him of the affidavit of one D., in which he stated that he was the manager of the company at certain works: the affidavit was received in the action as an admission of the agency of D. So depositions used by the vendee of an estate in a suit in Chancery commenced against him for the purpose of setting aside the sale, and containing statements as to the extent of the land, were received in a subsequent action as admissions of the extent of the estate in question. *Richards v. Morgan*, 4 B. & S. 641; 33 L. J., Q. B. 114. So in *Fleet v. Perrins*, L. R., 3 Q. B. 536, the answers to interrogatories made in a former action by one of the parties was held to be admissible as evidence against him. A deposition in an action by A. to perpetuate testimony cannot be used as an admission by A. unless it is proved to have been used or adopted by A. *Evans v. Merthyr Tydfil Council*, (1899) 1 Ch. 241, C. A.

In trespass *q. c. f.* defendant denied the possession of the plaintiff, and put in evidence the examination of A. B., then living, but abroad, who had been called by the plaintiff to prove possession in a previous summary proceeding for malicious trespass by plaintiff against defendant, but who on such examination had denied the plaintiff's possession: it was held that the deposition was admissible. *Cole v. Hudley*, 11 Ad. & E. 807. This unsatisfactory case is shortly reported, and the grounds of the judgment do not distinctly appear. It has been suggested that the evidence "was received as the deposition of a witness on a prior inquiry between the same parties on the same question": *Boileau v. Rutlin*, 2 Exch. 680, *per cur.*; but, even if this were the reason, a proceeding for conviction of an offence can hardly be considered as a cause between the same parties as a subsequent action of trespass; *vide post*, p. 207. See further *R. v. Latchford*, 6 Q. B. 567, and the judgment in *Boileau v. Rutlin*, *supra*.

Where the plaintiff in an action for goods sold had used an affidavit in another proceeding, erroneously alleging payment of the debt by the defendant to the plaintiff's agent, it was held that he was not estopped from suing the defendant, if the debt were not really paid. *Morgan v. Conchman*, 14 C. B. 100; 23 L. J., C. P. 36.

Even a voluntary deposition may be evidence as an admission of the party making it, on mere proof of signature. B. N. P. 238.

With regard to depositions taken under the Bankruptcy Act, 1883 (46 & 47 V. c. 52), see sect. 136. The answers of a bankrupt A. on his public examinations are not admissible in evidence against other parties in proceedings against them by A.'s trustee. *In re Brümmer*, 19 Q. B. D. 573.

Depositions previously made before any justice or magistrate in H.M.'s dominions out of the U. K., or before any British Consular officer abroad, in relation to the same subject-matter, are admissible in evidence, on proof that the witness cannot be found in the U. K. 57 & 58 V. c. 60, s. 691.

#### *Effect of Sentences in the Ecclesiastical and Divorce Courts.*

While the Ecclesiastical Courts had the exclusive right of deciding directly upon the legality of marriage, the temporal courts received their sentences upon such questions as conclusive evidence of the fact (*Bunting v.*

*Lepingwell*, 4 Rep. 29 a), upon the principle that the judgment of a court of exclusive jurisdiction, directly upon the point, is conclusive upon the same matter coming incidentally in question in another court for a different purpose, unless impeached for fraud. *Kingston's (Ds. of) case*, 20 How. St. Tr. 538, 540. See the cases cited *arguendo*, in *Stockdale v. Hansard*, 9 Ad. & E. 62. The jurisdiction of the Ecclesiastical Courts in these matters was transferred to the Court for Matrimonial Causes, and has been again transferred by the J. Act, 1873, s. 16, to the High Court of Justice, and assigned by sect. 34 to the Probate, Divorce, and Admiralty Division. The verdict of a jury in a divorce suit is not evidence *inter alios*, where there has been no decree. *Needham v. Bremner*, L. R., 1 C. P. 583. But where the jury have found the petitioner guilty of adultery, and on that ground his petition was dismissed, the verdict is conclusive evidence against him in a subsequent divorce suit, brought by him against a different co-respondent. *Conradi v. Conradi*, L. R., 1 P. & M. 514. So where the respondent husband was found guilty of adultery and cruelty, and a decree *nisi* made against him, the proceedings were held to be conclusive evidence against him on a petition brought by him against his wife, although the decree *nisi* had been set aside on the intervention of the Queen's Proctor on grounds not affecting the propriety of the findings. *Butler v. Butler*, (1893) P. 185; (1894), P. 25, C. A. A sentence in a suit of jactitation of marriage is evidence in an action at common law to disprove the marriage. *Jones v. Bow*, Carth. 225. In the last-mentioned case such sentence was held to be *conclusive* evidence; but on this point the authority of the decision has been overruled; for a sentence in a suit of jactitation has only a negative effect, *viz.*, it shows that the party has failed in his proof, leaving it open to new proofs of the same marriage in the same cause, and it does not conclude even the court which pronounces it. *Kingston's (Ds. of) case*, 20 How. St. Tr. 543. See *Blackham's case*, 1 Salk. 290, and Hargr. Law Tr. 451. A sentence of nullity of marriage may be impeached by proving that it was procured by fraud and collusion. *Harrison v. Southampton Cor.*, 4 D. M. & G. 137; 22 L. J., Ch. 722. A personal answer in a suit for tithes by a former rector is admissible against his successor in support of a modus. *Taylor v. Cook*, 8 Price, 668. As to the effect of the sentence of consecration of ground, see *R. v. Twiss*, L. R., 4 Q. B. 407, 412; *Campbell v. Liverpool Cor.*, L. R., 9 Eq. 579; and *In re Bideford*, (1900) P. 314.

#### *Effect of Probate and Letters of Administration.*

The Ecclesiastical Courts had formerly the exclusive right of deciding directly on the validity of wills of personalty, and on the granting of administration. *Noell v. Wells*, 1 Lev. 235. This jurisdiction was transferred to the Court of Probate, and has, by the J. Act, 1873, s. 16, been again transferred to the High Court of Justice, and is by sect. 34 assigned to the Probate, Divorce, and Admiralty Division. See *Pimney v. Hunt*, 6 Ch. D. 98. A probate, therefore, granted by a competent court, is conclusive of the validity and contents of such a will and the appointment of executors till it is revoked, and no evidence can be admitted to impeach it, except in proceedings in the Probate Division for its revocation. *Allen v. Dundas*, 3 T. R. 125; *Melnish v. Milton*, 3 Ch. D. 27, C. A. See *Pimney v. Hunt*, *supra*. On this ground the payment of money to an executor, who has obtained a probate of a forged will, is a discharge to the debtor of the intestate, though the probate be afterwards declared null. *Allen v. Dundas*, *supra*. See Hargr. Law. Tracts, 459. As to impeaching administration by proof that the value required a higher stamp, see *Stamps—Probate*, *post*, p. 270. Letters of administration are not evidence of any fact which is matter of

inference and not of adjudication, as the intestate's death, for the grant assumes the fact of death. *Thompson v. Donaldson*, 3 Esp. 63; *accord. Moons v. De Bernales*, 1 Russ. 301, 306. Though it could not be shown in a court of common law that the Ecclesiastical Court had erred in granting probate, yet evidence might be given to show that the court had no jurisdiction; as that the testator was alive. *Allen v. Dundas*, 3 T. R. 130. So the letters of administration might be proved to have been revoked. B. N. P. 247. And the books of the Prerogative Office are evidence of the revocation. *R. v. Ramsbottom*, 1 Leach, C. C. 25, n. So, it may be shown that the seal of the ordinary has been forged; but it cannot be shown that the will was forged, or that the testator was *non compos mentis*, or that another person was appointed executor; B. N. P. 247; *Noell v. Wells*, 2 Lev. 236; for those questions are settled by the judgment of the court.

As to the effect of a judgment granting probate, see *Concha v. Concha*, 11 Ap. Ca. 541, D. P.

A probate, we have seen, is not, except under special circumstances, evidence of a will of real property where the testator died before Jan. 1st, 1898, *ante*, pp. 144, 150 *et seq.*; nor is it generally evidence that an instrument is a will so as to pass copyhold or customary estates; *Hume v. Rundell*, Madd. & Geld. 331; or to operate as an execution of a power to charge land. S. C. We have seen, *ante*, p. 46, that it is *not* primary evidence in cases of pedigree to prove relationship.

As to the effect of probate in the case of a will of land, under the provisions of 20 & 21 V. c. 77, *vide ante*, pp. 150 *et seq.*; and under the Land Transfer Act, 1897, in the case of a person dying after Dec. 31st, 1897, *vide ante*, p. 145, and *post*, pp. 1060-1.

The other provisions of 20 & 21 V. c. 77, relating to the effect of probate generally, will be found *post*, pp. 1147-8, *sub tit. Actions by executors.*

#### *Effect of Sentences in Admiralty Courts.*

Upon questions of prize the Court of Admiralty has exclusive jurisdiction; therefore a sentence of condemnation in that court is conclusive, and being a proceeding *in rem*, it binds all the world. *Kinderley v. Chase*, Park, Ins. 8th ed. 743. The jurisdiction of the Court of Admiralty has been transferred by the J. Act, 1873, s. 16, to the High Court of Justice, and is assigned by sect. 34 to the Probate, Divorce, and Admiralty Division. And the sentence of a foreign Court of Admiralty is also, by the comity of nations, held to be conclusive upon the same question arising in this country. *Hughes v. Cornelius*, 2 Show. 232; *Bolton v. Gladstone*, 5 East, 155. But the sentence of a Court of Admiralty, sitting in contravention of the law of nations, will not be recognized in our courts. *Hawcock v. Rockwood*, 8 T. R. 268. If the property be condemned on the ground of its not being neutral, the sentence is conclusive evidence of that fact. *Barzillay v. Lewis*, Park, Ins. 8th ed. 725. So, where no special ground is stated, but the ship is condemned generally as good and lawful prize, it is to be presumed that the sentence proceeded on the ground of property belonging to an enemy, and the sentence will be conclusive evidence of that fact. *Saloucci v. Woodnus*, Park, Ins. 8th ed., 727; S. C., 3 Doug. 345. But where there is some ambiguity in the sentence of a foreign Court of Admiralty, so that the precise ground of the determination cannot be collected, the courts here may examine the ground on which it proceeded. *Bernadi v. Motteux*, 2 Doug. 574; *Lothian v. Henderson*, 3 B. & P. 499. And if the condemnation do not plainly proceed upon the ground of enemies' property, or of non-compliance with subsisting treaties, but on the ground of regulations arbitrarily imposed by the captor, to which neither the government of the captured ship nor the other powers

of Europe have been made parties, such a condemnation will not be admitted as conclusive of a breach of neutrality. *Pollard v. Bell*, 8 T. R. 444, and cases collected in Park, Ins. 8th ed. 730 *et seq.* In order to conclude the parties from contesting the ground of condemnation, such ground must appear clearly upon the face of the sentence; it must not be collected by inference only, or left in uncertainty whether the ship was condemned upon one ground which would be a just one by the laws of nations, or upon another ground which would amount only to a breach of the municipal regulations of the condemning country. *Per Tindal, C.J., Dalgleish v. Hodgson*, 7 Bing. 504; *Hobbs v. Henning*, 18 C. B., N. S. 791; 34 L. J., C. P. 117. A salvage award against a ship does not conclude the insurers thereon from setting up the defence that the loss was not occasioned by sea perils. *Ballantyne v. Mackinnon*, (1896) 2 Q. B. 455, C. A.

Proceedings *in rem* in the Admiralty Court, in a collision cause, followed by an order for the sale of the ship and payment of the amount to the plaintiffs, are no bar to an action of damages against the owners personally, if the proceeds of the sale are less than the damage sustained by the collision. *Nelson v. Couch*, 15 C. B., N. S. 99; 33 L. J., C. P. 46; and see *The Sylph*, L. R., 2 Adm. 24.

#### *Effect of Judgments of Inferior Courts.*

It would seem, upon principle, that the final judgment of a competent inferior court, whether of record or not, acting within its jurisdiction, will be conclusive between the same parties upon the same subject-matter where properly relied on. *Moses v. Macferlan*, 2 Burr. 1009; *Galbraith v. Neville*, 1 Doug. 6, n.; *Routledge v. Hislop*, 2 E. & E. 549; 29 L. J., M. C. 90; *Gibbs v. Cruikshank*, L. R., 8 C. P. 454; *Flitters v. Allfrey, infra.* And see the observations in 1 Stark. Ev., 4th ed., 346 *et seq.* So it has been held that a certificate from commissioners under an Act for settling the debts of the Army, stating the sum due from the defendant to the plaintiff, is conclusive in an action brought to recover the money. *Moody v. Thurston*, Stra. 481; see *A.-G. v. Davison*, M'Cl. & Y. 160. The judgment in a County Court action is conclusive as to any facts decided thereby; the judgment will appear by the record, but from the form of proceedings it is necessary to explain by parol what points were raised in the County Court and decided by the judgment. *Flitters v. Allfrey*, L. R., 10 C. P. 29. But where title incidentally comes in question, and the parties consent in writing to the judge deciding the claim, the judgment shall not be evidence of title in any other action. County Courts Act, 1888, 51 & 52 V. c. 43, s. 61. An action will not lie on a County Court judgment. *Berkeley v. Elderkin*, 1 E. & B. 805; 22 L. J., Q. B. 281. See *R. v. County Court Judge of Esser*, 18 Q. B. D. 704, C. A.

A County Court order under *Id.* sect. 138, for giving up possession of premises made against a person holding under the tenant and complied with by him, is not conclusive evidence of title in a subsequent action against such person for mesne profits. *Campbell v. Loader*, 3 H. & C. 520; 34 L. J., Ex. 50. And such order would seem not to be conclusive against him, even as to the right to possession; *Hodson v. Walker*, L. R., 7 Ex. 55; in which case it was held (*diss. Martin, B.*), that the order did not affect the rights of a person not a party to the proceedings. A judgment in an action of ejectment under *Id.* sect. 59, would however be conclusive. See *Flitters v. Allfrey, supra.*

In order to be a bar, the proceedings in a court of limited jurisdiction must show on the face of them, expressly or by necessary intendment, that the court had jurisdiction in the matter. *Taylor v. Clemson*, 2 Q. B. 978,

1031; 11 Cl. & F. 610; *Cox v. London, Mayor of*, L. R., 2 H. L. 239. So also the judgment of an inferior court of local jurisdiction may be avoided by proof that the cause of action did not arise within its jurisdiction; *Herbert v. Cook*, 3 Doug. 101; S. C. Willes, 36, n; *Briscoe v. Stephens*, 2 Bing. 213; or that defendant, the debtor against whom the inferior court awarded process, did not reside within the district; *Carratt v. Morley*, 1 Q. B. 18; it not appearing that any proof of residence had been, in fact, given to the court below. See also *Huxham v. Smith*, 2 Camp. 19. The above cases related to district courts having no statutable or other power, except over causes arising within the territorial limits. Where the court is limited only as to certain *persons* or *causes*, and not as to *locality*; or where the jurisdiction of the court, though established for a limited district, can lawfully exercise powers out of it; or where the practice of the inferior court requires, and is warranted by law in requiring, that the defect of jurisdiction should be pointed out by plea or otherwise, and the defendant has waived the objection;—in such cases it would seem that the inquiry will be, not simply where the cause of action arose, or where the parties reside, but whether the court had jurisdiction. See *Moore v. Ganjee*, 25 Q. B. D. 244. As to the jurisdiction of the Mayor's Court, London, see *Cox v. London, Mayor of*, *supra*; *L. Joint Stock Bank v. Id.*, 1 C. P. D. 1; 5 C. P. D. 494, C. A.; 6 Ap. Ca. 393, D. P.; and *Cooke v. Gill*, L. R., 8 C. P. 107.

It has been held that a judgment of the old County Court is examinable, and the existence of the facts necessary to the regularity of such judgment is a question for the jury, although a motion made in the County Court to set aside the proceedings for irregularity had been dismissed. *Thompson v. Blackhurst*, 1 N. & M. 266. But in such case there must be a proper defence to let in the inquiry. *Williams v. Jones*, 13 M. & W. 628. Where trespass was brought for executing a warrant to levy a poor-rate, the plaintiff was not permitted to impugn the appointment of the overseers on the ground of irregularity or miscalculation of votes at the meeting of justices at which the appointment was made; the jury having expressly negatived fraud. *Penney v. Slude*, 5 N. C. 319.

Where a cause was removed by *habeas* from an inferior court after a judgment by default, that judgment was not evidence against the defendant in the superior court. *Bottings v. Firby*, 9 B. & C. 762.

Where an affiliation order obtained by A. has been quashed by Quarter Sessions on the ground that C. was not the father of A.'s child, there is no estoppel to an action by A.'s master against C. for seduction, it being *res inter alios acta*. *Anderson v. Collinson*, (1901) 2 K. B. 107.

#### Effect of Convictions.

It is a general rule that the judgments of all courts of competent judicature are conclusive for the purpose of protecting their judicial officers acting within the scope of their authority. Thus, where the justices of the peace have an authority given to them by Act of Parliament, and they appear to have acted within the jurisdiction so given, and to have done all that they are required by the Act to do in order to originate their jurisdiction, a conviction drawn up in due form, and remaining in force, is a protection in any action brought against them for the act so done. *Per Abbott, C.J., Basten v. Carew*, 3 B. & C. 653. Therefore where, in trespass against two magistrates for giving the plaintiff's landlord possession of a farm as deserted, the defendants produced in evidence a record of their proceedings under the statute 11 G. 2, c. 19, s. 16, which set forth all the circumstances necessary to give them jurisdiction, and by which it appeared that they had pursued the directions of the statute, it was held that this record was not traversable,

and was a conclusive answer to the action. S. C. So, in trespass against magistrates for taking and detaining a vessel, a conviction by them under the Bum-boat Act (2 G. 3, c. 28), was conclusive evidence that the vessel in question was a "boat" within the meaning of the Act. *Brittain v. Kinnaird*, 1 B. & B. 432. See further *Kemp v. Neville*, 10 C. B., N. S. 523; 31 L. J., C. P. 158, *post*, p. 919, and cases cited, *sub tit.*, *Actions against justices*, *post*, pp. 1137 *et seq.*

The recital of an information on oath in a warrant of commitment in the nature of a conviction (as for refusal to give sureties of the peace) is evidence for the justice of such information; *Haylock v. Sparke*, 1 E. & B. 471; though it was held otherwise in the case of a warrant to apprehend on a charge. *Stevens v. Clark*, 2 M. & Rob. 435. See *R. v. Richards*, 5 Q. B. 926. In like manner a conviction for a contempt by commissioners of a court of requests is conclusive for them in an action of trespass against them; and the plaintiff cannot controvert the fact of contempt, though unnecessarily alleged in the plea. *Aldridge v. Haines*, 2 B. & Ad. 395. But a want of jurisdiction in the commissioners may be shown. *Andrews v. Marris*, 1 Q. B. 3.

An affiliation order obtained by E. W. may be used to contradict E. W., who, when called to prove her marriage and the legitimacy of the plaintiff her son, denied, on cross-examination, that she had ever applied to the magistrates for an affiliation order. *Watson v. Little*, 5 H. & N. 472; 29 L. J., Ex. 267.

Notwithstanding some authorities to the contrary (B. N. P. 245; *Gilb. Ev.* 6th ed., 26), it is now settled that a record of a conviction is inadmissible as evidence of the same fact coming into controversy in a civil suit. *Gibson v. McCarty*, Cas. temp. Hardw. 311; *March v. March*, 28 L. J., P. & M. 30; *Castrique v. Imrie*, L. R., 4 H. L. 434, *per* Blackburn, J. In many of the earlier cases the conviction was held inadmissible by reason of the evidence on which it was procured. See *Blakemore v. Glamorgan Canal Co.*, 2 C. M. & R. 139; *Brook v. Carpenter*, 3 Bing. 297; *Smith v. Rummens*, 1 Camp. 9, 151. But the conviction was also inadmissible, on the ground that it was *res inter alios acta*, and this objection is still in force. See *Gibson v. McCarty*, *supra*; and *Peake*, *Ev.* 41 *et seq.* Yet, a plea of guilty on an indictment for assault is evidence by way of admission against the defendant in an action for that assault. 1 *Phill. Ev.*, 7th ed., 338; *R. v. Fontaine Moreau*, 11 Q. B. 1033. Though a *verdict* of guilty would not be evidence. *R. v. Warden of the Fleet*, 12 Mod. 337-9. But a conviction may sometimes be admissible as evidence of reputation. See *Petrie v. Nuttall*, 11 Exch. 569; 25 L. J., Ex. 200. When a conviction operated *in rem* it was evidence *inter alios*, though obtained by the testimony of the party who used it in evidence. *Davis v. Nest*, 6 C. & P. 167.

#### *Effect of Sentences of Visitors, &c.*

The sentence of expulsion of a member of a college by the master and fellows is conclusive, and cannot be impeached in a court of law. *R. v. Grundon*, Cowp. 315. A sentence of deprivation by a visitor of a college is in the same manner conclusive, and the grounds of it not examinable in any court. *Philips v. Bury*, 1 Ld. Raym. 5; S. C., 2 T. R. 346; see *Hargr. Law Tracts*, 464, 465. So, in ejection against a schoolmaster, who has been removed by sentence of the trustees of the school (such power being vested in them) for misbehaviour, it is not necessary for the plaintiffs to prove the grounds of the sentence, and the defendant cannot disprove them. *Doe d. Davy v. Haddon*, 3 Doug. 310.

## Effect of Judgments of Foreign Courts.

The judgment of a foreign court (and for this purpose, Irish, Scotch, and Colonial courts are foreign courts) of competent jurisdiction, directly deciding a question cognisable by the law of the country, is conclusive here, if the same question arise incidentally between the same parties, and the sentence be conclusive by the law of the foreign country. *Garcus v. Ricardo*, 12 Cl. & Fin. 368; *Burrows v. Jemino*, Stra. 733; *Stafford v. Clark*, 2 Bing. 377; *Crispin v. Doglioni*, 3 Sw. & Tr. 96; 32 L. J., P. M. & A. 169; L. R. 1 H. L. 301; *Dent v. Smith*, L. R., 4 Q. B. 414; *Messina v. Petrococchino*, L. R., 4 P. C. 144; see cases collected in notes to *Kingston's (Ds. of) case*, 2 Smith's L. C. 11th ed. 783 *et seq.* Thus, in an action on a covenant to indemnify the plaintiff from all debts due from the late partnership of the plaintiff, defendant, and another, and from all suits, &c., proof of the proceedings in a foreign court in a suit there instituted against the late partners for the recovery of a partnership debt, in which suit a decree passed against them for want of answer, *per quod* the plaintiff was obliged to pay the debt, is conclusive against the defendant, who will not be permitted to show that the proceedings were erroneous. *Tarleton v. Tarleton*, 4 M. & S. 20.

In an action brought in this country upon the judgment of a foreign court having jurisdiction over the parties and subject-matter of the suit, such judgment must now be taken as conclusive and binding on both parties, so as to preclude their contesting the merits or propriety of the decision, although formerly on this question much difference of opinion prevailed. *Ferguson v. Mahon*, 11 Ad. & E. 179; *Australasia, Bank of v. Nias*, 16 Q. B. 717; 20 L. J., Q. B. 284; *De Cosse Brissac v. Rathbone*, 6 H. & N. 301; 30 L. J., Ex. 238; *Munroe v. Pilkington*, 2 B. & S. 11; 31 L. J., Q. B. 81; *Vanquetin v. Bonard*, 15 C. B., N. S. 341; 33 L. J., C. P. 78; *Ellis v. M'Henry*, L. R., 6 C. P. 228; *Godard v. Gray*, L. R., 6 Q. B. 139.

But if it appear on the face of the foreign proceedings or by extrinsic proof that the judgment is against natural justice, as that the defendant has never been summoned (in which case the court could have no jurisdiction), the courts here will not give effect to it. *Ferguson v. Mahon*, *supra*; *Euchanan v. Rucker*, 9 East, 192; S. C., 1 Camp. 63; *Cavan v. Stewart*, 1 Stark. 525. So, where the judgment has been obtained by fraud; *Ochsenbein v. Papelier*, L. R., 8 Ch. 695; even although the foreign court tried the question of fraud and decided that it had not been committed. *Aboulloff v. Oppenheimer*, 10 Q. B. D. 295, C. A.; *Fadula v. Larves*, 25 Q. B. D. 310, C. A. So, where the judges in the foreign court were interested parties. *Price v. Dewhurst*, 8 Sim. 279. In *Becquet v. MacCarthy*, 2 B. & Ad. 951, it was held to be no objection that the proceedings had (according to the law of the foreign country) been served upon a public officer in the absence of the defendant. See, however, *Singh v. Rajah of Faridkote*, (1894) A. C. 670, 685, J. C. Service of process at a domicile elected by the defendant for that purpose is good. *Valle v. Dumergue*, 4 Exch. 290; *Copin v. Adamson*, L. R., 9 Ex. 645; 1 Ex. D. 17, C. A. See further *Cowan v. Braidwood*, 1 M. & Gr. 882; *Australasia, Bank of v. Harding*, *post*, p. 209; and *Emanuel v. Symon*, (1907) 1 K. B. 235. Where judgment has been obtained in a foreign court for a penalty for an act of a criminal nature, it cannot be enforced here. See *Huntington v. Attrill*, (1893) A. C. 150, J. C. But the courts here are not concluded by the judgment of the foreign court that the act is criminal within this rule. S. C.

In order to render the judgment binding here, it must appear that it was final and conclusive in the foreign court in which it was given; *Plummer v.*



*Woodburn*, 4 B. & C. 625, 637; *Frayes v. Worms*, 10 C. B., N. S. 149; *In re Henderson, Nouvion v. Freeman*, 37 Ch. D. 244, C. A.; 15 Ap. Ca. 1, D. P.; that the cause of action was exactly the same; *Callandar v. Dittrich*, 4 M. & Gr. 68; and that the parties were within or subject to its jurisdiction; *Obicini v. Bligh*, 8 Bing. 335; *Novelli v. Rossi*, 2 B. & Ad. 757, explained in *Castrique v. Imrie*, L. R., 4 H. L. 435, per Blackburn, J. As to when a court has jurisdiction, see *Schibsbly v. Westenholz*, L. R., 6 Q. B. 155; *Singh v. Rajah of Faridkote*, ante, p. 208. Where the court had jurisdiction over the subject matter, and persons brought before it, its judgment is final, if the proceedings are not against substantial justice, although irregular under the local law. *Pemberton v. Hughes*, (1899) 1 Ch. 781, C. A. See also *Bater v. Bater*, (1906) P. 209, 237, per Romer, L. J. The judgment to be conclusive must be on the merits. *The Delta*, 1 P. D. 393; *The Challenge* and *The Duc d'Aumale*, (1904) P. 41. Thus, a foreign judgment in favour of the defendant on the foreign Statute of Limitations is no bar to an action here, where the statute only bars the remedy and not the right. *Harris v. Quine*, L. R., 4 Q. B. 653. In these respects an Irish, Scotch, or Colonial judgment stands on the same footing as a foreign judgment. *Harris v. Saunders*, 4 B. & C. 411; *Ferguson v. Mahon*, and other cases cited ante, p. 208. Mistake by the foreign court as to the English law applicable to the case affords no defence to an action on the judgment, it being a question of fact in that court. *Godard v. Gray*, L. R., 6 Q. B. 139; *In re Truport*, 36 Ch. D. 600. But where the foreign court acts in defiance of the comity of nations by refusing to recognise a title properly acquired according to the laws of England, our courts will not give effect to its decision. *Simpson v. Fogo*, 1 J. & H. 18; 29 L. J., Ch. 657; S. C., 1 H. & M. 195; 32 L. J., Ch. 349. This case was recognised as good law in *Castrique v. Imrie*, L. R., 4 H. L. 436, per Blackburn, J.

Where there was a decree in Ireland against the validity of a will of lands in England and Ireland, such decree was held no bar to a suit between the same parties in the English Chancery respecting the land in England devised by the same will. *Boyse v. Colclough*, 1 K. & J. 124; 24 L. J., Ch. 7. In *Australasia, Bank of v. Harding*, 9 C. B. 661; 19 L. J., C. P. 345, it was held on demurrer to a plea of judgment recovered in a British colony against the defendant, pleaded to a count on a simple contract, that such a judgment was no merger in this country, though it might be so in the colony; and, generally, that a foreign judgment was only *primâ facie* evidence of a debt here. The mere pendency of a suit in a foreign court is no bar to a suit in this country for the same cause. *Ostell v. Lepage*, 5 De G. & Sm. 95; 21 L. J., Ch. 501. A judgment against the defendant in the Consular Court in Constantinople, and payment to the plaintiff under the judgment, is a conclusive bar to another action in this country by the plaintiff against the defendant for the same cause of action. *Barber v. Lamb*, 8 C. B., N. S. 95; 29 L. J., C. P. 234. See *Taylor v. Hollard*, (1902) 1 K. B. 676.

A notarial attestation, purporting to contain the substance, but not the tenor, of a judgment of the Court of the Inquisition at Rome, stating the offences for which the defendant had been sentenced, and sealed with the seal of that court, is inadmissible as evidence of the offences alleged therein to have been committed. *R. v. Newman*, Dearsly, C. C. 85. The document was there admitted as proof that a judgment had been pronounced, but not of the grounds of it; and it seems questionable how far it was admissible even for this purpose; for it was a mere certificate of what the notary considered to be the result of a selected portion only of the original proceedings.

As to judgments *in rem* of foreign courts, *vide ante*, p. 195.

*Effect of Court Rolls and Manor Books.*

Court Rolls, whether of a court baron or customary court, are evidence as well between the lord of the manor and his tenants or copyholders (B. N. P. 247), as against them; *A.-G. v. Holham*, Turn. & Russ. 217; and for many purposes, as against strangers. Copies of court rolls, purporting to be a surrender by a person shown to have been in possession of the land, and an admittance of the surrenderee accordingly, are evidence against the defendant both of the copyhold tenure and of the title of surrenderee, in an action by him for use and occupation. *Standen v. Christus*, 10 Q. B. 135.

They will be admitted as evidence of reputation within the manor; and even an ancient custumal, not properly a court roll, nor signed by any of the tenants, but found among the rolls, and delivered down from steward to steward, purporting to have been made *assensu omnium tenentium*, has been admitted as evidence to prove the course of descent within a manor. *Denn d. Goodwin v. Spray*, 1 T. R. 466; *Johnstone v. Spencer*, *El.*, 30 Ch. D. 581. So, a presentment by the homage on the court rolls of a manor, stating the mode of descent of lands in the manor, is evidence of such mode, though no instance of any person having taken according to it be proved. *Roe d. Beebee v. Parker*, 5 T. R. 26. Entries of admissions *durante castâ viduitate* are evidence of a custom to hold on that condition, though there may be no instance of a forfeiture for incontinence. *Doe d. Askew v. Askew*, 10 East, 520. Proof of the admission of the youngest among the collaterals of a certain degree of consanguinity is not evidence *per se* of the custom of descent to the youngest of a more remote degree; thus the entry of an admission of the youngest son of an uncle is no evidence that the custom extends to youngest son of the youngest brother of a great-grandfather. *Muggleton v. Barnett*, 1 H. & N. 282; 26 L. J., Ex. 47; 2 H. & N. 653; 27 L. J., Ex. 125, Ex. Ch. An entry of an admission reciting a previous surrender to the use of a will, is evidence of the surrender (the latter being lost) in proof of a settlement by estate. *R. v. Thruscross*, 1 Ad. & E. 126. In an action by a copyholder against a freeholder of a manor, an ancient parchment writing, preserved among the muniments of a manor, purporting to be signed by certain copyholders of the manor, was held to be evidence, as against the plaintiff, of the reputation of the manor as to a customary right of common set up to him. *Chapman v. Cowlan*, 13 East, 10. The court rolls are evidence of a custom for the copyholds and freehold tenants of a manor to get stone from a quarry thereon to repair their tenements. *Heath v. Deane*, (1905) 2 Ch. 86. So of proclamations before seizure of a forfeited copyhold, though tendered on behalf of a party claiming under the lord after seizure. *Doe d. Tarrant v. Hellier*, 3 T. R. 164. A presentment of a jury at a manor court, setting forth the bounds of the manor, is admissible evidence of the bounds, though mutilated in part, such part not being apparently connected with the subject of boundary. *Evans v. Rees*, 10 Ad. & E. 151. The existence of a customary compiled within the period of legal memory is conclusive evidence against the existence of a custom not mentioned therein. *Portland, Dk. of v. Hill*, L. R., 2 Eq. 765. See also *Anglesey, Mqs. of v. Hatherton, Ld.*, 10 M. & W. 218.

Entries of ameracements on court rolls for acts of waste, offered in proof of the nature of a customary tenure, were said not to be admissible for that purpose without proof of payment. *Rowe v. Brenton*, 3 M. & Ry. 302. Yet it is not common to find in ancient court rolls anything to indicate such payments. Whether made voluntarily or upon process, the entry of payment is more likely to appear in the bailiff's accounts, or in the estreat rolls.

Presentments by the leet jury of unlawful fishing in a stream belonging to the lord of the manor are not evidence for the lord of his right to the stream; for they are made in the exercise of a criminal jurisdiction, and are *res inter alios*; per Erle, J., in *Mildmay v. Newton*, Winton Sum. Ass. 1846; *dubitante* Coleridge, J., in *Waddington v. Newton*, Winton Sum. Ass. 1850, who was disposed to admit them, on the same presentments being tendered at a subsequent trial on the same question between other parties. See *ante*, p. 207. In *Culmady v. Rowe*, 6 C. B. 861, 877, 878, presentments of purprestures were rejected by Patteson, J., because no fine appeared to have been imposed; and it should seem that a bare presentment, without more, is only evidence where *reputation* within the manor is admissible. Entries of fines assessed in the books of a deceased steward are not evidence of a custom to take such fines unless there be some proof of payment. *Ely, Dean of v. Caldecott*, 7 Bing. 433. Presentments are not evidence of matters not within the jurisdiction of the homage; as a presentment by the freeholders of a right of common enjoyed by the owner of a certain farm. *Richards v. Bassett*, 10 B. & C. 657.

#### *Effect of Public Books and Public Documents.*

Public books and documents of an official character are in many instances evidence, even as between strangers, of the facts therein recorded. Thus where a duty is cast by common law or statute upon a person to register or certify that certain facts existed *within his knowledge*, the register or certificate would, it seems, be evidence of those facts; and in some cases the statute requiring the registration to be made provides that the register shall be evidence although the facts are not within his knowledge, *e.g.*, registers of births and deaths, *ante*, pp. 126-7. In all other cases, however, the register would be admissible in proof of the *fact* of registration only. Thus a report made by public officers is admissible only in proof that they have made a report, but not of the facts therein stated. *Sturla v. Freccia*, 5 Ap. Ca. 623, D. P. The term "public document" is used in the sense of one made by a public officer, for the purpose of the public using it and being able to refer to it: the public having access thereto are not necessarily all the world, but may be limited, *e.g.*, the tenants of a manor, or the members of a corporation. *Id.* 643, per Ld. Blackburn. Such publicity must be contemporaneous, and such "as would afford the opportunity of correcting anything that was wrong." *Mercer v. Denne*, (1904) 2 Ch. 534, 544.

The official indorsement or certificate, or entry in the officer's book, of the registration of a deed required by statute to be registered, is *prima facie* evidence of its registration; *Grindell v. Brendon*, 6 C. B., N. S. 698; 28 L. J., C. P. 333, and see *ante*, p. 144; and also where the statute requires the observance of certain formalities at the time of such registration, that those formalities have been complied with. S. C. See further, *ante*, p. 43. The registration does not, however, afford evidence that other requisites necessary to the validity of the deed registered have been complied with; as that a composition deed has been assented to by the requisite majority of creditors. *Bramble v. Moss*, L. R., 3 C. P. 458. And particular facts supplied by private persons do not necessarily become evidence against third persons merely because they are entered in a public register. *Huntley v. Donovan*, *post*, p. 213. See also, as to the effect of the entry of a memorial of a conveyance on a county register, *ante*, p. 144. The stats. 8 & 9 V. c. 113, s. 1 (*ante*, p. 100), and 14 & 15 V. c. 99, s. 14 (*ante*, p. 101), will assist in the proof of public documents.

The following are some of the cases in which evidence of this kind has been received. Lists of registers which have been treated as authentic will be found in most of the books on evidence, but sufficient care has not been taken to distinguish between proof of a document, and its effect when proved.

The register of the Navy Office, with proof of the usage to return all persons dead with the mark *Dd.*, has been admitted to prove the death of a sailor. *B. N. P.* 249. So, the books of the Sick and Hurt Office, made up from returns of the King's ships, and kept by a public officer under the Admiralty, are evidence of the death of a sailor. *Wallace v. Cook*, 5 Esp. 117. As to similar registers in the army, see 42 & 43 V. c. 8, s. 3, *ante*, p. 129. An Army "Medical History Sheet" was admitted in evidence in *Glecn v. Glecn*, (1900) W. N. 258, Mich. S., Jeune, P. Books in the First Fruits Office are evidence of collations. *Irish Society v. Derry*, *Bp. of*, 12 Cl. & F. 641. The book at Lloyd's, stating the capture of a ship, was held evidence of such capture in an action on a policy, and also of notice of the loss, as against a subscriber to Lloyd's in the habit of examining the books there. *Abel v. Potts*, 3 Esp. 242. It is also evidence against an underwriter of the time of sailing; for he is presumed to have knowledge of its contents. *Macintosh v. Marshall*, 11 M. & W. 116. But a certificate by an agent of Lloyd's is not evidence of the amount of damage even against a subscriber. *Drake v. Maryatt*, 1 B. & C. 473. The log-book of a man-of-war is evidence to prove the time of a vessel sailing under its convoy, in an action on a policy upon such vessel. *D'Israeli v. Jowett*, 1 Esp. 427. Such log-book, however, is only evidence when produced as an official public book from the Admiralty; *Rundle v. Beaumont*, 4 Bing. 537; otherwise it can only be used to refresh the memory of the person who made the entries. *Burrough v. Martin*, 2 Camp. 112. As to merchant-logs, see the Merchant Shipping Act, 1894, s. 239, cited *ante*, p. 130. An official letter written at the end of a voyage by the captain of a convoy, and produced by the Admiralty, seems to have been held evidence of the facts stated in it in a suit *inter alios*. *Watson v. King*, 4 Camp. 275. Muster rolls of the King's ships, produced from the Admiralty, are evidence of the fact that persons therein named were then on board. *Semb. Barber v. Holmes*, 3 Esp. 190, and the cases cited and recognised *arguendo*, 15 Q. B. 100. A copy of the searcher's report at the Custom House is evidence of the cargo on board, being an official paper made under the statute. *Johnson v. Ward*, 6 Esp. 48. In the Court of Admiralty, entries in the journals of the lighthouses, *The Maria das Dores*, Brown. & L. 27; 32 L. J., P. M. & A. 163, and of coastguard stations, *The Catherina Maria*, L. R., 1 Ad. & Ec. 53, were admitted in evidence to show the state of wind and weather at a given time without further proof, although not admissible at common law. *Per Lushington, J.*, Brown. & L. 28; 32 L. J., P. M. & A. 164.

The bank books are the best evidence to prove a transfer of stock; the testimony of the broker is not enough. *Breton v. Cope*, Peake, 30. The book from the master's office will prove a person to be a solicitor of a superior court, without production of the roll. *R. v. Crossley*, 2 Esp. 526. The poll-books at an election were evidence. *Mead v. Robinson*, Willes, 424. So, the polling papers, handed in at a municipal election and produced by the town clerk, were, it seems, evidence of the vote given; but the custody of them must be traced so as to identify them as original papers; and the mere production of papers, purporting to be such, by a succeeding town clerk was not enough. *R. v. Ledgard*, 8 Ad. & E. 535. So, the books of the Old King's Bench and Fleet prisons were admitted to prove the dates of the commitment and discharge of prisoners; *R. v. Aickles*, 1 Leach, C. C. 239; although not then kept by any public authority; but they are

not evidence of the *cause* of commitment, of which the commitment itself is the best evidence. *Salte v. Thomas*, 3 B. & P. 188.

The copy of an official paper containing the number of passengers on board a vessel, made by the master in pursuance of an Act of Parliament, and deposited at the India House, is admissible to show the number and description of the persons on board the vessel. *Richardson v. Mellish*, Ry. & M. 66; S. C., 2 Bing. 229. Excise books, transcribed from the maltster's specimen paper, are evidence against him, without calling the officers who have transcribed them. *R. v. Grimwood*, 1 Price, 369. Shipping entries at the Custom House have been disallowed as evidence to fix a party with fraud, unless the original note, from which the entry was made, were produced and traced to him or his agent. *Hughes v. Wilson*, 1 Stark. 179. So, formerly, an entry of the sale of a ship in the register of the Custom House was thought not to be evidence of ownership without connecting the party with it, though made under an Act of Parliament. *Fraser v. Hopkins*, 2 Taunt. 5; but now see *Effect of ship's register, post*, p. 218. So, the certificates or reports which are required to be made by masters of *foreign* vessels at the Custom House for the purpose of landing, and filed there, are not evidence of the particulars certified (except as against the master and those in privity with him). *Huntley v. Donovan*, 15 Q. B. 96. The books of the clerk of the market, made up under stat. 47 G. 3, sess. 2, c. 68, s. 29, were not, *per se*, evidence of the contract of sale as between the buyer and seller of coals in London, though the Act made such entries evidence "in all actions touching anything done in pursuance of it." *Brown v. Capel*, M. & M. 374.

Entries in the books of the clerk of the peace of deputations granted many years since to gamekeepers by the owner of a manor are evidence, without production of the deputations themselves, to show that the party therein mentioned, exercised the right of appointing gamekeepers. *Hunt v. Andrews*, 3 B. & A. 341; and see *Rushworth v. Craven*, M'Cl. & Y. 417. A book of claims, kept by the clerk (deceased) of an enclosure commission, signed by the commissioners, is evidence of such claims, the originals being lost. *Doe d. Welsh v. Langfield*, 16 M. & W. 497. A manu-cript book of the date of Eliz., purporting to be written by an officer of the Duchy of Lancaster, and describing the duties of the office, is not evidence in behalf of his successor claiming to exercise the same rights and duties under an appointment from the Duchy. *Jewison v. Dyson*, 2 M. & Rob. 377. Surveys made for a Department of the Government for a temporary purpose and not affecting Crown property revenues or grants, are not evidence of facts therein stated or appearing. *Mercer v. Denne*, (1904) 2 Ch. 534; (1905) 2 Ch. 538, C. A. So as to maps and plans. S. C.

Where the plaintiff, the surgeon of a workhouse, was desirous of disproving neglect of a pauper, he was not permitted to put in evidence a journal kept by him and stating his attendances, though it was kept by order of the Poor Law Commissioners under 4 & 5 W. 4, c. 76. *Merrick v. Wakley*, 8 Ad. & E. 170. Returns of sales of corn under 1 & 2 G. 4, c. 87, were not conclusive, if evidence at all, to show the parties to whom the corn was delivered; for it was no part of the duty of the corn factor to mention this in the return. *Woodley v. Brown*, 2 Bing. 527. An entry in a vestry-book, stating that A. was duly elected treasurer of the parish at a vestry duly held in pursuance of notice, is evidence of such election, and of its regularity. *R. v. Martin*, 2 Camp. 100; *Hartley v. Cook*, 5 C. & P. 441. But it must appear by the entry, or *alimdc.*, that the meeting was duly convened after proper notice. *Heysham v. Forster*, 5 M. & Ry. 277. So, a ward-mote book proves the election of a constable in the City of London. *Underhill v. Wills*, 3 Esp. 56. In an action for disturbing the plaintiff in the enjoyment

of a pew claimed in right of his messuage, an old entry in the vestry-book signed by the churchwardens, stating repairs of the pew by a former owner of the messuage (under whom the plaintiff claims), in consideration of his using it, is evidence to prove the plaintiff's title; for it is made by the churchwardens on a subject within the scope of their official authority. *Price v. Littlewood*, 3 Camp. 288. But see *Cooke v. Banks*, 2 C. & P. 478.

*Books, &c. of public companies.*] The transfer book of a railway company is not evidence of the title of the transferee, though an act of Parliament makes the entry necessary to complete the title. *Hare v. Waring*, 3 M. & W. 362. Where a water company was sued on a bond, their books were rejected, as proof for them that the bond was executed at an irregular meeting, although the plaintiff was a proprietor, and the private Act required such books to be kept, and to be open for inspection to proprietors. *Hill v. Manchester, &c. Water Works Co.*, 5 B. & Ad. 866. In the Act in the last case there was no provision to make the books evidence, and the plaintiff, though a proprietor, was considered as a stranger *quoad hoc*, the books being those of the *corporate body*, and not of the proprietors generally. But in the acts now in force which regulate the incorporation of companies, provision is made for the entry of proceedings, &c., in books and those books are receivable in evidence; *vide sub tit. Actions by and against companies, post*, pp. 1097 *et seq.* As to the effect of the issue of the share certificates by a company and the registration of shares, *vide post*, pp. 1100, 1118 *et seq.*

*Banker's account books.*] As to effect in evidence of banker's account books under the Bankers' Books Evidence Act, 1879, *vide ante*, pp. 123-4.

*Land-tax books.*] Land-tax assessment books are evidence of the occupation of land by the parties named in them. *Doe d. Strode v. Seaton*, 2 Ad. & E. 171. But where it was proved to be usual to make no alteration in the name as long as the land was in the *same family*, they were rejected. *Doe d. Stansbury v. Arkwright, Id.* 182, n. The proof of redeemed land-tax is the certificate of the commissioner, or copy of the register. *Buchanan v. Poppleton*, 4 C. B., N. S. 20; 27 L. J., C. P. 210.

*Rate-books.*] Parish rate-books are admissible to prove who are the owners and occupiers of the property rated, *Smith v. Andrews*, (1891) 2 Ch. 678, 682; so are receipts for the rates. *Blount v. Layard, Id.* 681, 691, n. *cor. Field, J.*

*Heralds' books.*] The heralds' visitation-books, made under commissions regularly issued till the close of the 17th century (2 Jac. 2), are evidence of the facts therein recorded in matters of pedigree. B. N. P. 248; Report on Public Records, 1800, p. 82. It is usual, and safer, to be prepared with evidence of the commissions; though, as they were general ones and not merely issued *pro hâc vice*, such evidence is, perhaps, not strictly necessary. See *Proof of Inquisitions, &c., ante*, p. 111. It is doubtful, however, whether these visitation-books are admissible in evidence, *inter alios*, of the facts therein recorded. See *Polini v. Gray*, 12 Ch. D. 428, 433, 435, *per C. A.* A certificate taken from the register of the funerals of Peers at the Heralds' College is admissible in evidence as an official document taken by persons whose duty it was to make it up. *Vaux Peerage*, 5 Cl. & F. 526. But a pedigree deduced from these books and drawn up by a herald, is not admissible. *King v. Foster*, T. Jones, 224; 2 Rol. Ab. 686. So, a written pedigree, *purporting* to be made by one of the family, and entered in the

heralds' books, is not evidence. *Per Fortescue, J.*, 12 Vin. Abr. Evid. p. 119. An affidavit stating the members of deponent's family found in the Herald's office, may be good evidence as a declaration; and where the original was lost, an entry of it in their books has been allowed as secondary evidence. *Per Littledale, J.*, *Doe d. Hungate v. Gascoigne*, 2 Stark. Ev. 2nd ed., App. 1087.

*Bishops' registers.*] The official register-book of a bishop, containing entries of the transactions at visitations, has been admitted as evidence of the right of nomination to a curacy. *Arnold v. Bath and Wells, Bp. of*, 5 Bing. 316. So, episcopal registers have been admitted as evidence of vicarial endowments; *Tucker v. Wilkins*, 4 Sim. 262; *Leonard v. Franklyn*, 1 Daniel, 34; or of collations; *Irish Society v. Derry, Bp. of*, 12 Cl. & Fin. 641; or of the foundation of a demery in the 13th century; *R. v. S. Peter's Exeter*, 12 Ad. & E. 512. An enrolment-book of leases, granted by the Bishop of Durham, was allowed as secondary evidence of a lease on behalf of one claiming under the bishop; being a public muniment; *Humble v. Hunt*, Holt, N. P. 601; and a similar register of chapter leases, from the Chapter House of Salisbury, was admitted as evidence of reputation respecting the limits of a parish. *Per Tindal, C. J.*, in *Coombs v. Coether, M. & M.* 398. It seems to be on this footing that old copies of the foundation charters and grants, registered and preserved among the muniments of dissolved monasteries, are admitted in evidence on behalf of the successors to their estates at least where the originals cannot be found; *ante*, pp. 14, 15. See also *ante*, p. 143, as to *Enrolled deeds*.

*Reports of Charity Commissioners.*] By the Charitable Trusts Recovery Act, 1891 (54 & 55 V. c. 17), s. 5 (1), for the purpose of any action or other proceeding instituted by them under that Act, the printed reports of the Charity Commissioners appointed under stat. 58 G. 3. c. 91, "shall be admissible as *prima facie* evidence of the documents and facts therein stated, provided that either party intending to use any such report as evidence shall give notice of such intention in the prescribed manner to the other party." By Rules S. C. (Charitable Trusts Recovery), 1892 (made under sect. 6), r. 4, the notice "shall be a two days' notice in writing, and shall be served on the opposite party or his solicitor; but the Court or a judge may give leave for shorter or substituted or other notice, and the notice may be given before appearance." See *In re Alms Corn Charity*, (1901) 2 Ch. 750.

*Notarial and consular certificates.*] A notarial certificate of the protest abroad of a foreign bill of exchange is evidence of that fact. Bayley on Bills, 90; *Anon.*, 12 Mod. 345; and see further *Geralopulo v. Wielcr*, 10 C. B. 690; 20 L. J., C. P. 105, cited, *post*, p. 387. So, a certificate, which purported to be given by a notary public, verifying the signature of a person abroad before whom an affidavit is sworn, and stating that that person is competent to administer oaths, is evidence of these facts. *Ex parte Worsley*, 2 H. Bl. 275; *Omcaley v. Newell*, 8 East. 364; *Cole v. Sherard*, 11 Exch. 482. See *Abbott v. Abbott*, 29 L. J., P. M. & A. 57; *ante*, p. 129. As to the admissibility of an affidavit sworn before a notary abroad, see *In re Bernard*, 2 Sw. & Tr. 489; 31 L. J., P. M. & A. 89; *In re Lambert*, L. R., 1 P. & M. 138, *contra*; and *In re Davis' Trusts*, L. R., 8 Eq. 98. See also the Commissioners for Oaths Act, 1889 (52 & 53 V. c. 10), ss. 3, 6, 11, *ante*, pp. 80, 81, which replaces Rules, 1883, O. xxxviii. r. 6, *ante*, p. 81.

But, in other cases, notarial and consular certificates are not evidence of the facts certified; thus the presentment in England of a foreign bill cannot

be so proved. *Chesmer v. Noyes*, 4 Camp. 129. So, a notarial certificate of the execution of a power of attorney abroad was held to be insufficient evidence. *Ex pte. Church*, 1 D. & Ry. 324. In *Waldron v. Coombe*, 3 Taunt. 162, it was held, in an action on a policy of insurance on goods to recover a loss by sea damage, that the amount of the loss could not be proved by a certificate from the British vice-consul at Rio Janeiro, although it was the duty of the vice-consul to superintend the sale.

In Batavia, charter-parties are entered into by the instrument being written in a book by a notary (he being a public officer by the Dutch law, which prevails in Batavia), and there signed by the parties. The notary makes copies, which he signs and seals, and which the principal officer of the Government of Java signs, upon proof of their being executed by the notary. Then one copy is delivered to each party. In the courts of Java, in order to prove the charter-party, it is requisite to produce the notary's book; but this book is never allowed to be taken out of Java; and in Dutch courts, out of Java, faith is given to the above copies as to an original. It was held that the copies were not receivable in evidence in this country. The chief contention was that they had been made originals by the authority given to the notary by the parties themselves, which failed. The court also thought that, though secondary evidence of the contents of the notary's book might, under the circumstances, be admissible, still these copies were not sufficiently authenticated to be used for that purpose. *Brown v. Thornton*, 6 Ad. & E. 185. See *Boyle v. Wiseman*, 11 Exch. 360; 24 L. J., Ex. 160, *ante*, p. 5; and *R. v. Castro*, *ante*, pp. 98, 131.

A certificate of ordination, under the seal of the bishop, is evidence of holy orders. *R. v. Bathwick*, 2 B. & B. 639.

*Post-mark.*] The post-mark on a letter has been admitted as evidence of the date of its being sent. *Abbey v. Lill*, 5 Bing. 299; *R. v. Plumer*, R. & Ry. 264; *Kent v. Lowen*, 1 Camp. 177. But a post-mark may be contradicted by oral evidence of the real date of posting. *Stocken v. Collin*, 7 M. & W. 515. The post-mark is no proof of a publication of the contents of the letter at the place of posting. *R. v. Watson*, 1 Camp. 215. Where it was required to prove that A. effected an insurance by order of B., the production by B. of an order in a letter, with the post-mark, addressed to A., was received as evidence that a policy effected in A.'s name of the date of the letter was effected under that order. *Arcangelo v. Thompson*, 2 Camp. 260. In *R. v. Plumer*, *supra*, it was held that the double postage office-mark on a letter was not, *per se*, proof that it contained an inclosure. See further, *ante*, p. 123.

*Books of history, &c.*] A general history may be given in evidence to prove a matter relating to the kingdom in general. B. N. B. 248; Vin. Ab. Av. (A. b. 40); *Read v. Lincoln*, *Bp. of*, (1892) A. C. 614, J. C. Thus, Speed's Chronicle was admitted to prove the death of Isabel, Queen Dowager to Ed. II. *Brounker v. Atkyns*, Skin. 15. So chronicles are said to have been admitted to prove that at a certain period Charles V. of Spain had not surrendered the crown to Philip. *Neale v. Fry*, cited 1 Salk. 281; S. C. *sub nom.* *Neal v. Joy*, cited, 12 Mod. 86; S. C. *sub nom.* *Joy (Lady) & Neale's case*, cited *Skin.* 623. But see, however, S. C., *sub nom.* *Mossam v. Ivy*, 10 How. St. Tr. 625, where it is reported that the evidence was *rejected*, and observations in Peake, Ev. 82, 83, and 2 Taylor, Evid., 10th ed., § 1785, n. (1). Historical evidence of this kind is only to be used in proof of a matter concerning the government, and was therefore rejected as proof that



King Alfred was the founder of a college. *Cockman v. Mather*, 1 Barnardist. 14. Nor can it be admitted in proof of a local custom: thus Camden's "Britannia" was held to be no evidence on an issue whether, by the custom of Droitwich, salt-pits could be sunk in any part of the town. *Stainer v. Droitwich*, 1 Salk. 281. Nor is it evidence of the creation of a peerage. *Vaux Peerage*, 5 Cl. & F. 526. It seems indeed only to be used to refresh the memory of the jury on notorious facts, which require no evidence at all. Thus, it has been held that counsel may, in addressing a jury, refer generally to matters of history, whether ecclesiastical or political, and cite the language of writers or statesmen by way of illustration or explanation; but they are not at liberty to cite specific canons or foreign treaties, or the printed works in use among certain communities, and purporting to represent their doctrines, so as to fix a party to the suit with those doctrines, and to persuade the jury to act upon such imputation, unless such documents be proved by regular evidence, and brought home to the party by proof of his personal adoption of them. *Durby v. Ouseley*, 1 H. & N. 1; 25 L. J., Ex. 227.

#### *Effect of Corporation Books.*

The public official acts of a municipal corporation, registered in their books, regularly kept and entered by the proper officer, may be [and ought to be] proved by the books themselves, which are evidence of them even as between strangers. *Thetford, Case of*, 12 Vin. Ab. 90: *R. v. Mothersell*, Stra. 93; *Lauderdale Peerage*, 10 Ap. Ca. 692, 700. Thus, an entry of the disfranchisement of a corporator is evidence to prove it; and it cannot be collaterally examined on the merits. *Brown v. London, Corporation of*, 11 Mod. 225. But the books of a corporation, whether public or private, are not admissible in their own favour as to matters of a private nature; as to establish a claim of toll; *Brett v. Beales*, M. & M. 419, cited *ante*, p. 53; *Marriage v. Lawrence*, 3 B. & A. 142; *London v. Lynn*, 1 H. Bl. 214, n.; or a right to appoint a curate as against the vicar; *A.-G. v. Warwick Cor.*, 4 Russ. 222; or an exclusive right of trading. *Davies v. Morgan*, 1 C. & J. 590-3. Where plaintiff sued a corporation (of which he was an alderman) on a bond, and defendants pleaded, 1. Fraud; 2. That the bond was irregularly executed contrary to a bye-law, Parke, B., admitted the books of the corporation to prove the bye-law, but rejected them as evidence for the defendants of a private transaction between the plaintiff and the corporation in proof of the fraud. *Holdsworth v. Dartmouth, Mayor of*, Exeter Sum. Ass. 1838, MS.

#### *Effect of Parish Registers, &c.*

The registers of baptisms, marriages, and burials, preserved in churches, are good evidence of the facts which it is the duty of the officiating minister to record in them. B. N. P. 247; *Doe d. Warren v. Bray*, 8 B. & C. 816. Where it appeared that the practice was to make entries in the general parish register, once in three months, out of a day-book in which the entries were made immediately after the baptism or on the same morning; and in the day-book after a particular entry, the letters B.B. (signifying base-born) were inserted, which were omitted in the register, it was held that evidence of the day-book could not be received, for there could not be two parish registers. *May v. May*, 2 Stra. 1073. An entry by the minister of a baptism which took place before he became minister, and of which he received information from the parish clerk, is not admissible; nor is the private memorandum of the fact made by the clerk, who was present at the baptism. *Doe d. Warren v. Bray*, 8 B. & C. 813.

But see *Doe d. France v. Andrews*, 15 Q. B. 766, *ante*, p. 125. As to registers of burnings under the Cremation Act, 1902, *vide ante*, p. 126. As to proof of the identity of the parties, *vide ante*, p. 125.

The books of Fleet, King's Bench, May Fair, and Mint marriages are not evidence to prove a marriage, for they were not made by public authority. They were, in fact, only private memoranda kept by ministers who officiated at clandestine marriages contrary to the canons of the church. See *Burn on Fleet Registers*, ch. 6, and 3 & 4 V. c. 92, ss. 6, 20. Such a register, however, may, if signed by a party, be equivalent to a declaration by such party, and, as such, admissible where hearsay is admissible. *Lloyd v. Passingham*, 16 Ves. 59. A register of ceremonies performed at a dissenters' meeting-house seems admissible in evidence to the same extent: *Newham v. Raithby*, 1 Phillim. 315; *Ex pte. Taylor*, 1 J. & W. 483; but cannot be proved by an examined copy, for it is not a public document: *S. C.*; *Whittuck v. Waters*, 4 C. & P. 375; and the stat. 6 & 7 W. 4, c. 86, *ante*, pp. 126, 127, would appear not to have made any difference in this respect, for the register appointed by that Act is to be kept by the registrar. Such of these registers, however, as have been deposited with the Registrar-General under 3 & 4 V. c. 92, and 21 & 22 V. c. 25, *ante*, p. 126, are admissible in evidence after notice. See 3 & 4 V. c. 92, ss. 19 *et seq.* And in the case of marriages entered into under 61 & 62 V. c. 58, *post*, p. 1042, the register kept thereunder is a public document.

An attempt is sometimes made to use the register for the purpose of proving facts stated therein in addition to the main fact of baptism, marriage, or burial, as the case may be. There has been a good deal of discussion as to how far this can be done. In a criminal proceeding against a person for falsely swearing that he was 21 years of age, *Ld. Tenterden* refused to allow that part of a register of baptisms which stated the day upon which the defendant was born to be read; *R. v. Clapham*, 4 C. & P. 39; and in *Wihen v. Law*, 3 Stark. 63, and *Burghart v. Angerstein*, 6 C. & P. 690, the entry in a register of baptisms of the day of the defendant's birth was rejected as a proof of a plea of infancy. But such an entry has been admitted where the inquiry is as to the legitimacy of the person to whom the entry relates. *In re Turner*, 29 Ch. D. 985, following *Cope v. Cope*, 1 M. & Rob. 269, in which case, upon an issue as to the legitimacy of a child, a baptismal register which described it as the illegitimate son of E. C. was admitted by *Alderson, J.*, though with the observation that it was entitled to little weight. In *R. v. N. Petherton*, 5 B. & C. 508, a copy of a register of baptism was put in to show that an infant was born in a certain parish, but *Bayley, J.*, rejected the evidence, saying, however, that if it could be shown that the child was very young at the time of baptism, the register would afford presumptive evidence of its having been born in the parish where it was baptised. See *R. v. S. Kutharine*, 5 B. & Ad. 970, n. A register of marriage is evidence of the time of the marriage. *Doe d. Wollaston v. Barnes*, *Id.* 386. In *Wigley v. Treasury Solicitor*, (1902) P. 233, the entries in the Scotch register of a son's marriage were admitted as *prima facie* evidence of the marriage of his parents.

As to the effect of the registers of births, marriages, and deaths under 6 & 7 W. 4, cc. 85, 86, and 37 & 38 V. c. 88, see *ante*, p. 127. As to the effect of registers of births, marriages, and deaths in Scotland, Ireland, the colonies, at sea and abroad, *vide ante*, pp. 127 *et seq.*

#### *Effect of Ship's Register.*

A ship's register, describing her to be British built, was held to be no evidence of that fact as against third persons. *Reusse v. Meyers*, 3 Camp. 475.

Nor was it admitted as evidence of ownership or interest, except as against the persons who made the affidavit or declaration. *Fraser v. Hopkins*, 2 Taunt. 5; *Pirie v. Anderson*, 4 Taunt. 652; *Cooper v. South*, *Id.* 803. But under the Merchant Shipping Act, 1894, ss. 64, (2) (b), 695 (1), cited *ante*, p. 130, the certificate of registry given under sect. 14 is *prima facie* evidence of all the matters contained in it or certified by the registrar in his certificate, as, for instance, that the ship is British; *R. v. Bjornsen*, Leigh & Cave, 545; 34 L. J., M. C. 180; or that the defendant is owner; *Hibbs v. Ross*, L. R., 1 Q. B. 534. See also sect. 64 (3), cited *ante*, p. 130.

#### *Effect of Awards.*

An award, regularly made by an arbitrator to whom matters in difference are referred, is conclusive in an action at law between the parties to the reference upon all matters inquired into within the submission. 1 Phillipps Ev., 7th ed., 380; *Campbell v. Twendow*, 1 Price, 81. Thus, where a covenantor and a covenantee submitted the amount of damages of a breach of covenant to arbitration, the award was held conclusive of the amount in an action on the covenant to which defendants pleaded *non est factum*. *Whitehead v. Tattersall*, 1 Ad. & E. 491. See also *Cummings v. Heard*, L. R., 4 Q. B. 669. So, where in an action of ejectment it appeared that the lessor of the plaintiff and the defendant had before referred their right to the land to an arbitrator, who had awarded in favour of the lessor, it was held that the award precluded the defendant from disputing the lessor's title. *Doe d. Morris v. Rosser*, 3 East, 11. But where, on a reference by landlord and tenant, the arbitrator awarded that a stack of hay, left upon the premises by the tenant, should be delivered up by him to the landlord upon the tenant being paid a certain sum, it was held that the *property* in the hay did not pass to the landlord on his tender of the money by mere force of the award. *Hunter v. Rice*, 15 East, 100. Where the commissioners under an inclosure Act were directed to make an award respecting the boundaries of a parish, and to advertise a description of the boundaries so fixed, and the boundaries so fixed were to be inserted in their award, and to be binding, final, and conclusive, but the boundaries mentioned in the award varied from those which had been advertised; it was held that the commissioners, not having pursued their authority, their award was not binding as to the boundaries. *R. v. Washbrook*, 4 B. & C. 732; but see the remedial Acts, *ante*, p. 153.

It has been repeatedly decided that corruption or misconduct of the arbitrators, including the case of an award made *ex parte*, does not invalidate the award, in any case, at least, in which an application might have been successfully made to the court to set it aside; *vide post*, *Action on award, Defence*.

An award made on a reference of all matters in difference between the parties will not be a bar with regard to any demand which was not in difference between them at the time of the submission, nor referred by them to the arbitrators. *Ravee v. Farmer*, 4 T. R. 146; *Smith v. Johnson*, 15 East, 213. And awards under inclosure Acts are so far on the same footing as private submissions, that if the award go beyond the powers of the commissioners, it is void *pro tanto*; and if it omit to decide on anything within the scope of the submission, the interest of parties remains *in statu quo*. *Per Best, C. J., Thorpe v. Cooper*, 5 Bing. 129. But where an action by a person for his salary, and also for damages for dismissal from service, was referred, and the plaintiff gave evidence of dismissal, but claimed no damages for it before the arbitrator, who only awarded the

amount of salary: held that the award was nevertheless a bar to a second action for damages for the dismissal. *Dunn v. Murray*, 9 B. & C. 780. See *Hudley v. Green*, 2 C. & J. 374. A. filed a bill against B. for the infringement of a patent, and the arbitrator found that the patent was not illegal and void: it was held that, in a subsequent action, by A. against B. for infringement of the same patent, this award did not estop B. from setting up the defence that A. was not the first and true inventor. *Newall v. Elliott*, 1 H. & C. 797; 32 L. J., Ex. 120.

The judgment of an usurped jurisdiction between parties is not admissible as an award without proof of mutual submission. *Rogers v. Wood*, 2 B. & Ad. 245.

An award made on ejection, brought by A. against a mortgagor after mortgage, is not evidence for A. on an ejection brought by the mortgagee against him. *Doe d. Smith v. Webber*, 1 Ad. & E. 119. In a suit for injury to A.'s reversionary interest in a close whereof F. was tenant, in which the defendant set up the right of G., and denied that of A., it was held that the plaintiff could not put in, as evidence of such right, an award made in a former action between F. as plaintiff and G. as defendant, in which the same right was in question, and in which G. had pleaded not guilty only, and afterwards paid damages awarded against him; for as it was not shown that A. was substantially the plaintiff in the first action, or that F. brought it by A.'s authority, a verdict or award against F. could not have prejudiced A., and therefore could not be available as evidence for A. *Wenman Ly. v. Mackenzie*, 5 E. & B. 447; 25 L. J., Q. B. 44. But where the right as a watercourse and a question of boundary were referred by a submission between A. and his tenant B. on the one side, and C., a neighbouring landowner, on the other, the award was held admissible evidence for C. on both points in a subsequent action by him against B.; although B. had, in the meantime, become tenant of the same land to another landlord, under whom he now justified, and who was not shown to be in privity with A. *Breton v. Knight*, Winton Sum. Ass. 1837, *per* Tindal, C.J., confirmed in Banc on motion for a new trial; MS. On an issue between plaintiff and an execution creditor of B., whether growing crops belonged to B., an award made between plaintiff and B. touching the crops, just before the execution, was held admissible as against the defendant. *Thorpe v. Eyre*, 1 Ad. & E. 226. In an action on a policy *Ld. Kenyon* admitted evidence that the defendant had agreed to be bound by an award to which other persons were parties, and that the award was in favour of the plaintiff. *Kingston v. Phelps*, Peake, 228.

That an award is not evidence, as between strangers, even in a matter in which hearsay is admissible, see *Evans v. Rees*, 10 Ad. & E. 151, cited *ante*, p. 50; *Wenman, Ly. v. Mackenzie*, *supra*. So an award against a principal debtor is not evidence in an action against his surety. *Ex pte. Young*, 17 Ch. D. 668, C. A.

The award of arbitrators or an umpire upon a claim for compensation under the Lands Clauses Consolidation Act, 1845, has the same effect as the verdict of a jury in an inquisition before the sheriff under that Act (*ante*, p. 198), and is conclusive as to the amount, but not as to the right to compensation. *In re Newbold & Metropolitan Ry. Co.*, 14 C. B., N. S. 405; *Beckett v. Midland Ry. Co.*, L. R., 1 C. P. 241; *R. v. Cambrian Ry. Co.*, L. R., 4 Q. B. 320. So in the case of an award under the Public Health Act, 1875 (38 & 39 V. c. 55); *Pearsall v. Brierley Hill Local Board*, 11 Q. B. D. 735; 9 Ap. Ca. 595, D. P.; or under the Artizans' and Labourers' Dwellings and Improvement Act, 1875 (*Id.* c. 36). *Wilkins v. Mayor of Birmingham*, 25 Ch. D. 78. Where the award is given for one entire sum, if any part of the sum be given contrary to law the whole is invalidated, and this objection may be taken in an action on the award. *Beckett v. Midland Ry. Co.*, *supra*.

Of the effect of awards under inclosure Acts, see further *ante*, p. 153. Where an award under seal directs the payment of money, the award does not create a specialty debt, although the submission was also under seal. *Talbot v. Shrewsbury*, *El. of*, L. R., 16 Eq. 26.

## STAMPS.

The subject of stamps, though important and useful at *Nisi Prius*, is one that cannot be treated of at length in a work of this kind. The following summary only contains some of the principal heads, and a selection of the most useful decisions on the Acts. The prior Stamp Acts were repealed by the Stamp Act, 1891 (54 & 55 V. c. 39), and their provisions therein embodied, with some modifications, in a consolidated form.\*

By 61 & 62 V. c. 46, s. 7 (2), any document referring to any enactment so repealed shall, unless the context otherwise require, be construed to refer to the Stamp Act, 1891, or to the corresponding enactment therein.

The Stamp duties cited in the following pages are all, unless otherwise stated, those specified in the schedule to the Stamp Act, 1891. These duties are, by sect. 1, imposed on and after 1st January, 1892, on the instruments specified in the schedule, in lieu of all other duties thereon, and are subject to the exemptions contained in the schedule, and in any other Acts for the time being in force, and by sect. 2, they are charged in accordance with the regulations of that Act. Sect. 119 provides that "except where express provision to the contrary is made by this or any other Act," the same duties are to be charged on instruments relating to the property of the Crown, or the private property of the sovereign, as on instruments relating to the property of subjects; such express provision is made in the stat. 10 G. 4, c. 50, s. 77, with reference to instruments entered into with H. M.'s Commissioners of Woods and Forests, under the provisions of that Act; and that Act is incorporated with subsequent Acts, *e.g.*, 5 V. c. 1, s. 7.

The most important change introduced by the Act was the abolition of schedule duty, which had been retained by the Stamp Act, 1870, although that Act abolished progressive duty. The general reduction of the 35s. stamp chargeable on deeds and other instruments to 10s. effected by the Stamp Act, 1870, s. 4, is continued. See sect. 120 (*post*, p. 256), and schedule. And by the Revenue Act, 1906, 6 E. 7, c. 20, s. 9, awards now also bear a uniform duty of 10s., *vide post*, p. 237.

Stamp duty is chargeable on an instrument in accordance with its legal effect. *R. v. Ridgwell*, 6 B. & C. 665, 669, *per* Bayley, J.; *Hutton v. Lippert*, 8 Ap. Ca. 309, J. C. It is immaterial by what title the parties thereto may designate the transactions therein recorded. S. C. See also *Wale v. Inl. Rev. Comrs.*, 4 Ex. D. 270, and *Limmer Asphalt Paving Co. v. Id.*, cited *post*, p. 226. Where an instrument falls under two classes in the schedules the Commissioners may require it to be stamped as of that carrying the higher duty. *Speyer v. Inl. Rev. Comrs.*, *post*, p. 262.

By sect. 117, "Every condition of sale framed with the view of precluding objection or requisition upon the ground of absence or insufficiency of stamp upon any instrument executed after 'May 16th, 1888,' and every contract, arrangement, or undertaking for assuming the liability on account of absence or insufficiency of stamp upon any such instrument or indemnifying against such liability, absence or insufficiency, shall be void." [51 & 52 V. c. 8, s. 20.]

\* The corresponding provisions of the previous Act are, throughout this chapter, cited in brackets; "S. Act, 1870," representing the Stamp Act, 1870.

*Effect of want of stamp—stamp when presumed.*] By the Stamp Act, 1891, s. 14 (4), unless the duty and penalty be paid at the trial under sect. 14 (1), (*post*, p. 230), “an instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall not, except in criminal proceedings, *be given in evidence, or be available*, for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed.” [S. Act, 1870, s. 17.] The words in italics occur in the analogous provisions of the earliest Stamp Acts (5 & 6 W. & M. c. 21, s. 11; 9 & 10 W. 3, c. 25, s. 59), with the exception that those were limited in their operation to evidence given *in any court*. Those provisions were incorporated in succeeding Stamp Acts, *e.g.*, 55 G. 3, c. 184, s. 8; 13 & 14 V. c. 97, s. 2, &c.,—until their repeal by 33 & 34 V. c. 99. The enactment in *Id.* c. 97, s. 17, was very similar to the present one. The cases cited below, decided under the earlier Acts, are consequently applicable to the Stamp Act, 1891, s. 14 (4), *ante*, p. 222.

Sect. 17 imposes a penalty on the person who, in the course of his office, enrols, registers, or enters, in or upon any rolls, books or records any instrument not duly stamped. See also sect. 41, *post*, p. 246. Where the instrument appears on its face to be duly stamped, it does not seem to be *duty* of such person to enquire *alimunde* whether all the circumstances material to the amount of duty are correctly stated. If, however, he know that this is not the case, and that the amount is insufficient, he may (and *semble* must) refuse registration. *Maynard v. Consolidated Kent Collieries Co.*, (1903) 2 K. B. 121, C. A. These sections do not, however, invalidate the registration, &c., otherwise regular, of an instrument not duly stamped. *Bellamy v. Saull*, 4 B. & S. 265; 32 L. J., Q. B. 366.

The effect of sect. 14 (4), *supra*, is that an instrument requiring a stamp, cannot, in general, be admitted in evidence without being stamped; and consequently the objection of the want of a proper stamp is raised by any pleading that renders it necessary to put the document in evidence. Thus, in an action on a bill, the objection will arise on a traverse of the drawing or acceptance. *Dawson v. Macdonald*, 2 M. & W. 26; *M'Dowell v. Lyster*, *Id.* 52. If parties agree orally or by implication to be bound by the same terms as those contained in another written instrument, the latter cannot be given in evidence unless properly stamped. *Turner v. Power*, 7 B. & C. 625; *Walliss v. Broadbent*, 4 Ad. & E. 877; *Alcock v. Delay*, 4 E. & B. 660. Where a bond, required to be given by a judge's order, had been inadvertently filed by an officer of the court, although unstamped, and immediately the defect was discovered, the party filing the bond procured it to be stamped, the original defect was cured as regards third parties who had no notice of the defect; and it would seem also for all purposes. *Darby v. Waterlow*, L. R., 3 C. P. 453.

When an unstamped instrument in writing has been lost; *R. v. Castle Morton*, 3 B. & A. 588; or destroyed even by the party who objects to the want of the stamp; *Rippener v. Wright*, 2 B. & A. 478; oral evidence of the contents is inadmissible. But where an instrument has been lost or is not produced upon notice, and there is no evidence given respecting it one way or the other, the presumption is that it was properly stamped; but if it be shown to be at one time unstamped, the presumption is that it continued unstamped, until the presumption is rebutted by some evidence *contra*, so as either to prove the stamping, or to leave it altogether uncertain. *Closmadeuc v. Carrel*, 18 C. B. 36; *Marine Investment Co. v. Haviside*, L. R., 5 H. L. 624. See also *Arbon v. Fussell*, 7 L. T. 283, Ex. M. T. 1862; *Blair v. Ormond*, 1 De G. & Sm. 428. Thus, where an indenture of apprenticeship, executed 30 years before, was lost, it was presumed to have been properly

stamped, though an officer from the Stamp Office stated that it did not appear that any such indenture had been stamped. *R. v. Long Buckley*, 7 East, 45. So, an order for payment given by the defendant to the plaintiff, and lost by the latter, will be presumed, as against the defendant, to have been duly stamped. *Pooley v. Goodwin*, 4 Ad. & E. 94. An unstamped copy under the hand of the party against whom it is offered as secondary evidence is admissible, and the due stamping of the original is presumed, unless disproved. *Smith v. Maguire*, 1 F. & F. 199. Where a party refuses to produce an agreement after notice, it will be presumed, as against him, to be properly stamped; *Crisp v. Anderson*, 1 Stark. 35; unless evidence be given that it was not stamped. *Crouther v. Solomons*, 6 C. B. 758. In the cases in which a personal penalty is imposed by sect. 15 (2), *post*, p. 229, for not stamping a document within a certain time, it would seem, on the principle of the presumption of innocence, *vide ante*, p. 94, that unless the document be shown to be unstamped after the lapse of that time, it must be presumed to have been duly stamped within that time. In *L. & County Banking Co. v. Ratcliffe* (see 6 Ap. Ca. 730), the C. A. received a copy, stamped as an original, as evidence of an unstamped document which had been destroyed; but it is difficult to see on what principle this copy could have been admitted. See also *Marine Investment Co. v. Haviside*, L. R., 5 H. L. 630. If an instrument be produced at the trial bearing adhesive stamps properly cancelled, it will be presumed that they were affixed at the proper time. *Brallaugh v. De Riv*, L. R., 3 C. P. 286.

When the transaction is capable of being legally proved by other evidence than that of the instrument which ought to bear a stamp, such evidence, if allowed by the pleadings, may be resorted to; thus, where a promissory note appears to be improperly stamped, the plaintiff may resort to the original consideration. *Farr v. Price*, 1 East, 58; *Tyte v. Jones*, *Id.* n. In *Vincent v. Cole*, M. & M. 257, where a witness called by the plaintiff stated that the work, the payment for which formed the subject of the claim, was commenced under a written agreement, but that the items relied on by the plaintiff were extras, and not contained in it, Ld. Tenterden ordered the agreement to be produced, and as it was unstamped the plaintiff was nonsuit. But, in *Reid v. Butte*, *Id.* 413, a distinct order by the defendant having been proved, Ld. Tenterden thought that, though it was shown that the work was commenced under a written contract, the contract need not be produced. And a verbal admission of a debt, and promise to pay it, may be proved, though the party at the same time gave an unstamped admission and promise to pay. *Singleton v. Barrett*, 2 C. & J. 368. So, though an unstamped receipt is no evidence of payment, the fact of payment may be proved by a witness who was present, and he may be allowed to use the unstamped receipt for the purpose of refreshing his memory. *Rambert v. Cohen*, 4 Esp. 213. So, an unstamped promissory note may be used in an action for money lent, to refresh the defendant's memory and to obtain an admission of the loan. *Birchall v. Bullough*, (1896) 1 Q. B. 225. See, as to use of unstamped copies and counterparts as secondary evidence of the originals, *post*, pp. 253, 255. In the case of the payment of legacies special evidence is required, *vide post*, p. 272. Where an action is brought upon an instrument which ought to be stamped, and the form of the pleading is such that at the trial it is not necessary to produce it, the court will not examine whether it is legally available with reference to the stamp laws. *Per Id.* Eldon, C., *Huddleston v. Briscoe*, 11 Ves. 596; *Thynne v. Protheroe*, 2 M. & S. 553. When a bill of exchange on a wrong stamp has been given for goods sold, the vendor, in suing for the price, need not prove notice of dishonour. *Cundy v. Marriott*, 1 B. & Ad. 696.

If a plaintiff succeed in making out a case of implied or oral contract, and

it does not appear on the cross-examination of his witnesses that there was any contract in writing, the defendant will not be allowed to give an unstamped written contract in evidence for the purpose of nonsuiting the plaintiff. *Fielder v. Ray*, 6 Bing. 332; *R. v. Padstow*, 4 B. & Ad. 208; *Magnay v. Knight*, 1 M. & Gr. 944. But where the defendant, being called as a witness for the plaintiff, proved that there was a written agreement, and on his being called on to produce it, it appeared to be unstamped, it was held that the plaintiff must be nonsuit; *Alcock v. Delay*, 4 E. & B. 660; for an unstamped agreement is not a nullity. S. C.; *R. v. Watts*, Dears. & Bell, 326. A party who executes the counterpart of a deed, properly stamped, cannot object to its admissibility in evidence on the ground that the original is not properly stamped. *Paul v. Meek*, 2 Y. & J. 116. Now, however, by sect. 72, *post*, p. 255, in every case, except a lease not executed by the lessor, the counterpart must bear a denoting stamp, unless it be stamped as an original. The stamp must be such as was applicable to the instrument at the time of its execution. *Clarke v. Roche*, 3 Q. B. D. 170.

*Unstamped instrument, when evidence for collateral purposes.*] In many cases, an instrument, not properly stamped, is admissible to prove a collateral fact. And the fact seems to be collateral, if the instrument be offered, not for the purpose of giving effect to it, but in order to prove something independent of, and unconnected with, the purpose for which the stamp is required to be impressed. Thus, in an action of debt for bribery at an election, an unstamped promissory note payable to the defendant, which a witness said he had given for the repayment of money received by him, as a voter, from the defendant, is evidence to corroborate the testimony of the witness. *Dover v. Maestaer*, 5 E.-p. 92. So, an unstamped agreement has been admitted between the parties to prove usury. *Nash v. Duncomb*, 1 M. & Rob. 104. Or, to show the illegal consideration of the plaintiff's debt. *Coppock v. Bower*, 4 M. & W. 361. Or, to refresh the memory of a witness, *ante*, pp. 176, 177, 223. Or, to show fraud: thus an unstamped promissory note may be given in evidence to establish fraud, by showing that it was written by the maker in a state of intoxication. *Gregory v. Fraser*, 3 Camp. 454; *Keable v. Payne*, 8 Ad. & E. 555; *R. v. Gompertz*, 9 Q. B. 824. So, an unstamped agreement may be used to show fraud. *Ashcombe v. Ellam*, 2 F. & F. 306. And see *Holmes v. Sixsmith*, 7 Exch. 802; 21 L. J., Ex. 312. And an allegation that plaintiff delivered up a guarantee may be proved by delivery of an unstamped guarantee. *Haigh v. Brooks*, 10 Ad. & E. 309.

An unstamped deed of assignment is admissible in proof of an act of bankruptcy. *Ponsford v. Walton*, L. R., 3 C. P. 167; *Ex pte. Squire*, L. R., 4 Ch. 47.

It has been held that the court cannot inspect an unstamped contract even for the purpose of ascertaining whether its contents preclude the admission of oral evidence of extras. *Buxton v. Cornish*, 12 M. & W. 426. But the dictum of Bayley, J., *R. v. Pendleton*, 15 East, 449, and the decision in *Reed v. Deere*, 7 B. & C. 261, seem at variance with this ruling; however, the cases may perhaps be reconciled by holding that where the work, the price of which is claimed, cannot be proved without disclosing the existence of a written and unstamped contract, the court cannot inspect that contract for the purpose of ascertaining whether the work actually in question does or does not come within its terms; but it is otherwise where such work can be proved by independent evidence which does not require the contract to be produced; see *infra*. Such an instrument cannot be read to the jury as evidence of the contract, or any part of it, in respect of which the plaintiff sues. *Jardine v. Payne*, 1 B. & Ad. 670. Yet, in an action for goods sold,



a bill of parcels, on which the seller has written an unstamped receipt when he made out the bill, may be put in by the defendant as evidence that another person, and not he, was debited by the plaintiff as buyer: for it is not used *as a receipt*, nor need that part be read. *Millen v. Dent*, 10 Q. B. 846. A statement of account is admissible against the party whose unstamped receipt for the balance is signed at the foot. *Matheson v. Ross*, 2 H. L. C. 286. But if the payment had been in dispute in the cause, or had been material in the issue between the parties, so that it would have been necessary to instruct the jury to discharge the receipt from their minds, it is questionable whether the statement could then have been admitted, even for the collateral purpose of proving the account. S. C. *Id.* 307, *per* Ld. Campbell, C.J.

On trial of issues out of Chancery upon a suit for specific performance of a sale, a writing in the following form was put in by the vendee:—"Received of A. B. the sum of —, being the amount of three tenements sold by me adjoining, &c. Signed, C. D." (the vendor). The two questions were, 1. Whether there was a contract of sale? 2. Whether there was any payment? The writing was stamped as an agreement only. Upon an appeal in Chancery, Ld. Cottenham considered the paper inadmissible on the first issue, being an attempt to prove an agreement by proving the fact of payment. On a further trial and appeal, Ld. St. Leonards, C., held it admissible evidence of the contract of sale. It was not contended to be admissible as proof of payment, and it contained all the terms of the contract, with the signature of the vendor subscribed. *Evans v. Prothero*, 2 Mac. & G. 319; 20 L. J., Ch. 448; S. C., 1 D. M. & G. 572; 21 L. J., Ch. 772. But where a memorandum stamped as a receipt only, amounts to a promissory note, it is not admissible to prove an advance of money claimed to be due under an equitable mortgage; *Ashling v. Boon*, (1891) 1 Ch. 568; or on an account stated; *Green v. Davies*, 4 B. & C. 235.

A party declared upon two written agreements, by the second of which variations were made in the first: there were counts upon each separately, and it appeared, when the instruments were produced in evidence by the plaintiff, that the first only was stamped: it was held that the second could not be read in evidence to support the plaintiff's case, but might be looked at by the court in order to ascertain whether the first was altered by it; and that, if it were, the plaintiff could not exclude the second agreement, and proceed upon the first only. *Reed v. Deere*, 7 B. & C. 261. Where, in an action against an acceptor, it appeared that, on the bill becoming due, his name had been erased and another bill (unstamped) drawn on the back of the first, it was held that the unstamped bill could not be submitted to the jury for the purpose of drawing the conclusion that the first bill had been cancelled. *Sweeting v. Halse*, 9 B. & C. 365. But where the plaintiff proved a deposit of money on certain terms contained in a promissory note duly stamped, and the note was afterwards altered by consent so as to become invalid for want of a fresh stamp, it was held to be still admissible evidence of the terms of the deposit. *Sutton v. Toomer*, 7 B. & C. 416. On a plea of payment to an action on a bill, where some proof appeared on the plaintiff's evidence that payment was made by another bill, he may put in the bill to show that it was unavailable for want of a stamp. *Smart v. Nokes*, 6 M. & Gr. 911.

*Stamps how applied—Number required.*] By the Stamp Act, 1891, s. 3, "(1.) Every instrument written upon stamped material is to be written in such manner, and every instrument partly or wholly written before being stamped is to be so stamped, that the stamp may appear on the face of the instrument, and cannot be used for or applied to any other instrument

written upon the same piece of material. (2.) If more than one instrument be written upon the same piece of material every one of the instruments is to be separately and distinctly stamped with the duty with which it is chargeable." [S. Act, 1870, s. 7.]

Sect. 4. "Except where express provision to the contrary is made by this or any other Act,—(a) An instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the matters.

(b) An instrument made for any consideration in respect whereof it is chargeable with *ad valorem* duty, and also for any further or other valuable consideration or considerations, is to be separately and distinctly charged as if it were a separate instrument with duty in respect of each of the considerations." [S. Act, 1870, s. 8.]

The stamp required depends on the true character of the instrument, notwithstanding what it purports to be, and it is to be stamped for its leading and principal object, and this stamp covers everything accessory to this object. *Limmer Asphalt Paving Co. v. Inl. Rev. Coms.*, L. R., 7 Ex. 211, 215, 217; and *vide ante*, p. 221. But where one instrument operates as two independent ones, each of which would be liable to duty, it must be stamped in respect of each. *Hadgett v. Id.*, 3 Ex. D. 46, *post*, p. 250.

Where the subject-matter of the instrument is joint, though several persons are interested in it, only one stamp is requisite. Thus an assignment of the prize-money of several seamen on board a privateer, payable out of one fund, requires only one stamp. *Baker v. Jardine*, 13 East, 235, n. So, an agreement by several for a subscription to one common fund. *Davis v. Williams*, 13 East, 232. So an agreement of reference by all the underwriters on one policy. *Goodson v. Forbes*, 6 Taunt. 171. So, a bond by several obligors in a penalty conditioned for the performance of certain acts by each and every of them. *Bowen v. Ashley*, 1 N. R. 274; and see *Stead v. Liddard*, 1 Bing. 196. So an agreement by three persons, in consideration that A. would pay a certain debt and costs, to indemnify A. to the extent of 50*l.*, to be paid separately by each with one-fourth of the costs, requires only one stamp. *Ramsbottom v. Davis*, 4 M. & W. 584. A release by several commoners of their respective rights, to make them competent witnesses, required only one stamp. *Carpenter v. Buller*, 2 M. & Rob. 298. And a single release of all encroachments by persons who had severally encroached on a common, made to the trustees of the commoners in general, was held to require only one stamp. *Doe d. Croft v. Tidbury*, 14 C. B. 304. See also *Thomas v. Bird*, 9 M. & W. 68. So, where the members of a mutual insurance club all executed the same power of attorney, severally authorizing the persons therein named to sign the club policies for them. *Allen v. Morrison*, 8 B. & C. 565. So, where several shareholders convey their interests by one deed, only one *ad valorem* stamp for the total amount is necessary. *Wills v. Bridge*, 4 Exch. 193. See also *Freeman v. Inl. Rev. Coms.*, L. R., 6 Ex. 101.

When an agreement refers to another document, and the two papers form, in fact, but one agreement, it is sufficient if one of them only bear a stamp. *Peate v. Dicken*, 1 C. M. & R. 422. But where a paper contains several contracts, and consequently requires several stamps, and only one is impressed upon it, that stamp applies to the contract only on which the stamp is impressed. *Powell v. Edmunds*, 12 East, 6. Where a paper contains a number of independent contracts with different tenants, though under the same general terms of holding, and there is but one stamp upon it, it is matter of evidence to which contract the stamp applies, and the juxtaposition of the stamp is to be regarded. *Doe d. Copley v. Day*,

13 East, 241; and now see sect. 3, *ante*, p. 225. And if it be uncertain to which the stamp applies, the paper is inadmissible. *Shipton v. Thornton*, 9 Ad. & E. 331. The several admissions of five corporators, as freemen, were written on the same paper with only one stamp; such stamp was held to apply to the first admission only, and the others could not be read. *R. v. Reeks*, 2 Ld. Raym. 1445; and see *Perry v. Bouchier*, 4 Camp. 80; *Waddington v. Francis*, 5 Esp. 182. To a stamped agreement to refer a question to A., the parties some days afterwards added a memorandum appointing B. instead of A.: held that one stamp was sufficient. *Taylor v. Parry*, 1 M. & Gr. 604. Where the defendant made in his own name a single agreement as to goods of his own and also goods of himself and partners, the whole of the goods forming part of the cargo of one ship, and signed in the name of the firm; held in an action on it against him alone, that only one stamp was necessary. *Shipton v. Thornton*, 9 Ad. & E. 314.

*Number of words.*] As the Stamp Acts, 1870, 1891, contain no provision charging progressive duty, the number of words in any instrument chargeable under the Acts is immaterial.

*Foreign instruments.*] Under sect. 14 (4) (*ante*, p. 222), no instrument, wherever executed, relating to any property situate, or to any matter or thing done or to be done, in the United Kingdom, shall be given in evidence unless stamped. If a stamp be necessary to render an instrument valid in one of the British colonies, it has been held that it cannot be received in evidence without that stamp here. *Clegg v. Levy*, 3 Camp. 167; *Alves v. Hodgson*, 7 T. R. 241. So where a foreign contract is void for want of a foreign stamp, it will also be void in this country. *Bristow v. Sequeville*, 5 Exch. 275. But as a general rule our courts do not take notice of foreign revenue laws; therefore an unstamped receipt, given in France, will be evidence here, though the French law requires that it should be stamped. *James v. Catherwood*, 3 D. & Ry. 190.

Under sect. 15 (3 *a*), an instrument first executed abroad may be stamped within thirty days after its first arrival in the United Kingdom, without the payment of any penalty. See *In re English, &c., Bank*, (1893) 3 Ch. 385, C. A. A contract made in a British ship at sea is, in the same position with regard to a stamp as one made abroad; see *Ximenes v. Jaques*, 1 Esp. 311.

As to the stamps required by foreign bills, promissory notes, charter-parties, and policies of insurance, see under those respective heads.

*Value, how ascertained.—Statement of.*] By sect. 6 (1), foreign or colonial currency is to be valued according to the rate of exchange, and stock, &c., is to be valued at the average price at the date of the instrument; and by sect. 6 (2), an instrument stating the value so estimated and stamped accordingly is, *primâ facie*, duly stamped. [S. Act, 1870, ss. 11–13.] By 62 & 63 V. c. 9, s. 12 (1), in the case of foreign or colonial currency for which a rate of exchange is specified in the Schedule to the Act, that rate is to be taken for the valuation, and (2) the Commissioners of Inland Revenue may add to or alter the Schedule so as to take effect after advertisement in the London Gazette for two successive weeks.

*Denoting stamp.*] This is used, under sect. 11, to indicate that an instrument which would, *primâ facie*, be liable to higher duty is, in fact, correctly stamped, by reason of the higher duty having been paid on some other instrument. See *Duplicate*, *post*, p. 255.

*Adjudication stamp.*] Under sect. 12 (1), (3), (4), the Commissioners of

Inland Revenue may be required, without the payment of any fee, to affix a stamp on any executed instrument, denoting that it is not liable to any duty, or to assess the duty thereon, and on payment thereof, to affix thereto a stamp denoting that the full amount of duty has been paid. (5.) "Every instrument stamped with the particular stamp denoting either that it is not chargeable with any duty, or is duly stamped, shall be admissible in evidence and available for all purposes, notwithstanding any objection relating to duty." [S. Act, 1870, s. 18.] The section does not, however (6 *b*), apply to an instrument chargeable with duty, and made as security without limit, nor to an instrument which may not be stamped after execution. See *Prudential Assurance, &c. Co. v. Curzon*, 8 Exch. 97; 22 L. J., Ex. 85; *Morgan v. Pike*, 14 C. B. 473; 23 L. J., C. P. 64. It may be observed that by sect. 13 an appeal is given from the decision of the Commissioners to the High Court, whence it lies further to the C. A. and D. P.

*Proper denomination.*] Sect. 10. "(1.) A stamp which by any word or words on the face of it is appropriated to any particular description of instrument is not to be used, or, if used, is not to be available for an instrument of any other description. (2.) An instrument falling under the particular description to which any stamp is so appropriated as aforesaid is not to be deemed duly stamped, unless it is stamped with the stamp so appropriated." [S. Act, 1870, s. 9.]

As to bills of exchange bearing a stamp of a wrong denomination, see *post*, p. 240.

*Impressed and adhesive stamps.*] Sect. 2. "All stamp duties" . . . "except where express provision is made to the contrary, are to be denoted by impressed stamps only." [S. Act, 1870, s. 23.]

Adhesive stamps are allowed in the cases of the following instruments: agreements bearing 6*d.* stamp; agreements or leases bearing 1*d.*, or for furnished houses, &c., bearing 2*s.* 6*d.* stamp; cheques and other bills of exchange payable on demand; foreign bills of exchange; charter-parties; contract notes; copies of registers of baptism, &c.; cost-book mine transfers; delivery orders and warrants for goods; letters of renunciation; policies of insurance (except sea and life policies); protests on bills, and notarial acts; receipts.

Adhesive postage stamps "to a proper amount may be used to denote any stamp duties of an amount not exceeding 2*s.* 6*d.*, which may legally be denoted by adhesive stamps, not appropriated by any word or words on the face of them to any particular description of instrument." [45 & 46 V. c. 72, s. 13 (2).]

*Adhesive stamps, how cancelled.*] Sect. 8. (1.) "An instrument, the duty upon which is required, or permitted by law, to be denoted by an adhesive stamp is not to be deemed duly stamped with an adhesive stamp unless the person required by law to cancel the adhesive stamp cancels the same by writing on or across the stamp his name or initials, or the name or initials of his firm, together with the true date of his so writing, or otherwise effectively cancels the stamp and renders the same incapable of being used for any other instrument, or for any postal purpose, or unless it is otherwise proved that the stamp appearing on the instrument was affixed thereto at the proper time." [S. Act, 1870, s. 24 (1).] Where two or more adhesive stamps are used to denote the stamp duty, each or every stamp is to be cancelled in the manner aforesaid. [45 & 46 V. c. 72, s. 14 (1).]

It will be seen that under these sections cancellation is not imperative;

it merely obviates the necessity of adducing evidence that the stamp was affixed at the proper time. *Marc v. Rouy*, 31 L. T. 372; M. T. 1874, Q. B. See further provision in the case of foreign bills, sect. 35, and decisions thereon, *post*, p. 240.

The several sections allowing the use of adhesive stamps enact by whom the same are to be respectively cancelled. In general the person first signing the instrument is the proper person to cancel the stamp; in the case, however, of charter-parties the last person executing is to cancel the stamp. See sect. 49 (2), *post*, p. 247.

*Time of stamping.*] By sect. 15, an instrument may in general be stamped by the Commissioners of Stamps with an impressed stamp, after execution, on payment of the duty and a penalty, as to which *vide infra*; and instruments first executed abroad may be stamped within 30 days after their first arrival in the United Kingdom without the payment of any penalty. [S. Act, 1870, s. 15; 51 & 52 V. c. 8, s. 18 (2).] If an instrument bear a proper impressed stamp when produced at the trial it is sufficient, though it was not stamped when executed, provided the commissioners are not expressly prohibited from subsequently affixing a stamp. *R. v. Chester, Bp. of*, Stra. 624; and see *Rogers v. James*, 7 Taunt. 147. The court will not inquire whether the penalty has been paid, or whether the stamp has been affixed in proper time, but will receive the instrument in evidence, when the stamp is not required by statute to be affixed within a certain time. *R. v. Preston*, 5 B. & Ad. 1028; *Rose v. Tomlinson*, 3 Dowl. 49; *Lacy v. Rhys*, 4 B. & S. 873, Ex. Ch. *post*, p. 270. But with regard to an instrument to which a stamp cannot by law be subsequently affixed, an inquiry as to the time of affixing is admissible. *Green v. Davies*, 4 B. & C. 235. And as an adhesive stamp cannot in general be applied to an instrument after its execution, it would seem that in this case an inquiry as to when the stamp was affixed is admissible. Express evidence as to the time of the affixing of the stamp is required by sect. 8 (1), *ante*, p. 228, unless it has been cancelled as required by that section. But where, as in the case of foreign bills of exchange, an adhesive stamp is to be affixed before negotiation in this country, if the stamp appear on the bill at the trial, this is, *prima facie*, sufficient evidence. *Bradlaugh v. De Rin*, L. R., 3 C. P. 286.

By sect. 15 (2), in the case of the following instruments liable to *ad valorem* duty, viz. :—bond, covenant, or instrument of any kind whatsoever, conveyance on sale, lease, mortgage, bond, debenture, covenant and warrant of attorney, and settlement executed after May 16th, 1888, (a) the instrument must be stamped before the expiration of 30 days after it is first executed or first received in the United Kingdom if executed abroad, unless the opinion of the Commissioners of Inland Revenue as to the amount of stamp duty chargeable has been required under sect. 12, *ante*, p. 227, in which case (b) the instrument must be stamped within fourteen days of the notice of the assessment. [51 & 52 V. c. 8, s. 18 (1).]

*Penalty for stamping.*] By sect. 15 (1), in general, the penalty for stamping after execution is 10*l.*, and where the duty to be paid exceeds 10*l.*, interest is chargeable on the duty at the rate of 5*l.* per cent. per annum from the day on which the instrument was first executed to the time when the interest is equal to the amount of unpaid duty. But (3 b and 6, and 58 & 59 V. c. 16, s. 15) the Commissioners of Inland Revenue may, if they think fit, mitigate or remit any penalty payable on stamping. [S. Act, 1870, s. 15, 51 & 52 V. c. 8, s. 18 (2).] As to instruments first executed abroad, *vide ante*, p. 227.

Some instruments may be stamped within a certain time of their execution

without penalty; and in the case of others the amount of the penalty differs from that above stated. The special enactments relating to these instruments will be found under their respective heads, *post*, pp. 231 *et seq.*

By sect. 15 (2), in the case of instruments falling within this sub-section, and not duly stamped under the provisions in *Id.* (a) (b), *vide ante*, p. 229, the obligee, covenantee, or other person taking the security, vendee, or transferee, lessee, mortgagee, or obligee, or settlor, as the case may be, shall forfeit 10*l.*, "and in addition to the penalty payable on stamping the instrument, there shall be paid a further penalty equivalent to the stamp duty thereon, unless a reasonable excuse for the delay in stamping, or the omission to stamp, or the insufficiency of stamp, be afforded to the satisfaction of the" . . . "court, judge, arbitrator, or referee before whom it is produced." [51 & 52 V. c. 8, s. 1 (c).]

*Stamping at the trial.*] By sect. 14. (1.) "Upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the United Kingdom, or before any arbitrator or referee, notice shall be taken by the judge, arbitrator or referee of any omission or insufficiency of the stamp thereon, and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the court whose duty it is to read the instrument or to the arbitrator or referee, of the amount of the unpaid duty, and the penalty payable on stamping the same, and of a further sum of 1*l.*, be received in evidence, saving all just exceptions on other grounds. (2.) The officer, arbitrator or referee, receiving the said duty and penalty shall give a receipt for the same." . . . (3.) "On production to the Commissioners of any instrument in respect of which any duty or penalty has been paid, together with the receipt the payment of the duty and penalty shall be denoted on the instrument." [S. Act, 1870, s. 16.]

This section has been held not to apply to a trial in the Ch. Div. because there is there no such officer of the court as is named in the section. *Jennings v. Christopher*, *cor.* Romilly, M. R. cited (1900) 1 Ch., 478. The court will, however, in such case, admit an unstamped document in evidence, on the undertaking of the solicitor of the party tendering it, that it shall be duly stamped. S. C.; *accord.* *In re Coolgardie Goldfields*, *Id.* 475.

*Time and mode of objecting to the stamp.*] After proof of the due execution of an instrument, the rule is that it lies on the opponent to point out any objection to the stamp. If indications of an effaced stamp appear, it is for the judge to decide whether he is satisfied of its admissibility. *Doe d. Fryer v. Coombs*, 3 Q. B. 687; *Wilson v. Smith*, 12 M. & W. 401. And the objection must be made before the paper is read in evidence, *Foss v. Wagner*, 7 Ad. & E. 116, n. But where the objection does not appear except on extrinsic evidence, the objection may be made after it has been read. *Field v. Woods*, *Id.* 114. In that case the objection was that a cheque was post-dated. Interlocutory proof in support of the objection must be received *instanter*, and the question be decided by the judge. *Bartlett v. Smith*, 11 M. & W. 483. The court will grant a new trial where the evidence is left to the jury as part of the defendant's case. *Id.* If, however, the objection is not a mere stamp objection, as where the existence of the original stamped policy of insurance, a copy of which is tendered in evidence, is disputed, the whole question must be left to the jury. *Stowe v. Querner*, L. R., 5 Ex. 155, cited *ante*, p. 10. A stamp objection must be taken at the earliest possible moment. *Robinson v. Veruon, Ltd.*, 7 C. B., N. S. 235; 29 L. J., C. P. 310. Where a probate was read without objection, its evidence could not be excluded by afterwards showing that the amount of personality passing

under the will exceeded the amount covered by the stamp. S. C. Where an instrument bearing an agreement stamp only was put in as such, and the defendant's counsel afterwards relied on it as a lease, it was held that the objection ought then to be taken to the stamp, and was too late on a motion for a new trial. *Doe d. Philip v. Benjamin*, 9 Ad. & E. 644. The fact that the defendant was a party to the fraud on the revenue will not estop him from objecting. *Steadman v. Duhamel*, 1 C. B. 888. It should be observed that it is not usual for counsel to take a stamp objection to a document where the objection can be cured by stamping at the trial under sect. 14 (1), *ante*, p. 230.

It was formerly competent for the parties to overlook the want of a stamp or of a proper stamp; but by sect. 14 (1), *ante*, p. 230, the objection is now to be taken by the judge, &c. at the trial.

By Rules, 1883, O. xxxix. r. 8, "A new trial shall not be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp." The C. L. P. Act, 1854, s. 31, which was in like terms, is repealed by 46 & 47 V. c. 49. Where a judge trying an action without a jury rules that a document is sufficiently stamped or does not require a stamp, his decision is final. *Blewitt v. Tritton*, (1892) 2 Q. B. 327, C. A. Where, however, he rejects it on account of the insufficiency of the stamp, the ruling is, of course, still open to review. *Sharples v. Rickard*, 2 H. & N. 57; 26 L. J., Ex. 302. After the expression of the judge's opinion adverse to the reception of the document, counsel must formally tender it in evidence and require a note to be taken of the tender, otherwise the point will be of no avail on a motion for a new trial. *Campbell v. Loader*, 34 L. J., Ex. 50.

Stamp objections by the officer of the court are sometimes avoided by the consent of the parties to the use of copies of unstamped originals, for the officer of the court can only take such objections as the parties might have taken if sect. 14 (1), *ante*, p. 230, had not been enacted. If an admitted copy of a document be put in evidence, and it afterwards appears that the original was not duly stamped, the unstamped copy is still admissible. *Traviss v. Hurgreave*, 4 F. & F. 1078; *cor.* Keating, J. Where, however, the objection appeared on the face of a special case, the court refused to allow the case to be argued. *Nixon v. Albion Marine Insur. Co.*, L. R., 2 Ex. 338.

The stamp duties chargeable on those instruments which are most frequently used in evidence at *Nisi Prius* will be found below, the instruments being arranged in alphabetical order.

### Affidavit.

#### *Affidavit and Statutory Declaration:—2s. 6d.*

*Exemptions.*] These include affidavit (1) made for the immediate purpose of being filed, read, or used in any court, &c.; (2) required by commissioners, &c., of revenue or by law and made before a justice of the peace; (3) required at the Bank of England or Ireland to prove the death of, or to identify, any proprietor of stock transferable there, or to remove any other impediment to the transfer of any such stock; (4) relating to the loss, mutilation, or defacement of any bank-note or bank post-bill; (5) declaration required to be made pursuant to any Act relating to marriages in order to a marriage without licence; (6) declaration forming part of an application for a patent.

*Agreement.*

*Agreement* or *Contract*, accompanied with a deposit. See *Mortgage, &c.*, and sects. 23, 86, *post*, pp. 262 *et seq.*

*Agreement* for a lease or for any letting. See *Lease*, and sect. 75, *post*, pp. 255, 256.

*Agreement* for sale of property. See *Conveyance on Sale*, and sect. 59, *post*, pp. 249, 250.

"*Agreement* or *Contract* made or entered into pursuant to the Highway Acts for or relating to the making, maintaining, or repairing of high-ways:—6*d.*"

"*Agreement*, or any *Memorandum* of an *agreement*, made in England or Ireland under hand only, or made in Scotland without any clause of registration, and not otherwise specifically charged with any duty, whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument:—6*d.*"

Sect. 22. "The duty of 6*d.* upon an agreement may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the agreement is first executed." [S. Act, 1870, s. 36.]

The exemptions contained in the schedule are treated at length, *post*, pp. 234 *et seq.*

[*What are agreements within the meaning of the Stamp Act.*] Many documents, although they may be assistance in the proof of an original or substituted contract, do not require to be stamped as agreements. Of this kind are directions and licences, which excuse what would otherwise be a trespass or a breach of contract. So also, memoranda of agreements, the term of which do not appear to have been mutually and finally approved of by the contracting parties, before or at the time when these memoranda were committed to writing, are regarded as mere proposals, and may be admitted in evidence without a stamp. In *Ingram v. Lea*, 2 Camp. 521, where a customer wrote down upon a slip of paper a description of the goods which he had ordered, which paper he signed and delivered to the shop-keeper, it was admitted in evidence without a stamp. In *Parker v. Dubois*, 1 M. & W. 31, where the defendant, in answer to an application to that effect, wrote back authorizing the plaintiff to pay a call upon shares which the defendant had agreed to purchase from him, it was held that the latter required no stamp. In *Bethell v. Blencowe*, 3 M. & Gr. 119, a memorandum allowing the defendant, a projected lodger, to leave lodgings without any notice if he saw reason to suspect embarrassment in the landlord, and signed by the landlord, was, though unstamped, admitted. In *Walker v. Rostron*, 9 M. & W. 411, a letter written by the buyer of goods to his factors, directing them to appropriate the proceeds of the sale of the goods to the payment of bills accepted by the buyer, if these bills had not previously been honoured, was held not to require a stamp. But it would seem under the present Act to require a stamp under sect. 32 (*post*, p. 239), as a bill payable on demand, *vide post*, pp. 241, 242. A memorandum signed by a tenant authorizing his landlord, upon condition of withdrawing a distress, to re-enter and distrain in case of default in payment of the rent by a certain day, was held not to be an agreement requiring a stamp. *Hill v. Rumm*, 5 M. & Gr. 789. So a document signed by a tenant, by which he requested a bailiff to forbear selling his goods, and consented that they should remain on the premises in his possession for a period of three months, when he, the tenant, would give them up, and pay all costs and charges attending the distress. *Fishwick v. Milnes*, 4 Exch. 825. So a prospectus containing the terms



upon which the plaintiff undertook to introduce applicants to partnerships or situations, though these terms were adopted in the agreement upon which the action was brought. *Edgar v. Blick*, 1 Stark. 464. A prospectus of the terms of a school which had been shown to the father of two boys, upon which he agreed to place them in the school, subject to a slight reduction in the terms of payment, was held admissible in evidence without a stamp. *Clay v. Crofts*, 20 L. J., Ex. 361. So where a lease of premises was sold by auction, and the auctioneer handed to the buyer an *unsigned* written paper specifying the term, the rent, and the extent of the premises, this paper was received in evidence unstamped. *Ramsbottom v. Tunbridge*, 2 M. & S. 434. But where a similar paper *was* signed by the auctioneer, it was held that it must be stamped, even although the memorandum did not satisfy the Statute of Frauds. *Ramsbottom v. Mortley*, *Id.* 445. *Accord. Glover v. Halkett*, 2 H. & N. 487; 26 L. J., Ex. 416.

In *Vollans v. Fletcher*, 1 Exch. 21, where a shareholder proved his title to shares by his letter of application and the letter of allotment in reply, in which was contained a power for the company, in default of payment of the deposit, to cancel the allotment, a term not alluded to in the first letter, an objection, that the letters required a stamp, was overruled. See *Duke v. Andrews*, 2 Exch. 290; *Willey v. Parratt*, 3 Exch. 211. In *Chaplin v. Clarke*, 4 Exch. 403, a letter of allotment of shares, the letter of applications having been lost, was admitted without a stamp. See also *Moore v. Garwood*, *Id.* 681, Ex. Ch. See now, however, *Letter of Allotment*, *post*, p. 258. Where the plaintiff made a memorandum in writing of an offer on his part to let to the defendant a piece of land upon the same conditions as those which had been agreed to by the defendant and a third person, to which offer the defendant afterwards verbally assented, the memorandum was admitted without a stamp. *Drant v. Brown*, 3 B. & C. 665; *Hawkins v. Warre*, *Id.* 690; *Hudspeth v. Yarnold*, 9 C. B. 625.

A resolution, signed by the provisional committee of a company, to employ the plaintiff as secretary was received in evidence unstamped, as not amounting to an agreement. *Vaughton v. Brine*, 1 M. & Gr. 359. But where a minute was made at a meeting, of a resolution, by the defendants and others, to make an alteration in the terms of a previous contract between them and the plaintiff, and to allow him an additional sum for extra trouble, and this minute was read over to the plaintiff, and assented to by him, Rolfe, B., held, at *N. P.*, that the resolution required a stamp. *Lucas v. Beach*, *Id.* 417. The defendant, after having given the plaintiff a verbal order for 50 shares in a railway company, signed a memorandum that he had bought of the plaintiff 50 shares in the company at 10*l.* a share, which memorandum was handed to the plaintiff. This was held to require an agreement stamp. *Knight v. Barber*, 16 M. & W. 67. "A written instrument, to come within the terms of this clause of the Stamp Act, must have been made with the intention of containing within itself the terms of an agreement between the parties." *Id.* 70, *per* Parke, B. A draft agreement forwarded by the plaintiff to the defendant's solicitor, and sent back by him on the same day with certain alterations, to which the plaintiff did not object, was held inadmissible (although it had no signature) for want of an agreement stamp. *Chadwick v. Clarke*, 1 C. B. 700. The words "under hand only" in this part of the Stamp Act, merely refer to instruments not under seal. S. C., *per Cur.* But see 6 C. B. 700, n. An agreement to enlarge the time for performing another agreement requires a new stamp, where the former one required to be stamped. *Bacon v. Simpson*, 3 M. & W. 78.

An instrument operating as an *attornment* only, requires no stamp. *Doe d. Linsey v. Edward*, 5 Ad. & E. 95; *Doe d. Wright v. Smith*, 8 Ad. & E. 255. So, a mere acknowledgment. Thus, in an action against an attorney,

the plaintiff gave in evidence the following unstamped letter:—"I have this day received a bill of exchange for 300*l.*, drawn, &c., which I hold as your attorney to recover the value of from the respective parties, or to make such other arrangement for your benefit as may appear to me in my professional capacity reasonable and proper." Held, that this letter was a mere *acknowledgment* of the duty which the party took upon himself to perform, and that it therefore required no stamp. *Langdon v. Wilson*, 7 B. & C. 640, n; *Mullett v. Hutchison*, 7 B. & C. 639; *De Porquet v. Page*, 15 Q. B. 1073; 20 L. J., Q. B. 28. So, a memorandum, "I acknowledge that you have for my accommodation accepted a bill for, &c., and I will provide for the same when due." *Notley v. Webb*, 5 C. B. 834. So a memorandum put in to show the assent of a party to an act done under a previous agreement by him, already in proof, in which the terms of the agreement are recapitulated. *Marshall v. Powell*, 9 Q. B. 779. So, an acknowledgment by the defendant of the deposit of goods with him requires no stamp though given in evidence in an action against him for not redelivering them. *Blackwell v. McNaughtan*, 1 Q. B. 127. But it may now require a stamp as a warrant for goods, *vide post*, p. 276. "Borrowed of A. 100*l.* for one or two months. Cheque for 100*l.* on—bank:" Held an acknowledgment only, and not an agreement or promissory note. *Hyne v. Dewdney*, 21 L. J., Q. B. 278. But an acknowledgment signed by the defendant, that he holds the land as tenant to the plaintiff on certain terms, cannot be put in evidence by the defendant to show that a notice to quit was irregular, without an agreement stamp. *Doe d. Frankis v. Frankis*, 11 Ad. & E. 792. And such an agreement may now require a lease stamp, *vide post*, p. 256. A broker's note of the purchase of shares, sent to his principal, does not require an agreement stamp; *Tomkins v. Savory*, 9 B. & C. 704; it is now, however, liable to a duty of 1*d.* or 1*s.* *Vide Contract Note, post*, p. 248.

The 9 G. 4, c. 14, s. 8, exempts from *agreement* duty any memorandum or other writing made necessary by that Act; thus a qualified promise to pay, put in evidence not to prove the debt but to rebut the Statute of Limitations, is exempt. *Morris v. Dixon*, 4 Ad. & E. 845. See also cases *post*, pp. 243, 244. This exemption is continued by sect. 1 of the present Act, *vide ante*, p. 221.

*First Exemption.*] "Agreement or memorandum the matter whereof is not of the value of 5*l.*"

Under 55 G. 3, c. 184, sched. 1, the amount was 20*l.*, and under that Act many of the cases cited below were decided.

The statute only applies when the value of the contract is measurable. Thus a contract of marriage may be proved by unstamped letters. *Oxford v. Cole*, 2 Stark. 351. The value must appear on the instrument, or be capable of being ascertained at the time of making. Parke, B., *Taylor v. Steele*, 16 M. & W. 665; *Lloyd v. Mansel*, 1 L. M. & P. 130; 19 L. J., Q. B. 192. Where the agreement was to give up a shop and goodwill for 7*l.*, and not to open a shop of the same description under a forfeiture of 20*l.*, it was held not to require a stamp; for the forfeiture is not of the value of the matter. *Pemberton v. Vaughan*, 10 Q. B. 87. So, an agreement to pay interest at 1*s.* *per 1l.* *per month*, if a bill for 100*l.*, to be discounted, should not be paid at maturity. *Semple v. Steinau*, 8 Exch. 622; 22 L. J., Ex. 224. The general regulations of a free school under which the master is appointed, signed by him and the trustees, may be proved against him, though unstamped. *Browne v. Dawson*, 12 Ad. & E. 624. A memorandum by a carrier of the receipt of goods worth 20*l.* might be given in evidence, to show the terms upon which they were received, without a stamp; the carriage being of less amount. *Latham v. Rutley*, Ry. & M. 13. So in the

case of a wharfinger. *Chadwick v. Sills*, *Id.* 15; but in this latter case a 3d. stamp would now generally be required, *vide Warrant for Goods*, *post*, p. 276. A memorandum relating to the warehousing of goods worth more than 20*l.* was admissible if the warehouse rent were less. *Baldwin v. Alsager*, 13 M. & W. 365. An agreement to indemnify a bailiff who distrained for 1*l.* 4*s.* rent, was held to require no stamp; for the value is uncertain. *Cox v. Bailey*, 6 M. & Gr. 193. So, an agreement to do work of uncertain quantity at 1*l.* 14*s.* *per rod.* *Liddiard v. Gale*, 4 Exch. 816. But an agreement to indemnify A. from all costs, charges, damages, or other expenses, which he might incur as bail for B., required an agreement stamp, the arrest of B. being for more than 20*l.*, though the costs, &c., incurred did not amount to that sum. *Williams v. Jarrett*, 5 B. & Ad. 32. Where the agreement relates to granting a lease, the *rent* is the matter on which the value is to be calculated. *Mayfield v. Robinson*, 7 Q. B. 486; *Burton v. Reeve*, 16 M. & W. 307. But if the period of tenancy be fixed, the rent multiplied by the time is the test of value. *Doe d. Marlow v. Wiggins*, 4 Q. B. 366, 372, 377. As, however (by sect. 75 (1), *post*, p. 256), agreements for leases for terms not exceeding 35 years now require lease stamps, these decisions will not frequently be applicable. See further, *post*, pp. 257, 258.

*Second Exemption.*] “Agreement or memorandum for the hire of any labourer, artificer, manufacturer, or menial servant.”

An assignment of an apprentice is not within this exemption. *R. v. S. Paul's, Bedford*, 6 T. R. 452. Firemen and stokers on board *foreign* steamers are within it. *Wilson v. Zuluetta*, 14 Q. B. 405; *Cornforth v. Danube & Black Sea Ry. Co.*, 2 F. & F. 197. So, a person hired to take charge of glebe, dairy, &c., at a salary and share of clear profit. *R. v. Wortley*, 2 Den. C. C. 333; 21 L. J., M. C. 44.

By the general exemption (3), at the end of the schedule, “bonds, contracts, and agreements entered into in the United Kingdom for or relating to the service in any of Her Majesty’s colonies or possessions abroad of any person as an artificer, clerk, domestic servant, handicraftsman, mechanic, gardener, servant in husbandry, or labourer,” are exempt from all duty.

*Third Exemption.*] “Agreement, letter, or memorandum made for or relating to the sale of any goods, wares, or merchandise.”

*Cases within the third Exemption.*] An undertaking to guarantee the payment of goods to be furnished to third persons. *Warrington v. Furber*, 8 East, 242; *accord. Sadler v. Johnson*, 16 M. & W. 775; *Chatfield v. Cox*, 18 Q. B. 321; 21 L. J., Q. B. 279. An agreement by A. to take half of certain goods bought by B. on their joint account, and to furnish B. with half the amount in time for payment. *Venning v. Leckie*, 13 East, 7. An agreement to cancel a former agreement relative to the sale of goods, and for the future sale of goods upon different terms. *Whitworth v. Crockett*, 2 Stark. 431. An agreement for the sale of rape oil, not yet expressed from the seed. *Wilks v. Atkinson*, 6 Taunt. 11. An agreement to make a chattel and deliver it within a certain time; *Pinner v. Arnold*, 2 C. M. & R. 613; *Lee v. Griffin*, 1 B. & S. 272; 30 L. J., Q. B. 252; though it was formerly held that a contract to make goods for sale was not within the exemption. *Burton v. Bedall*, 3 East, 303. An agreement for the sale of chimney-pieces, the vendor “to finish them in a tradesmanlike manner.” *Hughes v. Breeds*, 2 C. & P. 159. A receipt for the price of a horse containing a warranty of soundness. *Skrine v. Elmore*, 2 Camp. 207. An agreement for a crop growing in a close, and conferring no interest in the

land. *Parker v. Staniland*, 11 East, 362; *Warwick v. Bruce*, 2 M. & S. 205; *Evans v. Roberts*, 5 B. & C. 829; *Watts v. Friend*, 10 B. & C. 446; *Jones v. Flint*, 10 Ad. & E. 753. An agreement for the purchase of timber, though the trees are growing. *Smith v. Surman*, 9 B. & C. 561. An agreement to supply a house with water. *W. Middlesex Waterworks v. Suverkropp*, M. & M. 409. Some of the above cases were decided on the Stat. of Frauds, ss. 4 and 17; but they are authorities on the Stamp Act also. A memorandum by the defendant of an advance made to him by the plaintiff, an auctioneer, on receipt of books for sale by the plaintiff by auction, requires no stamp. *Southgate v. Bohn*, 16 M. & W. 34.

*Cases not within the third Exemption.*] An agreement by a principal to provide for certain bills drawn upon his factor, if certain goods, then either in the factor's possession or about to be placed there, should remain unsold at the time of the bills falling due; for the exemption is confined to instruments whereof the sale of goods is the primary object. *Smith v. Cator*, 2 B. & A. 778. An agreement for the sale of goods and goodwill. *South v. Finch*, 3 N. C. 506. And now see sect. 59, *post*, p. 250. A contract for the erection of fixtures; *semb. per Parke, B., Pinner v. Arnold*, 2 C. M. & R. 613; or the sale of railway shares, *Knight v. Barber*, 16 M. & W. 66. So, an agreement for the sale of growing crops, conferring an interest in the land; *Crosby v. Wadsworth*, 6 East, 602; *Waddington v. Bristow*, 2 B. & P. 453; *Emmerson v. Heelis*, 2 Taunt. 38; or a sale of growing underwood, to be cut by the purchaser; *Scorell v. Boxall*, 1 Y. & J. 396; or an agreement to print a book, and supply the paper; *Clay v. Yates*, 1 H. & N. 73; 25 L. J., Ex. 237 (decided on the Statute of Frauds, ss. 4 and 17). So, a contract under seal for the sale of goods. *Per Bayley, J., Clayton v. Burtenshaw*, 5 B. & C. 45.

*Fourth Exemption.*] "Agreement or memorandum made between the master and mariners of any ship or vessel for wages on any voyage coastwise from port to port in the United Kingdom." See also the exemptions given by the Merchant Shipping Act, 1894 (57 & 58 V. c. 60), s. 721; and by sect. 320 (4) passengers' contract tickets entered into under that section are free from duty.

#### Appraisement.

"*Appraisement or valuation* of any property, or any interest therein, or of the annual value thereof, or of any dilapidations, or of any repairs wanted, or of the materials and labour used or to be used in any building, or of any artificer's work whatsoever," must be stamped as follows: where the amount of appraisement does not exceed 5*l.*,—3*d.*; where it exceeds 5*l.* and does not exceed 10*l.*,—6*d.*; 10*l.* and not 20*l.*,—1*s.*; 20*l.* and not 30*l.*,—1*s.* 6*d.*; 30*l.* and not 40*l.*,—2*s.*; 40*l.* and not 50*l.*,—2*s.* 6*d.*; 50*l.* and not 100*l.*,—5*s.*; 100*l.* and not 200*l.*,—10*s.*; 200*l.* and not 500*l.*,—15*s.*; exceeds 500*l.*,—1*l.*

*Exemptions.*] Appraisement or valuation (1) made for the information of one party only, and not being in any manner obligatory as between parties, either by agreement or operation of law; (2) made under order of Admiralty Court; (3) of the property of a deceased person made for the information of an executor or other person required to deliver an affidavit of the estate of such deceased person; (4) made for ascertaining legacy or succession duty.

Where nothing is referred to but the mere value of goods and the repairs of a farm, an appraisement stamp is proper, and not an award stamp. *Leeds v. Burrows*, 12 East, 1.

#### Award.

An Award "in any case in which an amount or value" was the matter in dispute, executed before Oct. 1st, 1906, was to be stamped as follows: where no amount is awarded or the amount or value awarded does not exceed 5*l.*,—3*d.*; where it exceeds 5*l.* and does not exceed 10*l.*,—6*d.*; 10*l.* and not 20*l.*,—1*s.*; 20*l.* and not 30*l.*,—1*s.* 6*d.*; 30*l.* and not 40*l.*,—2*s.*; 40*l.* and not 50*l.*,—2*s.* 6*d.*; 50*l.* and not 100*l.*,—5*s.*; 100*l.*, and not 200*l.*,—10*s.*; 200*l.* and not 500*l.*,—15*s.*; 500*l.* and not 750*l.*,—1*l.*; 750*l.* and not 1,000*l.*,—1*l.* 5*s.*; exceeds 1000*l.*,—1*l.* 15*s.*; in any other case,—1*l.* 15*s.* But by stat. 6 E. 7, c. 20, s. 9, in the case of awards executed on or after Oct. 1st., 1906, a uniform duty of 10*s.* is substituted for the above scale.

It seems that an award ordering something to be done, other than, or as well as, the payment of money, formerly bore the duty of 1*l.* 15*s.*

The appointment of an umpire, made in writing by two arbitrators, requires no stamp. *Routledge v. Thornton*, 4 Taunt. 704. An agreement stamp is not necessary to an arbitration bond which, besides the usual covenants, contains an agreement as to the payment of costs. *Re Wansborough*, 2 Chitty, 40. A paper drawn up by a person appointed by two parties to ascertain the amount of an account requires an award stamp. *Jebb v. M'Keirnan*, M. & M. 340. But not if the account is not intended to bind them. *Goodyear v. Simpson*, 15 M. & W. 16. The opinion of counsel, by which parties agree to abide, does not require an award stamp. *Semb. Boyd v. Emmerson*, 2 Ad. & E. 184. Nor does a certificate by a referee, agreed on at the trial, as to the amount at which a verdict, taken at the trial, is to stand. *Salter v. Yeates*, 5 Dowl. 291; and see *Tomes v. Hawkes*, 10 Ad. & E. 32. An award of land by commissioners of inclosure only requires an award stamp and not an *ad valorem* stamp, as on a sale. *Doc d. Ld. Suffield v. Preston*, 7 B. & O. 392.

By the C. L. P. Act, 1854, s. 30, no document made or required under the provisions of that Act shall be liable to any stamp duty. Sects. 3—17, which related to arbitration, are repealed by the Arbitration Act, 1889 (52 & 53 V. c. 49), s. 26 (1); but as by *Id.* (2), "any enactment or instrument referring to any enactment repealed by this Act, shall be construed as referring to this Act," sect. 30 will, it would seem, apply to the analogous provisions of 52 & 53 V. c. 49, notwithstanding the repeal of sect. 30, in terms, by 55 & 56 V. c. 19.

#### Bank Note, Bill of Exchange, Cheque, and Promissory Note.

*Bank Note.*—For money not exceeding 1*l.*,—5*d.*; exceeding 1*l.* and not 2*l.*,—10*d.*; 2*l.* and not 5*l.*,—1*s.* 3*d.*; 5*l.* and not 10*l.*,—1*s.* 9*d.*; 10*l.* and not 20*l.*,—2*s.*; 20*l.* and not 30*l.*,—3*s.*; 30*l.* and not 50*l.*,—5*s.*; 50*l.* and not 100*l.*,—8*s.* 6*d.*

*Banker*—*Bank Note.*] Sect. 29. "For the purposes of this Act the expression 'banker' means any person carrying on the business of banking in the United Kingdom, and the expression 'bank note' includes—(a) Any bill of exchange or promissory note issued by any banker, other than the Bank of England, for the payment of money not exceeding 100*l.* to the bearer on demand; and (b) any bill of exchange or promissory note so issued which entitles or is intended to entitle the bearer or holder thereof, without endorsement, or without any further or other indorsement than may

be thereon at the time of the issuing thereof, to the payment of money not exceeding 100*l.* on demand, whether the same be so expressed or not, and in whatever form, and by whomsoever the bill or note is drawn or made." [S. Act, 1870, s. 45.]

Sect. 30. "A bank note issued duly stamped, or issued unstamped by a banker duly licensed or otherwise authorized to issue unstamped bank notes, may be from time to time re-issued without being liable to any stamp duty by reason of the re-issuing." [S. Act, 1870, s. 46.]

The provisions relating to notes issued by private banks will be found in 7 & 8 V. c. 32; 8 & 9 Vict. cc. 37, 38; and 17 & 18 V. c. 83, ss. 11, 12. Their issue is now restricted by 7 & 8 V. c. 32, ss. 10, 28.

"*Bill of Exchange*.—Payable on demand, or at sight, or on presentation, or within 3 days after date or sight, 62 & 63 V. c. 9, s. 10 (2),—1*d.*"

This includes cheques and orders for the payment of money, see sect. 32, *post*, p. 239. A draft payable generally is payable on demand. *Whitlock v. Underwood*, 2 B. & C. 157.

A draft payable on demand, whether to bearer or order, is not rendered invalid by being post-dated; and if the instrument appear on its face, when tendered in evidence, to be properly stamped it is admissible; *R. Bank of Scotland v. Tottenham*, (1894) 2 Q. B. 715, C. A.; see also *Misa v. Currie*, 1 Ap. Ca. 554, D. P. Such a draft is allowed by the Bills of Exchange Act, 1882, ss. 13 (2), 73, *post*, pp. 353, 405, and the Stamp Act, 1891, contains no enactment that a cheque should bear date on or before the day on which it was issued.

"*Bill of Exchange* of any other kind whatsoever (*except a Bank Note*, as to which *vide ante*, p. 237, and certain foreign bills as to which *vide infra*), and *Promissory Note* of any kind whatsoever (*except a Bank Note*)—drawn, or expressed to be payable, or actually paid or endorsed, or in any manner negotiated in the United Kingdom:—"

Where the amount or value of the money for which the bill or note is drawn or made does not exceed 5*l.*,—1*d.*; exceeding 5*l.* and not 10*l.*,—2*d.*; 10*l.* and not 25*l.*,—3*d.*; 25*l.* and not 50*l.*,—6*d.*; 50*l.* and not 75*l.*,—9*d.*; 75*l.* and not 100*l.*,—1*s.*; exceeds 100*l.*—for every 100*l.*, and also for any fractional part of 100*l.*, of such amount or value,—1*s.*

By 62 & 63 V. c. 9, s. 10 (1), the above duty "on bills of exchange drawn and expressed to be payable out of the United Kingdom, when actually paid or endorsed or in any manner negotiated in the United Kingdom, shall, where the amount of the money for which the bill is drawn exceeds 50*l.*, be reduced so as to be—(a) where the amount exceeds 50*l.* and does not exceed 100*l.*,—6*d.*; and (b) where the amount exceeds 100*l.*,—6*d.* for every 100*l.* and also for any fractional part of 100*l.* of that amount."

*Exemptions.*] These include (1) notes and bills of the Banks of England and Ireland; (2, 3) certain drafts, orders and letters drawn by bankers; (6) warrants for Government annuities and dividends on Government securities; (5, 7, 8, 9) bills drawn by certain public departments; or (10) for the sole purpose of remitting money to be placed to any account of public revenue; (11) coupons or warrants for interest attached to and issued with any security, or with an agreement or memorandum for the renewal or extension of time for paying a security.

In consequence of the decision in *Rothschild v. Inl. Rev. Coms.*, (1894) 2 Q. B. 142, it has been enacted by 57 & 58 V. c. 30, s. 40, that one of a set of coupons for interest on a marketable security is exempt, whether issued with the security or subsequently, in a sheet. As to the construction of

Exemption 10, see *L. Clearing Bankers, Committee of, v. Int. Rev. Comrs.*, (1896) 1 Q. B. 222, 542, C. A.

The statute 10 G. 4, c. 56, s. 37, does not exempt from duty a draft payable to bearer given by a friendly society to their members. *A.-G. v. Gilpin*, L. R., 6 Ex. 193. This decision will apply to the Friendly Societies Act, 1875 (38 & 39 V. c. 60), s. 15 (2 *a*), and the Building Societies Act, 1874 (37 & 38 V. c. 42), s. 41, the corresponding provisions being similar in terms.

*Bill of Exchange.*] Sect. 32. "For the purposes of this Act the expression 'bill of exchange' includes draft, order, cheque, and letter of credit, and any document or writing (except a bank note) entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money; and the expression 'bill of exchange payable on demand' includes—

"(a.) An order for the payment of any sum of money by a bill of exchange or promissory note, or for the delivery of any bill of exchange or promissory note in satisfaction of any sum of money, or for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen; and

"(b.) An order for the payment of any sum of money, weekly, monthly, or at any other stated periods, *and also an order for the payment by any person at any time after the date thereof of any sum of money, and sent or delivered by the person making the same to the person by whom the payment is to be made, and not to the person to whom the payment is to be made, or to any person on his behalf.*" [S. Act, 1870, s. 48.]

As to what instruments fall within this section, *vide post*, pp. 241 *et seq.*

*Promissory Note.*] Sect. 33. "(1.) For the purposes of this Act the expression 'promissory note' includes any document or writing (except a bank note) containing a promise to pay any sum of money.

"(2.) A note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, is to be deemed a promissory note for that sum of money." [S. Act, 1870, s. 49.]

The paragraphs in italics were introduced by the Stamp Act, 1870, and the earlier provision (in 55 G. 3, c. 184, Sched., Part 1), corresponding to sect. 32 (a), *supra*, applied only to notes payable to bearer or to order, and definite and certain, and not amounting in the whole to 20*l.* Instruments in the form of notes and held to be agreements, were, except in the case of those expressly directed to be promissory notes, exempt from the note stamp, but liable to be stamped as agreements. As to what instruments fall within the present sections, *vide post*, pp. 242 *et seq.*

By 60 & 61 V. c. 24, s. 8, county council or municipal bills, payable not more than 12 months after date, are to be stamped as promissory notes although secured on property, &c.

*Bill payable on demand, cheque, &c., adhesive stamp on.*] Sect. 34. "(1.) The fixed duty of 1*d.* on a bill of exchange payable on demand or at sight or on presentation may be denoted by an adhesive stamp, which, where the bill is drawn in the United Kingdom, is to be cancelled by the person by whom the bill is signed before he delivers it out of his hands, custody, or power."

This stamp may, under sect. 38 (2) (*post*, p. 241), be affixed and cancelled by the person to whom it is presented.

*Foreign bills, adhesive stamp on.*] Sect. 34. "(2.) The *ad valorem* duties upon bills of exchange and promissory notes drawn or made out of the United Kingdom are to be denoted by adhesive stamps.

Sect. 35. (1.) Every person into whose hands any bill of exchange or promissory note "comes in the United Kingdom before it is stamped shall, before he presents for payment, or indorses, transfers, or in any manner negotiates, or pays the bill or note, affix thereto a proper adhesive stamp or" . . . "stamps of sufficient amount, and cancel every stamp so affixed thereto.

"(2.) Provided as follows:—(a) If at the time when any such bill or note comes into the hands of any *bonâ fide* holder there is affixed thereto an adhesive stamp effectually cancelled, the stamp shall, so far as relates to the holder, be deemed to be duly cancelled, although it may not appear to have been affixed or cancelled by the proper person; (b) If at the time when any such bill or note comes into the hands of any *bonâ fide* holder there is affixed thereto an adhesive stamp not duly cancelled, it shall be competent for the holder to cancel the stamp as if he were the person by whom it was affixed, and upon his so doing the bill or note shall be deemed duly stamped, and as valid and available as if the stamp had been cancelled by the person by whom it was affixed." [S. Act, 1870, s. 51.]

Sect. 35 (1) includes a foreign bill payable on demand. *In re Boyse*, 33 Ch. D. 612.

On the transferor is imposed the duty of cancelling the stamp affixed to a foreign bill, and on the transferee of seeing that it is done. *Pooley v. Brown*, 11 C. B., N. S. 566; 38 L. J., C. P. 134.

If a foreign bill be produced at the trial bearing the proper stamp, it will be presumed that the stamp was affixed at the time required by this section; *Bradlaugh v. De Rin*, L. R., 3 C. P. 286; even though it is not properly cancelled; *Marc v. Rouy*, 31 L. T. 372, M. T. 1874, Q. B. The party objecting to the admission of the instrument on the ground that the stamp was not affixed at the proper time must plead the objection specially. S. C., *per* Blackburn, J. It seems that cancellation may be made at any time in court before verdict. *Viale v. Michael*, 30 L. T. 463, E. T. 1874, Q. B. *per Id.*

Sect. 36. "A bill of exchange or promissory note which purports to be drawn or made out of the United Kingdom is, for the purpose of determining the mode in which the stamp duty thereon is to be denoted, to be deemed to have been so drawn or made, although it may in fact have been drawn or made within the United Kingdom."

This section obviates the objection held to be fatal in *Steadman v. Dukamel*, 1 C. B. 888.

*Wrong denomination of stamp.*] Sect. 37. "(1.) Where a bill of exchange or promissory note has been written on material bearing an impressed stamp of sufficient amount but of improper denomination, it may be stamped with the proper stamp on payment of the duty and a penalty of 40s. if the bill or note be not then payable according to its tenor, or of 10*l.* if the same be so payable." [S. Act, 1870, s. 53.]

It is sufficient if a bill so re-stamped be produced at the trial. *Heiser v. Grout*, 5 H. & N. 35; S. C., *sub nom.* *Kaiser v. Grout*, 29 L. J., Ex. 20.

*Effect of want of stamp.*] Sect. 37. "(2.) Except as provided in (1), *supra*, no bill of exchange or promissory note shall be stamped with an impressed stamp after the execution thereof." [S. Act, 1870, s. 53.]

Sect. 38. "(1.) Every person who issues, indorses, transfers, negotiates, presents for payment, or pays any bill of exchange or promissory note



liable to duty and not being duly stamped shall incur a fine of 10*l.*, and the person who takes or receives from any other person any such bill or note either in payment or as a security, or by purchase or otherwise, shall not be entitled to recover thereon, or to make the same available for any purpose whatever.

“(2.) Provided that if any bill of exchange payable on demand, or at sight or on presentation, is presented for payment unstamped, the person to whom it is presented may affix thereto an adhesive stamp of 1*d.*, and cancel the same, as if he had been the drawer of the bill, and may, thereupon, pay the sum in the bill mentioned, and charge the duty in account against the person by whom the bill was drawn, or deduct the duty from the said sum, and the bill is, so far as respects the duty, to be deemed valid and available.” [S. Act, 1870, s. 54.]

*Bill in set.*] Sect. 39. “When a bill of exchange is drawn in a set according to the custom of merchants, and one of the set is duly stamped, the other or others of the set shall, unless issued or in some manner negotiated apart from the stamped bill, be exempt from duty; and upon proof of the loss or destruction of a duly stamped bill forming one of a set, any other bill of the set which has not been issued or in any manner negotiated apart from the lost or destroyed bill may, although unstamped, be admitted in evidence to prove the contents of the lost or destroyed bill.” [S. Act, 1870, s. 55.]

*Bill, whether inland or foreign.*] A bill drawn in England on a person abroad, and accepted by him payable in England, is an inland bill, and must bear an impressed stamp. *Amner v. Clark*, 2 C. M. & R. 468. So, conversely, a bill sketched out and accepted here, and transmitted to a person abroad for his signature as drawer, is a foreign bill, and does not require an impressed stamp. *Boehm v. Campbell*, Gow, 56. A foreign bill drawn and indorsed abroad, may be presented in this country by the indorsee for *acceptance* without being stamped, and he may sue the drawer on it for non-acceptance. *Sharples v. Rickard*, 2 H. & N. 57; 26 L. J., Ex. 302. A foreign bill may be given in evidence for a collateral purpose without a stamp, before it has been presented for payment, indorsed, transferred, or otherwise negotiated. *Griffin v. Weatherby*, L. R., 3 Q. B. 753.

The Bills of Exchange Act, 1882 (45 & 46 V. c. 61), s. 97 (3), provides that nothing therein, “or in any repeal effected thereby shall affect (a.) the provisions of the Stamp Act, 1870, or Acts amending it, or any law or enactment for the time being in force relating to the revenue.”

*What are bills, &c., within the Stamp Act, 1891.*] The 1st part of sect. 32 applies to bills of exchange generally, and any document mentioned in it, if payable on demand, falls also within the 2nd part. *L. Clearing Bankers, Committee of, v. Inl. Rev. Comrs.*, (1896) 1 Q. B. 222, 542, C. A. The object of the legislature, in framing sects. 32, 33, *ante*, p. 239, was “to treat as promissory notes and bills of exchange, and to subject to stamp duty such instruments as, being payable on a contingency or out of a particular fund, could not, in strictness, fall under that denomination.” *Per* Ld. Ellenborough, C.J., on 55 G. 3, c. 181; *Firbank v. Bell*, 1 B. & A. 36; and see *Jones v. Simpson*, 2 B. & C. 321. In considering the cases decided under that Act, with a view of ascertaining whether an instrument is now chargeable with duty or not, it must be borne in mind that the provisions of the present Act are considerably wider than those of the former one (*vide ante*, p. 239), and the cases decided on 55 G. 3, c. 181, cited below,

where instruments were held to be entitled to exemption, must be applied subject to such modifications.

Where the instrument operates as an equitable assignment it is not within the Act. Thus, where T. contracted with J. to build a steam launch for J. for 80*l.*, and after receiving 40*l.* on account, addressed the following letter to J.:—"I hereby assign to R. the sum of 40*l.*, or any other sum now due or that may hereafter become due in respect of the steam launch I am building for you," this was held not to be an order for the payment of money, but the assignment of a debt. *Buck v. Robson*, 3 Q. B. D. 686, following *Brice v. Bannister*, *Id.* 569, C. A. So, a document addressed to C., the trustee of a will, and given to F., "I hereby authorize and direct you to pay to F. or his order the sum of 140*l.* out of moneys now due, or hereafter to become due to me under the will of my late father, and before making any payment to me thereout." *Fisher v. Culvert*, 27 W. R. 301, M. R., H. S. 1879.

But unless the order specifies the fund or debt out of which the payment is to be made, it is not an equitable assignment. *Percival v. Dunn*, 29 Ch. D. 128. So an ordinary bill of exchange drawn on H. by C. for the exact amount of C.'s funds in H.'s hands does not operate as an equitable assignment of such funds. *Shand v. Du Buisson*, L. R., 18 Eq. 283. And the Bills of Exchange Act, 1882 (45 & 46 V. c. 61), s. 53, expressly provides that "a bill of itself does not operate as an assignment of funds in the hands of the drawee available for payment thereof," but this section has no effect on the stamp duty payable on such an instrument, *vide* sect. 97 (3, a), *ante*, p. 241.

In order to come within 55 G. 3, c. 184, it was held that the instrument must be for the payment of a specified sum; and therefore where A., having consigned goods to B., sent him the following order,—“Pay to C. the proceeds of a shipment of 12 bales of goods, value about 2,000*l.*, consigned by me to you:” and B., by writing, consented to pay over the full amount of the net proceeds of the goods; it was held that neither of these instruments came within the above clause. *Jones v. Simpson*, 2 B. & C. 318; and see *Roscoe*, Dig. Bills of Exchange, p. 31.

It seems that an order for the payment of money sent or delivered to the person by whom it is to be paid, and not to the person to whom the payment is to be made, or any person on his behalf, is not liable to any stamp duty, unless payable after the date thereof, in which case it must bear a *ld.* stamp. See *Hutchinson v. Heyworth*, 9 Ad. & E. 375. A written authority by A. to defendant to pay certain sums to plaintiff out of debts from time to time accruing due from defendant to A., and a written promise by defendant to pay accordingly, were held to constitute together an agreement, and not to require a bill or note stamp. *Hamilton v. Spottiswoode*, 4 Exch. 200. See *Thompson v. Condy*, *post*, p. 243. See also *Walker v. Rostron*, 9 M. & W. 411, cited *ante*, p. 232. So, where the creditor sends an account to his debtor, requesting him, at the foot of it, to pay the amount to A. B., and hands the account to A. B. to collect it on his (the creditor's) behalf, this is not a bill of exchange within the Act. *Norris v. Solomon*, 2 M. & Rob. 266.

[What are promissory notes within the Stamp Act, 1891.] The terms of the present Act are so much wider than those of 55 G. 3, c. 184 (*vide ante*, p. 239), that many of the cases decided thereon are now clearly inapplicable; it has been decided, however, that notwithstanding the wideness of the terms of sect. 33 (*ante*, p. 239), the section is “meant to include documents, the contents of which consist substantially of a promise to pay a definite sum of money and of nothing else.” *Mortgage Insur. Cor. v. Ind. Rev. Coms.*, 21 Q. B. D. 352, 358, C. A. If the promise to pay be coupled with

stipulations other than those provided for by sect. 33 (2), it is not a promissory note. S. C. Thus, a policy of insurance guaranteeing the payment of 100*l.* in 1976, for a present payment of 9*l.* 17*s.* 4*d.*, with a proviso that the assured might at any time claim the surrender value, fixed according to tables of the corporation for the time being in force, was held by reason of the proviso to require an agreement stamp only. S. C. See also *Yeo v. Dawe*, 53 L. T. 125, E. S. 1885, C. A.; and *British India Steam Nav. Co. v. Intl. Rev. Coms.*, 7 Q. B. D. 165, cited *post*, p. 265.

The following letter, signed by the defendant, and addressed by him to the plaintiff, "G. T. M. Co.—I hereby undertake to pay you on the first allotment of shares in the above-named Co., the sum of 105*l.* out of commission I shall have to pay E. M. in accordance with his letter to you on the other side," does not require a note stamp under s. 33, *ante*, p. 239. *Thompson v. Condy*, Sittings in London, 27th June, 1874; *cor.* Pollock, B., after consulting with Kelly, C.B., *Ex rel. editoris*. The ground of this decision appears to have been that sect. 33 (1) applies only where the promise is to pay absolutely and at all events; and that (2) is limited in its application to instruments purporting to be notes though not legally such because payable on a contingency, &c., and is not to be extended in its construction by reference to (1). See also *Hamilton v. Spottiswoode*, *ante*, p. 242.

The following cases were all decided on 55 G. 3, c. 18*+*, and some of them upon the special provisions of that Act with reference to agreements in the form of promissory notes, which were to be charged with agreement but not note duty, *vide ante*, p. 239. The Stamp Act, 1891, contains no similar provision, and the cases must therefore be read subject to sect. 33 (1), *ante*, p. 239, of that Act.

An instrument in this form: "Received of A. B. 100*l.* which I promise to pay on demand," is a promissory note, and requires a stamp as such. *Green v. Davies*, 4 B. & C. 235. "I O U 20*l.*, to be paid on the 22nd inst.," dated and signed, is an instrument requiring to be stamped either as a note or an agreement. *Brooks v. Elkins*, 2 M. & W. 74. But the words "value received," will not render an I O U liable to a stamp. *Gould v. Coombs*, 1 C. B. 543. "I O U 40*l.*, which I borrowed of M., and to pay 5*l.* per cent. till paid,—R. T.," is neither an agreement nor a note. *Melanotte v. Teasdale*, 13 M. & W. 216. See also *Sibree v. Tripp*, 15 M. & W. 23. "I have received the sum of 20*l.* borrowed of you, and an accountable for it with interest," was held to be an agreement and not a note. *Horne v. Redfearn*, 4 N. & C. 433. So, "Borrowed of J. W. 200*l.* to account for at . . . months' notice if required," &c. *White v. North*, 3 Exch. 689. So, an instrument in the form of a receipt for money which had been advanced long before, containing a promise to pay interest thereon, is not a promissory note. *Taylor v. Steele*, 16 M. & W. 665. But a note for money payable on demand to H., "and I have lodged with H. the counterpart leases signed, &c., as a collateral security for the sum," is a note and not an agreement. *Fancourt v. Thorne*, 9 Q. B. 312.

The reservation of interest is not to be considered an addition to the sum advanced so as to require a larger stamp; thus a stamp, applicable to a note not exceeding 30*l.*, is applicable to a note for the payment of 30*l.* at three months after date with interest from the date. *Pruessing v. Ing*, 4 B. & A. 204. Where a joint and several note for securing the repayment of a loan was signed first by one, and some days afterwards by the other party, it was held not to require an additional stamp if the last signature was put before the money was advanced; or if the party last signing had promised to sign the note before the advance, notwithstanding it may not have been signed till afterwards. *Ex pte. White*, 3 Deac. & Chit. 366.

A memorandum in the form of a promissory note, offered in evidence for

the purpose of taking a case out of the Statute of Limitations, is inadmissible, unless stamped; although 9 G. 4, c. 14, s. 8, exempts memoranda made for that purpose from the stamp duty on *agreements*. *Jones v. Ryder*, 1 M. & W. 32. So, it was held that a promissory note for 1,110*l.*, with 4 per cent. interest, made on a receipt stamp, was not admissible to take a debt out of the Statute of Limitations. *Parmiter v. Parmiter*, 1 J. & H. 135; 30 L. J., Ch. 508. It is to be observed that the schedule of 55 G. 3, c. 184, *ante*, p. 239, exempting instruments in the form of notes, from the note stamp, if deemed to be agreements, was not cited in either of the two cases last cited.

*Stamp on re-issued bill.*] A bill payable to the drawer's order, and taken up by him, may be re-issued without a fresh stamp, unless this would have the effect of rendering any of the indorsers liable to an action. *Callow v. Lawrence*, 3 M. & S. 97; *Hubbard v. Jackson*, 4 Bing. 390. Where the bill is an accommodation bill, it would seem that it can only be re-issued with the consent of the acceptor, and therefore would require a fresh stamp. *Jewell v. Parr*, 13 C. B. 909; 22 L. J., C. P. 253. But a bill payable to the order of a third person, indorsed by him and taken up by the drawer, cannot be re-issued by him, for it would wrongfully charge the payee. *Beck v. Robley*, 1 H. Bl. 89, n.

*What alteration of a bill requires a new stamp.*] If a bill or note is altered in a material part, though by the consent of all parties, after it has once been issued it requires a new stamp; Bayl. on Bills, 6th ed. 118; *Bowman v. Nichol*, 5 T. R. 537; *Wilson v. Justice*, Peake, Add. Ca. 96; for it is, in effect, substituting a new bill, and using a stamp already used for the old one.

An alteration in the date of a bill payable after date, S. C. C.; *Outhwaite v. Luntley*, 4 Camp. 179; or in the consideration, *Knill v. Williams*, 10 East, 431; or by inserting words rendering a bill or note negotiable, which was not so originally; *Id.* 437, explaining *Kershaw v. Cox*, 3 Esp. 246;—are material alterations, and require restamping. So, where the drawer, without the consent of the acceptor, added the words “payable at Mr. B.’s, C. Street,” to the acceptance, this alteration was held to be material. *Cowie v. Halsall*, 4 B. & A. 197. And a similar alteration was held to be material since the statute 1 & 2 G. 4, c. 78; for the right of an indorsee to sue his indorser would, according to the altered bill, be complete upon default made at a banker’s and notice thereof; whereas, in truth, the acceptor, not having in reality undertaken to pay there, would have committed no default by such non-payment. *Macintosh v. Haydon*, Ry. & M. 362; see *Marson v. Petit*, 1 Camp. 82, n. The Bills of Exchange Act, 1882, s. 64 (2), enumerates some material alterations, but this, by reason of sect. 97 (3, a), *post*, p. 245, has no bearing on the present question.

If the alteration be merely the correction of a mistake in furtherance of the original intent of the parties, as inserting the words “or order” in a bill intended to be negotiable, it will not require a new stamp. *Byrom v. Thompson*, 11 Ad. & E. 31. So, a mistake in the date may be corrected. *Brutt v. Picard*, Ry. & M. 37. See *Hutchins v. Scott*, 2 M. & W. 809.

At common law, a stranger to a bill, by indorsing it, rendered himself liable to a subsequent indorsee, as a new drawer of the bill; but it remained the same instrument as before, and did not require a fresh stamp. *Penny v. Innes*, 1 C. M. & R. 439; *Matthews v. Bloxsome*, 33 L. J., Q. B. 209. This doctrine was inapplicable to promissory notes (*Gwinnell v. Herbert*, 5 Ad. & E. 436) by reason of the Stamp Act. *M’Call v. Taylor*, 34 L. J., C. P. 365, 366, *per* Willes, J. By the Bills of Exchange Act, 1882, s. 56, where a

person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities “of an indorser, to a holder in due course,” *i.e.*, to a *bonâ fide* holder for value without notice; see sect. 29. By sect. 89 (1), the provisions of the Act are in general to extend to promissory notes; the maker being deemed to correspond with the acceptor of a bill, and the first indorsee with the drawer of an accepted bill payable to the drawer’s order. As, however, sect. 97 (3, *a*), *post*, p. 351, provides that nothing in the Act is to affect the Stamp Acts, it would appear that sect. 56 does not apply to promissory notes, and that *Gwinnell v. Herbert*, *ante*, p. 244, is still good law.

The subject of altering bills and notes is treated of under the head of *Defences to actions on bills*, *post*, pp. 395, 396, to which it more properly belongs: for the alteration of such an instrument, without consent, even by a stranger, affects its validity without reference to the Stamp Acts. *Master v. Miller*, 2 H. Bl. 141; 1 Smith’s L. C. If made after issue or negotiation, even with consent, the bill is, as above stated, vitiated for want of a new stamp.

[*What is such an issuing as to render an alteration fatal.*] A bill is *primâ facie* considered as issued as soon as it is passed away by the drawer or accepted by the drawee, and not before. Bayley on Bills, 6th ed. 123. An exchange of acceptances is an issuing; *Cardwell v. Martin*, 9 East, 190; but a bill is not issued so as to make an alteration fatal, until it is in the hands of a person entitled to make a claim thereon. *Downes v. Richardson*, 5 B. & A. 674; *Turleton v. Shingler*, 7 C. B. 812; *Scholfield v. Londesborough*, *El. of*, (1894) 2 Q. B. 660: *affirm.*, (1895) 1 Q. B. 536, C. A., and (1896) A. C. 514, D. P. on other grounds.

The onus of proving that the alteration was made *before* negotiation lies upon the party suing on it. *Johnson v. Marlborough*, *Dk. of*, 2 Stark. 313; *Henman v. Dickinson*, 5 Bing. 183. And, where the alteration is visible, it cannot be left to the jury to say, on the mere inspection without further evidence, whether it was made at or after the original making of the bill. *Knight v. Clements*, 8 Ad. & E. 215; and *Bishop v. Chambre*, M. & M. 116, there explained; *Clifford v. Parker*, 2 M. & Gr. 909. Where there was an alteration by consent in a bill drawn abroad to which no stamp was necessary, it was held to lie on the party who objected to the want of a stamp to show that it was altered in England. *Hamelin v. Bruck*, 9 Q. B. 306.

#### *Bankrupt’s Estates—Instruments relating thereto.*

By the Bankruptcy Act, 1883 (46 & 47 V. c. 52), s. 144, every deed, conveyance, &c., relating solely to freehold, &c., property, or to any mortgage, &c., on, or any estate, right or interest in any real or personal property which is part of the estate of any bankrupt, and which after the execution of such deed, &c., “either at law or in equity, is or remains the estate of the bankrupt or of the trustee under the bankruptcy, and every power of attorney, proxy, paper, writ, order, certificate, affidavit, bond or other instrument or writing relating solely to the property of any bankrupt, or to any proceeding under any bankruptcy, shall be exempt from stamp duty, except in respect of fees under this act.”

By 58 & 59 V. c. 16, s. 16, this exemption is extended to the estates of companies wound up by order of the Court under the Companies Winding-up Act, 1890.

*Bill of Lading.*

“*Bill of lading* of or for any goods, merchandise, or effects, to be exported or carried coastwise:—*6d.*”

Sect. 40. (1.) “A bill of lading is not to be stamped after the execution thereof.” [S. Act, 1870, s. 56 (1).]

*Bill of Sale.*

Absolute. See *Conveyance of sale*, *post*, p. 249.

By way of security. See *Mortgage, &c.*, *post*, p. 262.

Sect. 41. “A bill of sale is not to be registered under any act” . . . “unless the original, duly stamped, is produced to the proper officer.” [S. Act, 1870, s. 57.]

This section, however, does not invalidate the registration, otherwise regular, of a bill of sale not duly stamped. *Bellamy v. Saull*, 4 B. & S. 265; 32 L. J., Q. B. 366.

*Bond.*

“*Bond* for securing the payment or repayment of money or the transfer or re-transfer of stock. See *Mortgage, &c.*,” *post*, p. 264.

“*Bond* in relation to any annuity upon the original creation and sale thereof. See *Conveyance on Sale*,” *post*, p. 249.

“*Bond, covenant, or instrument* of any kind whatsoever.

(1.) Being the only or principal or primary security for any annuity (*except upon the original creation thereof by way of sale or security, and except a superannuation annuity*) or for any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack.

For a definite and certain period, so that the total amount to be ultimately payable can be ascertained:—The same *ad valorem* duty as a bond or covenant for such total amount.

For the term of life or any other indefinite period:—For every 5*l.* and also for any fractional part of 5*l.*, of the annuity or sum periodically payable:—2*s.* 6*d.*

(2.) Being a collateral or auxiliary or additional or substituted security for any of the above-mentioned purposes where the principal or primary instrument is duly stamped.

Where the total amount to be ultimately payable can be ascertained:—

The same *ad valorem* duty as a bond or covenant of the same kind for such total amount.

In any other case:—For every 5*l.*, and also for any fractional part of 5*l.*, of the annuity or sum periodically payable:—6*d.*

(3.) Being a grant or contract for payment of a superannuation annuity, that is to say, a deferred life annuity granted or secured to any person in consideration of annual premiums payable until he attains a specified age, and so as to commence on his attaining that age. For every 5*l.*, and also for any fractional part of 5*l.* of the annuity:—6*d.*

As to the bonds of colonial and foreign governments, &c., and of public companies, see *Loan Capital and Marketable Security*, *post*, pp. 260 *et seq.*

The term security in this schedule is to be construed in the same way as in the mortgage clause, *post*, p. 262, and means any obligation created by any instrument; *Jones v. Inl. Rev. Coms.*, (1895) 1 Q. B. 484, 492, 494; though not under seal. *National Telephone Co. v. Inl. Rev. Coms.*, (1900) A. C. 1, D. P. Thus an agreement for the use of telephone wires and apparatus is

chargeable on the amount of the rent payable. S. CC. Where the deed reserves a sum weekly, the instrument is to be stamped in respect of such sum; *Clifford v. Inl. Rev. Coms.*, (1896) 2 Q. B. 187: but where the covenant was for the payment of 625*l.* every three months by quarterly payments on the usual quarter days, it was held to be security for an annuity of 625*l.*; *Lewis v. Id.*, (1898) 2 Q. B. 290. See further, *Conservators of R. Thames v. Inl. Rev. Coms.*, 18 Q. B. D. 279, cited *post*, p. 258.

By sect. 105, in a settlement of reversionary property, a covenant by the tenant for life to pay an annuity is in some cases exempt from duty.

“Bond on obtaining letters of administration in England or Ireland,” 5*s.*, from which there are certain exemptions.

“Bond of any kind whatsoever not specifically charged with any duty.

Where the amount limited to be recoverable does not exceed 300*l.*:—the same *ad valorem* duty as a bond for the amount limited. In any other case:—10*s.*”

*Exemptions.*] As to bonds relating to service in the colonies, see the general exemption (3) at the end of the schedule, cited *ante*, p. 235. Exemption (5) applies only to replevin bonds given in Ireland.

By the Merchant Shipping Act, 1894 (57 & 58 V. c. 60), s. 309, a bond given thereunder by the master and owner or charterer of an emigrant ship, is exempt from Stamp duty, and by sect. 619 (ii) so is the bond given by a Trinity House pilot.

### Charter-party.

#### Charter-party:—6*d.*

Sect. 49. (1.) “For the purposes of this Act the expression charter-party includes any agreement or contract for the charter of any ship or vessel, or any memorandum, letter, or other writing between the captain, master, or owner of any ship or vessel, and any other person, for or relating to the freight or conveyance of any money, goods, or effects on board of the ship or vessel.”

(2.) “The duty upon a charter-party may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is last executed, or by whose execution it is completed as a binding contract.” [S. Act, 1870, s. 66.]

Sect. 50. “Where a charter-party is first executed out of the United Kingdom, without being duly stamped, any party thereto may, within ten days after it has been first received in the United Kingdom, and before it has been executed by any person in the United Kingdom, affix thereto an adhesive stamp denoting the duty chargeable thereon, and at the same time cancel such adhesive stamp, and the instrument when so stamped shall be deemed duly stamped.” [S. Act, 1870, s. 67.]

Sect. 51. “A charter-party may be stamped with an impressed stamp after execution upon the following terms; that is to say—(1.) Within seven days after the first execution thereof, on payment of the duty and a penalty of 4*s. 6d.* (2.) After seven days, but within one month after the first execution thereof, on payment of the duty and a penalty of 10*l.*; and shall not in any other case be stamped with an impressed stamp.” [S. Act, 1870, s. 68.]

Sect. 50, *supra*, enables any party to a charter-party, first signed abroad, to stamp the document in the special manner and within the time above mentioned; but sect. 51, *supra*, does not prohibit the document from being stamped by the Commissioners of Inland Revenue, within 30 days of its arrival in this country, under the general provisions of sect. 15 (3 *a*), *ante*, p. 227. See *The Belfort*, 9 P. D. 215.

A guarantee for the due performance of a charter-party does not require to be stamped as a charter-party. *Rein v. Lane*, L. R., 2 Q. B. 144.

#### Cheque.

See *Bill of Exchange*, ante, pp. 238, 239.

#### Cognovit.

A cognovit requires no stamp, for it is a mere acknowledgment of an account, unless matter of agreement be contained in it; as if it contains an agreement to take the debt by instalments. *Ames v. Hill*, 2 B. & P. 150; *Reardon v. Swaby*, 4 East, 188. An agreement to grant time, entered into at the same time on a separate paper, does not render an agreement stamp on the cognovit necessary. *Morley v. Hall*, 2 Dowl. 494.

#### Company—Statement of Capital.

By sect. 112, extended by 59 & 60 V. c. 28, s. 12, and amended by 62 & 63 V. c. 9, s. 7, a statement of the amount of nominal capital to be raised by shares of any company to be registered with limited liability, and of any increase of registered capital of any company now or to be so registered, shall be delivered to the registrar of joint stock companies, and shall bear an *ad valorem* duty of 5s. per 100*l.*, and fraction of 100*l.* over any multiple of 100*l.*, of the amount or increase of capital.

This section applies where there has been an increase of nominal capital, on a re-arrangement and consolidation scheme, although there has been no increase of assets. *Midland Ry. Co. v. A.-G.*, (1902) A. C. 171, D. P. See also *A.-G. v. Regents Canal & Dock Co.*, (1904) 1 K. B. 263.

#### Contract Note.

*Contract note*, for or relating to the sale or purchase of any stock or marketable security—Of the value of 5*l.* and under the value of 100*l.*:—1*d.*; and, by 56 & 57 V. c. 7, s. 3 (1)—Of the value of 100*l.* or upwards:—1*s.*

By sect. 52 (1), amended by 62 & 63 V. c. 9, s. 13. For the purposes of this Act the expression “contract note” means the note sent by a broker or agent to his principal (except where such principal is acting as broker or agent for a principal), advising him of the sale or purchase of any stock or marketable security. “(2.) Where a note advises the sale or purchase of more than one description of stock or marketable security, the note shall be deemed to be as many contract notes as there are descriptions of stock or security sold or purchased.” [S. Act, 1870, s. 17.] (3.) Amended by 56 & 57 V. c. 7, s. 3 (2). The duty of 1*d.* on a contract note may be denoted by an adhesive stamp, and the duty of 1*s.* is to be denoted by an adhesive stamp or stamps *appropriated to a contract note*. (4) The adhesive stamp is to be cancelled by the person by whom the note is executed. [S. Act, 1870, s. 69 (1).] By 56 & 57 V. c. 7, s. 3 (2), the duty of 1*s.* may be added to the charge for brokerage or agency.

Sect. 53. (3.) “No broker, agent, or other person shall have any legal claim to any charge for brokerage, commission, or agency with reference to the sale or purchase of any stock or marketable security of the value of 5*l.* or upwards mentioned or referred to in any contract note, unless the note is duly stamped.” [S. Act, 1870, s. 69 (3).] By 61 & 62 V. c. 46, s. 7 (1), this applies where a person required to make, execute and transmit a contract note fails to do so, in the same manner as if he had made one not duly stamped. This provision overrides the decision in *Learoyd v. Bracken*, (1894) 1 Q. B. 114.



*Contract for Sale of Equitable Estates, &c.*

See *Conveyance*, *post*, pp. 250, 252.

*Conveyance.*

*Conveyance or transfer on sale*:—

Of any property (*except Bank of England and some colonial stocks*), where the amount or value of the consideration for the sale does not exceed 5*l.*—6*d.*; exceeds 5*l.* and does not exceed 10*l.*—1*s.*; 10*l.* and not 15*l.*—1*s.* 6*d.*; 15*l.* and not 20*l.*—2*s.*; 20*l.* and not 25*l.*—2*s.* 6*d.*; 25*l.* and not 50*l.*—5*s.*; 50*l.* and not 75*l.*—7*s.* 6*d.*; 75*l.* and not 100*l.*—10*s.*; and so on at the rate of 10*s.* for every 100*l.*, ascending by half-crowns till the purchase-money amounts to 300*l.*, and then by crowns at each step.

Sect. 54. "For the purposes of this Act the expression 'conveyance on sale' includes every instrument, and every decree or order of any court or of any commissioners, whereby any property or any estate or interest in any property, upon the sale thereof is transferred to or vested in the purchaser, or any other person on his behalf or by his direction." [S. Act, 1870, s. 70.]

Sects. 55, 56, direct how the duty is to be estimated where the consideration consists of stock or marketable security, or periodical payments; and sect. 57, when it consists of a debt, or the property is conveyed subject either certainly or contingently to the payment of money &c. See also 61 & 62 V. c. 10, s. 6, as to the stamp on a foreclosure decree, and *In re Lovell and Collard's Contract*, (1907) 1 Ch. 249.

*Where several instruments.*] Sect. 58. (3.) "Where there are several instruments of conveyance for completing the purchaser's title to property sold, the principal instrument of conveyance only is to be charged with *ad valorem* duty, and the other instruments are to be respectively charged with such other duty as they may be liable to, but the last-mentioned duty shall not exceed the *ad valorem* duty payable in respect of the principal instrument." [S. Act, 1870, s. 76.]

Sect. 61. (1.) "In the cases hereinafter specified the principal instrument is to be ascertained in the following manner:

(a.) Where any copyhold or customary estate is conveyed by a deed, no surrender being necessary, the deed is to be deemed the principal instrument: (b.) In other cases of copyhold or customary estates, the surrender or grant, if made out of court, or the memorandum thereof, and the copy of court roll of the surrender or grant, if made in court, is to be deemed the principal instrument."

(2.) "In any other case the parties may determine for themselves which of several instruments is to be deemed the principal instrument, and may pay the *ad valorem* duty thereon accordingly." [S. Act, 1870, s. 77.]

"*Conveyance or transfer* by way of security of any property" . . . "or of any security. See *Mortgage*," *post*, p. 262.

"*Conveyance or transfer* of any kind not hereinbefore described, 10*s.*"

Sect. 62. "Every instrument, and every decree or order of any court or of any commissioners, whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person, is to be charged with duty as a conveyance or transfer of property. Provided that a conveyance or transfer made for effectuating the appointment of a new trustee," or the retirement of a trustee although no new trustee is appointed (2 E. 7, c. 7, s. 9), "is not to be charged with any higher duty than 10*s.*" [S. Act, 1870, s. 78.] This proviso overrides the specific duties on transfers imposed by

the schedule. See *Foley, Ltd. v. Inl. Rev. Coms.*, L. R., 3 Ex. 263. Where, however, an order appoints new trustees and also vests the trust property in them, it is liable to duty both as an appointment and also as a conveyance; 10s. in each case. *Hadlyett v. Id.*, 3 Ex. D. 46. A written assent, not under seal, given under 60 & 61 V. c. 65, s. 3 (1), *post*, pp. 1053, 1061, by an executor to a devise, is not liable under sect. 62. *Kemp v. Inl. Rev. Coms.*, (1905) 1 K. B. 581.

The stat. 63 & 64 V. c. 7, s. 10, makes in respect of conveyances a provision similar to S. Act, 1891, s. 77 (2), *post*, p. 256 relating to leases.

Stat. 58 & 59 V. c. 16, s. 12, provides for the payment of *ad valorem* duty where "by virtue of any Act . . . (a) any property is vested by sale in any person, or (b) any person is authorized to purchase property." "Property" includes chattels. *A.-G. v. Eastbourne Cor.*, (1902) 1 K. B. 403, C. A.; (1904) A. C. 155.

As to the stamp on the conveyance of an appropriated part of the residuary estate of a deceased person by his personal representatives, in satisfaction of a legacy or share of such estate, see 60 & 61 V. c. 65, s. 4 (2), and *In re Beverly*, (1901) 1 Ch. 681.

*Contract for sale of equitable estates, goodwill, and annuities, &c.*] By sect. 59 (1), any contract or agreement, made in the United Kingdom, for the sale of any equitable estate or interest in any property, or of any equitable estate or interest in any property, except lands, tenements, &c., or property, locally situate out of the U. K., or of goods, &c., or stock or marketable securities, or any ship, or share in any ship, is charged with the same *ad valorem* duty as if it were an actual conveyance on sale (*vide ante*, p. 249). (2.) On a re-sale, when the *ad valorem* duty has been paid before conveyance, *ad valorem* duty is to be paid on the excess, if any, of the consideration on the re-sale beyond that on the original sale, and in any other case a fixed duty of 10s. or 6d. as the case may require. (3.) The conveyance is to be then stamped free of duty, and the payment of the *ad valorem* duty duly denoted (*vide ante*, p. 227).

(4.) Provides that where any such contract is stamped with the fixed duty of 10s. or 6d. (*vide supra*), it "shall be regarded as duly stamped for the mere purpose of proceedings to enforce specific performance or recover damages for the breach thereof." Hence the question of *ad valorem* duty in this case will not often arise at N. P. See also sub-sect. 5. [52 & 53 V. c. 42, s. 15.] For the object of sect. 59, see *Inl. Rev. Coms. v. Angus*, *post*, p. 251, and *W. L. Syndicate v. Inl. Rev. Coms.*, *post*, p. 252.

By sect. 60, when on the sale of any annuity or other right not before in existence such annuity, &c., is not created by actual grant or conveyance, but is only secured by bond, warrant of attorney, covenant, contract or otherwise, the bond or other instrument is to be charged with the same duty as an actual grant or conveyance. See *Mersey Docks, &c. Board v. Inl. Rev. Coms.*, (1897) 2 Q. B. 316, C. A., *post*, p. 251; and *Gt. N. Ry. Co. v. Inl. Rev. Coms.*, (1901) 1 K. B. 416, C. A., *post*, p. 273.

*Exemptions.*] By the general exemptions (1), (2), at the end of the schedule, transfers of shares in the government stocks or funds, and instruments for the sale, transfer, or other disposition, either absolutely or by way of mortgage or otherwise, of any ship or vessel, or any share therein, are free from all stamp duty. So by the Merchant Shipping Act, 1894 (57 & 58 V. c. 60), s. 721, are any instruments used for carrying into effect Part I. of that Act relating to the registry of ships.

Certain conveyances relating to the estate of a bankrupt are exempt from a conveyance stamp, *vide ante*, p. 245.

An assignment of copyright by entry in the book of registry, kept at Stationers' Hall, is not liable to stamp duty; 5 & 6 V. c. 45, s. 13.

As to the liability to duty of a conveyance relating to crown property, *vide ante*, p. 221.

*Decisions on conveyances.*] The following decisions (partly under the former Acts) seem still applicable. A mere agreement for sale, inoperative at law as a conveyance, is not chargeable under this head; *Wilmot v. Wilkinson*, 6 B. & C. 506; *Inl. Rev. Coms. v. Angus*, 23 Q. B. D. 579; unless it fall within sects. 59, 60, *ante*, p. 250. So, an agreement for the sale of a bed of coals, without any legal transfer of the freehold, requires no conveyance stamp. *Phillips v. Morrison*, 12 M. & W. 740. Nor a deed purporting to be a grant by an asphaltic company of an exclusive licence to sell the asphaltic of the company in certain counties, as it conveys no property. *Limmer Asphaltic Paving Co. v. Inl. Rev. Coms.*, L. R., 7 Ex. 211. See also *Conservators of R. Thames v. Inl. Rev. Coms.*, 18 Q. B. D. 279, cited *post*, p. 258. There must be a sale for money [or for stock or securities, public or private]. *Coates v. Perry*, 3 B. & B. 48. If for stock, &c., the mode of valuation is pointed out by sect. 55 (1). The sale of a perpetual annuity is "a conveyance on sale" although the grantor may have an option of re-purchase. *Mersey Docks, &c. Board v. Inl. Rev. Coms.*, (1897) 2 Q. B. 316, C. A. On the sale of part of the land comprised in a lease at an apportioned rent, the payment of such rent by the assignee is not part of the consideration for the sale, for the purpose of stamp duty. *Swayne v. Id.*, (1900) 1 Q. B. 172, C. A. The conveyance on sale of a chose in action is within the Act, for it extends to any subject of "property which belongs to a person exclusive of others, and which can be the subject of a bargain and sale to another." *Per Cur., Potter v. Inl. Rev. Coms.*, 10 Ex. 147, 156; 23 L. J., Ex. 345, 347. Thus it extends to the assignment of the goodwill of a business; S. C.; *Inl. Rev. Coms. v. Muller & Co.'s Margarine, post*, p. 252; see also *Danubian Sugar Factories v. Inl. Rev. Coms.*, (1901) 1 K. B. 245, C. A.; a written sale of fixtures; *Horsfall v. Hey*, 2 Exch. 778; a deed whereby a partner in a firm of two, conveyed and released all his interest in the partnership property to his co-partner, in consideration of the payment of the ascertained amount of the partnership property due to the former. *Christie v. Inl. Rev. Coms.*, L. R., 2 Ex. 45; *Phillips v. Id.*, *Id.* 399.

An instrument whereby the C. Co. was amalgamated with the Gt. W. Co. on the terms that the Gt. W. Co. should issue its stock to the shareholders in the C. Co. in payment, is a conveyance on sale, and *ad valorem* duty is payable on the value of such stock; *Gt. W. Ry. Co. v. Inl. Rev. Coms.*, (1894) 1 Q. B. 507, C. A.; so where a shareholder exchanges his shares in one company for those of another. *Coats v. Inl. Rev. Coms.*, (1897) 2 Q. B. 423, C. A. A deed whereby the partners in a firm convert themselves into a limited company to carry on the business, receiving debentures in the company in proportion to their interest in the business, is a conveyance on sale, although the partners are the only members of the company. *Foster (John) & Son v. Id.*, (1894) 1 Q. B. 516, C. A. And so is a deed of family arrangement where there is a conveyance of property and money given for it. *Bristol, Mqs. of, v. Id.*, (1901) 2 K. B. 336.

Where the value of land taken by a railway company is assessed at separate sums for (1) land, (2) buildings, (3) compensation for loss of business, the conveyance must bear an *ad valorem* stamp in respect of the aggregate amount of these three sums. *Inl. Rev. Coms. v. Glasgow & S. W. Ry. Co.*, 12 Ap. Ca. 315, D. P.

Where the consideration for the conveyance is a periodical payment, duty

is payable under sects. 56 (2), 57, although the payment depends on one or more contingencies. *Underground Electric Rys. Co. &c. v. Inl. Rev. Coms.*, (1905) 1 K. B. 174, C. A.; (1906) A. C. 21, D. P.

A partition is not a sale within the Stamp Acts. *Henniker v. Henniker*, 1 E. & B. 54; 22 L. J. Q. B. 91.

If the deed of conveyance contain other matter not incident to the sale or conveyance, it requires an additional stamp adapted to the added matter; but where the transfer of railway shares contained a covenant to abide by the rules of the company, which covenant was required in all transfers, it was held that no additional stamp was necessary beyond the *ad valorem* stamp. *Wolseley v. Cox*, 2 Q. B. 321.

A certificate of the transfer and acceptance of shares in a mine, signed by both parties, may be received as an admission of the existence of a transfer without a transfer stamp. *Toll v. Lee*, 4 Exch. 230; *Walker v. Bartlett*, 18 C. B. 845.

Under sect. 14 (4), *ante*, p. 222, a conveyance of land abroad (e.g., in Australia), executed in England, must be stamped. See *In re Wright*, 11 Exch. 458. S. C., *sub nom. Wright v. Inl. Rev. Coms.*, 25 L. J., Ex. 49. See also *Stonelake v. Babb*, 5 Burr. 2673. *Secus* when executed abroad, although the consideration is expressed to be payable in England. *Maple & Co. v. Inl. Rev. Coms.*, (1906) 2 K. B. 834, C. A.; in D. P., *c. a. v.*, May 1st, 1907.

An agreement is made in the U. K. within sect. 59 (1), *ante*, p. 250, if it be executed in the U. K. by a party thereto whose execution is required to make it on its face complete. *Inl. Rev. Coms. v. Muller & Co's Margarine, infra*. An agreement for the sale of an hotel and the goodwill thereof is within it as far as relates to the goodwill. *W. London Syndicate v. Inl. Rev. Coms.*, (1898) 2 Q. B. 507, C. A. As to what amounts to a sale of an equitable interest, *vide* S. C.; *Chesterfield Brewery Co. v. Inl. Rev. Coms.* (1899) 2 Q. B. 7. A conveyance in the form of a declaration of trust is liable to the duty. S. C. The sale of an equitable interest in property locally situate out of the U. K. has been held not to be within the exception in sect. 59 (1). *Farmer v. Inl. Rev. Coms.*, (1898) 2 Q. B. 141. Nor that of a share in a colonial patent and of a sole licence to use it in the colony. *Smelting Co. of Australia v. Id.*, (1897) 1 Q. B. 175. Followed in *Danubian Sugar Factories Co. v. Id.*, (1901) 11 Q. B. 245 C. A. As, however, it has since been decided in *Inl. Rev. Coms. v. Muller & Co's Margarine*, (1901) A. C. 217, D. P., that the goodwill of a business carried on in premises abroad, the vendor covenanting not to carry on a similar business within 50 miles of the existing premises, all the customers being abroad, is "property locally situate out of the U.K.," it is doubtful how far the two decisions last cited can be supported. *Vide Id.* 237-8, *per* Ld. Lindley.

#### Copy.

"Copy or Extract (attested or in any manner authenticated) of or from— (1.) An instrument chargeable with any duty. (2.) An original will, testament, or codicil. (3.) The probate or probate copy of a will or codicil. (4.) Any letters of administration or any confirmation of a testament. (5.) Any public register (except any register of births, baptisms, marriages, deaths, or burials). (6.) The books, rolls, or records of any court.

In the case of an instrument chargeable with duty not amounting to 1s.:—the same duty as such instrument.

In any other case:—1s."

*Exemption.*—Copy or extract of or from any law proceedings.

By sect. 63, the copies of the instruments falling within (1), (2), (3), (4),

*supra*, may be stamped at any time within 14 days after the date of the attestation, on payment of the duty only. [S. Act. 1870, s. 79.]

“Copy or Extract (*certified*) of or from any register of births, baptisms, marriages, deaths, or burials, ‘or burnings (2 E. 7, c. 8, s. 7)’ :—1*d*.”

*Exemptions*.—“(1.) Copy or extract furnished by any clergyman, registrar, or other official person pursuant to and for the purposes of any Act or furnished to any general or superintending registrar under any general regulation. (2.) Copy or extract for which the person giving the same is not entitled to any fee or reward.”

*Adhesive Stamp*.] By sect. 64, this duty of 1*d*. “is to be paid by the person requiring the copy or extract, and may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the copy or extract is signed before he delivers the same out of his hands, custody, or power.”

An examined copy of a deed, produced by a witness at a trial to prove the original, which the opposite party refuses to produce, requires no stamp, for “copy” means an authenticated copy receivable in evidence in the first instance, and the unstamped copy is used merely to refresh the witness’s memory. *Braythwayte v. Hitchcock*, 10 M. & W. 494. So, a copy signed by the party against whom it is offered as secondary evidence is admissible without a stamp. *Smith v. Maquire*, 1 F. & F. 199. See also *Stowe v. Querner*, L. R., 5 Ex. 155, cited *ante*, p. 10.

As to stamps on copy of court roll, *vide infra*.

#### Copyhold and Customary Estates—Instruments relating thereto.

“Upon a sale thereof. See *Conveyance on Sale*,” *ante*, p. 249.

“Upon a mortgage thereof. See *Mortgage, &c.*,” *post*, p. 262.

“Upon a demise thereof. See *Lease*,” *post*, p. 255.

“Upon any other occasion. Surrender or grant made out of court, or the memorandum thereof, and copy of court roll of any surrender or grant made in court :—10*s*.”

Sect. 65. “(1.) No instrument is to be charged more than once with duty by reason of relating to several distinct tenements, in respect whereof several fines or fees are due to the lord or steward of the manor.” [S. Act, 1870, s. 82.]

“(2.) The copy of court roll of a surrender or grant made out of court shall not be admissible or available as evidence of the surrender or grant, unless the surrender or grant, or the memorandum thereof, is duly stamped, of which fact the certificate of the steward of the manor on the face of the copy shall be sufficient evidence.

“(3.) The entry upon the court rolls of a surrender or grant shall not be admissible or available as evidence of the surrender or grant unless the surrender or grant, if made out of court, or the memorandum thereof, or the copy of court roll of the surrender or grant, if made in court, is duly stamped, of which fact the certificate of the steward of the manor in the margin of the entry shall be sufficient evidence.” [S. Act, 1870, s. 81.]

Sect. 67 requires the steward, within four months of surrender or grant made in court, to deliver stamped copy of court roll; and by sect. 68, he may refuse to accept surrender or make grant in court before payment of his fees and of the stamp duty. [S. Act, 1870, ss. 85, 86.]

A mere examined copy, proved in evidence, requires, it seems, no stamp; for the “copy” mentioned in the schedule means the copy delivered by the steward. *Doe d. Burrowes v. Freeman*, 12 M. & W. 844. Although, if it were shown that the entry on the rolls was unstamped, the evidence would become inadmissible by reason of sect. 67, *supra*.

*Cost-Book Mines, Transfer of Shares in.*

See *Transfer, post*, p. 275.

*Counterpart.*

See *Duplicate, post*, p. 255.

*Covenant.*

“*Covenant* for securing the payment or repayment of money, or the transfer or re-transfer of stock. See *Mortgage, &c.*,” *post*, p. 262.

“*Conveyance* in relation to any annuity upon the original creation and sale thereof. See *Conveyance on Sale*,” *ante*, p. 249; and sect. 60, *ante*, p. 250.

“*Covenant* in relation to any annuity (except upon the original creation and sale thereof) or to other periodical payments. See *Bond, Covenant, &c.*,” *ante*, p. 246.

“*Covenant*. Any separate deed of covenant (not being an instrument chargeable with *ad valorem* duty as a conveyance on sale or mortgage) made on the sale or mortgage of any property, and relating solely to the conveyance or enjoyment of, or the title to, the property sold or mortgaged, or to the production of the muniments of title relating thereto, or to all or any of the matters aforesaid.

Where the *ad valorem* duty in respect of the consideration or mortgage money does not exceed 10s. :—a duty equal to the amount of such *ad valorem* duty. In any other case :—10s.”

*Debenture.*

See *Mortgage, post*, p. 262.

*Declaration of Use or Trust.*

“*Declaration* of any use or trust of or concerning any property by any writing, not being a will, or an instrument chargeable with *ad valorem* duty as a settlement :—10s.”

*Declaration, Statutory.*

See *Affidavit, ante*, p. 231.

*Deed.*

*Deed* of any kind whatsoever, not described in the schedule :—10s.

By sect. 120, any instruments specifically charged with a duty of 35s. by any Act not relating to stamp duties is now to bear a 10s. stamp.

An agreement under seal for a lease for a term exceeding 35 years requires a 10s. stamp. *Clayton v. Burtenshaw*, 5 B. & C. 41. If not exceeding 35 years, it bears a lease stamp under sect. 75 (1), *post*, p. 256. *Semb.*, a licence to use a patent, though under seal, does not require a stamp. *Chanter v. Johnson*, 14 M. & W. 408.

See sect. 59 (2), (4), (5), *ante*, p. 250.

*Delivery Order.*

This duty has been abolished by the Finance Act, 1905, 5 E. 7, c. 4, s. 5 (2) and schedule.

*Duplicate.*

“*Duplicate* or *Counterpart* of any instrument chargeable with any duty.

“Where such duty does not amount to 5s.:—the same duty as the original instrument. In any other case:—5s.”

Sect. 72. “The duplicate or counterpart of an instrument chargeable with duty (except the counterpart of an instrument chargeable as a lease, such counterpart not being executed by or on behalf of any lessor or grantor), is not to be deemed duly stamped unless it is stamped as an original instrument, or unless it appears by some stamp impressed thereon that the full and proper duty has been paid upon the original instrument of which it is the duplicate or counterpart.” [S. Act, 1870, s. 93.]

Where two parts of a written agreement are executed at the same time, the one stamped and the other unstamped, the unstamped part, if properly verified, is admissible as secondary evidence of the contents of the stamped part; for, in point of law, it is only used as a memorandum to refresh the mind of the witness. *Waller v. Horsfall*, 1 Camp. 501; *Munn v. Godbold*, 3 Bing. 292; and see *Braythwayte v. Hitchcock*, 10 M. & W. 494, cited *ante*, p. 253. Where, however, both the parts are executed by both parties, the unstamped part is a duplicate original (*vide ante*, p. 3), and, being primary evidence, excludes secondary evidence, but could not itself be put in evidence without being stamped as a duplicate.

*Foreign Instrument.*

*Vide ante*, p. 227.

*Lease.*

*Lease*:—

“(1.) For any definite term not exceeding a year:—

“Of any dwelling-house or part of a dwelling-house, at a rent not exceeding the rate of 10*l.* per annum:—1*d.*

“(2.) For any definite term less than a year:—

“(a.) Of any furnished dwelling-house or apartments where the rent for such term exceeds 25*l.*:—2*s.* 6*d.*

“(b.) Of any lands, tenements, or heritable subjects except, or otherwise than as aforesaid:—the same duty as a lease for a year at the rent reserved for the definite term.

“(3.) For any other definite term or for any indefinite term; of any lands, tenements, or heritable subjects—

“Where the consideration, or any part of the consideration, moving either to the lessor or to any other person, consists of any money, stock, or security: in respect of such consideration:—the same duty as a conveyance on a sale for the same consideration.

“Where the consideration, or any part of the consideration is any rent:

in respect of such consideration :—if the rent, whether reserved as a yearly rent or otherwise, is at a rate or average rate :

		If the term does not exceed 35 years, or is indefinite.			If the term exceeds 35 years, but does not exceed 100 years.			If the term exceeds 100 years.		
		£	s.	d.	£	s.	d.	£	s.	d.
Not exceeding 5 <i>l.</i> per annum	- -	0	0	6	0	3	0	0	6	0
Exceeding—										
5 <i>l.</i> and not exceeding 10 <i>l.</i>	- -	0	1	0	0	6	0	0	12	0
10 <i>l.</i> „ „ 15 <i>l.</i>	- -	0	1	6	0	9	0	0	18	0
15 <i>l.</i> „ „ 20 <i>l.</i>	- -	0	2	0	0	12	0	1	4	0
20 <i>l.</i> „ „ 25 <i>l.</i>	- -	0	2	6	0	15	0	1	10	0
25 <i>l.</i> „ „ 50 <i>l.</i>	- -	0	5	0	1	10	0	3	0	0
50 <i>l.</i> „ „ 75 <i>l.</i>	- -	0	7	6	2	5	0	4	10	0
75 <i>l.</i> „ „ 100 <i>l.</i>	- -	0	10	0	3	0	0	6	0	0
100 <i>l.</i>										
For every full sum of 50 <i>l.</i> and also for any fractional part of 50 <i>l.</i> thereof	- -	0	5	0	1	10	0	3	0	0

“(4.) Of any other kind whatsoever not hereinbefore described :—10*s.*”

It was held under the earlier Acts that where the lease was for 45 years at a substantial rent for the first 23 years, and at a peppercorn during the remaining 22, the lowest scale applied; *Pearson v. Inl. Rev. Coms.*, L. R., 3 Ex. 242; but under the present Act it seems that, for the calculation of the duty, the average of the rent has to be taken for the whole term.

*Agreement for lease.*] Sect. 75. (1.) An agreement for a lease, or with respect to the letting of any lands, tenements, &c., for any term not exceeding 35 years, or for any indefinite term, is to be charged with the same duty as if it were an actual lease made for the term and consideration mentioned in the agreement. (2.) A lease made subsequently to, and in conformity with, such an agreement duly stamped, is to be charged with the duty of 6*d.* only. [S. Act, 1870, s. 96.]

Sect. 76 relates to the calculation of the duty where the consideration consists of produce or goods.

Sect. 77. (1.) A lease, or agreement for a lease, or with respect to any letting, is not to be charged with any duty in respect of any penal rent, or increased rent in the nature of a penal rent, thereby reserved or agreed to be reserved or made payable, or by reason of being made in consideration of the surrender or abandonment of any existing lease or agreement of or relating to the same subject-matter.

“(2.) A lease made for any consideration or considerations in respect whereof it is chargeable with *ad valorem* duty, and in further consideration either of a covenant by the lessee to make, or of his having previously made, any substantial improvement of or addition to the property demised to him, or of any covenant relating to the matter of the lease, is not to be charged with any duty in respect of such further consideration.

“(3.) No lease for a life or lives not exceeding three, or for a term of years determinable with a life or lives not exceeding three, and no lease for a term absolute not exceeding 21 years, granted by an ecclesiastical



corporation aggregate or sole, is to be charged with any higher duty than 35s." [S. Act, 1870, s. 98.]

(5.) An instrument whereby the rent reserved by any other instrument duly stamped as a lease is increased, is chargeable only as a lease made in consideration of the additional rent thereby made payable. [39 & 40 V. c. 16, s. 11.]

*Adhesive Stamp.*] Sect. 78 (1). "The duty upon an instrument chargeable with duty as a lease or tack of—(a) Any dwelling-house or part of a dwelling-house for a definite term not exceeding a year, at a rent not exceeding the rate of 10*l.* per annum, or (b) Any furnished dwelling-house or apartments for any definite term less than a year; and upon the duplicate or counterpart of any such instrument, may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is first executed." [S. Act, 1870, s. 99.]

*Decisions on lease stamps.*] The Act makes no distinction as to whether a written lease is under seal or not. *Goodtitle d. Eastwick v. Way*, 1 T. R. 735.

Where a lease contained a demise of two farms with two different *habendums* and separate reservations of rents and covenants, some applying to one farm and some to another, one *ad valorem* stamp for the amount of both rents was held sufficient. *Blount v. Pearman*, 1 N. C. 408; *Parry v. Deare*, 5 Ad. & E. 551. As to what payments in the lease of a tramway are rent, see *British Electric Traction Co. v. Inl. Rev. Coms.*, *infra*.

An instrument purporting to grant a freehold lease; *Stone v. Rogers*, 2 M. & W. 443; *Zimble v. Abrahams*, (1903) 1 K. B. 577, C. A., or a term of years exceeding three; *Parker v. Taswell*, 2 De G. & J. 559; 27 L. J., Ch. 812; *Bond v. Rosling*, 1 B. & S. 371; 30 L. J., Q. B. 127; *Rollason v. Leon*, 7 H. & N. 73; 31 L. J., Ex. 96; *Tidey v. Mollett*, 16 C. B., N. S. 298; 33 L. J., C. P. 235; *Stranks v. St. John*, L. R., 2 C. P. 376; but which was ineffectual for want of a seal, could only operate as an agreement, and therefore did not require a lease stamp, but it required an agreement stamp, and when the term does not exceed 35 years the stamp is now the same as on a lease (see sect. 75 (1), *ante*, p. 256). A mere attornment does not require a stamp. *Doe d. Linsay v. Edwards*, 5 Ad. & E. 95; *Acc. Barry v. Goodman*, 2 M. & W. 768. The stamp formerly required was regulated by the consideration (whether fine or rent) *expressed* to be paid, and not by that which was actually paid; *Doe d. Kettle v. Lewis*, 10 B. & C. 673; but under the present Act this seems to be otherwise. A lease containing an agreement to take the fixtures cannot be given in evidence without a lease stamp, though only used in an action for the value of the fixtures, and though it has an agreement stamp. *Corder v. Drakeford*, 3 Taunt. 382. A lease containing a distinct agreement, not ancillary to the lease, requires stamps of both kinds. *Lovelock v. Frunklyn*, 8 Q. B. 371; *Coster v. Cowling*, 7 Bing. 456. But where there is a lease with an agreement contained in it, giving the lessee the option of purchasing the premises within a certain time, only a lease stamp is necessary. *Worthington v. Warrington*, 5 C. B. 356. An agreement by the lessees in the lease of a tramway to take electrical energy from the lessor to the value of not less than 400*l.* a year, is within sect. 77 (2). *British Electric Traction Co. v. Inl. Rev. Coms.*, (1902) 1 K. B. 441, C. A. Where there was a written lease to A., and an agreement at the end of it by a third person B., to guarantee to the lessor the payment of moneys to become due from A. to him under the provisions of the lease, a lease stamp and also an agreement stamp were held necessary, B. not being a party to the rest of the instrument. *Wharton v. Wulton*, 7 Q. B. 474. An instrument, not under seal, whereby conservators agree to grant permission, during their pleasure, for the erection of a jetty in their river, subject to the

payment to them of a yearly sum, while it is there, requires only a 6*d.* agreement stamp. *Conservators of R. Thames v. Inl. Rev. Coms.*, 18 Q. B. D. 279.

A lease made by the landlord to a vendee of the party, to whom he had agreed to grant it, must recite and be charged upon the consideration paid on the sale to the vendee. *A.-G. v. Brown*, 3 Exch. 662. Under the Stamp Act, 1891, it is liable to double duty: *i.e.*, the duty as on a lease to the vendor, and the duty as on a sale by him to the vendee.

A lease at a yearly rent of an incorporeal hereditament, *e.g.* a right of sporting, is chargeable with an *ad valorem* lease stamp. *Lowther v. Inl. Rev. Coms.*, Nov. 27, 1900, Q. B. D., Highmore, Stamp Laws, 2nd ed. p. 156. But a contract between A. and a telephone company for the supply to A. of telephonic communication by means of wires and apparatus to be kept in order by the company for a definite period in consideration of annual payments made by A. is not a lease within the schedule. *Jones v. Id.*, (1895) 1 Q. B. 484. Nor is a contract to allow an automatic machine to stand at a railway station, where the company may from time to time direct, at a yearly rent. *Sweetmeat, &c. Co. v. Id., Id.* *Seem* "lease" in the schedule refers only to leases of land and tenements. S. CC. See also *National Telephone Co. v. Id.*, (1899) 1 Q. B. 250, C. A.; (1900) A. C. 1, D. P.

#### *Legacy Receipt.*

See *Receipt, post*, p. 272.

#### *Letters of Administration.*

See *Probate, post*, p. 269.

#### *Letter of Allotment, Scrip Certificate, &c.*

"*Letter of allotment and letter of renunciation*, or any other document having the effect of a letter of allotment:—(1.) Of any share of any company or proposed company; (2.) In respect of any loan raised, or proposed to be raised by any company or proposed company, or by any municipal body or corporation; (3.) Issued or delivered in the United Kingdom, of any share of any foreign or colonial company or proposed company, or in respect of any loan raised or proposed to be raised by or on behalf of any foreign or colonial state, government, municipal body, corporation, or company:—1*d.* By 62 & 63 V. c. 9, s. 9 (1), "where the nominal amount which is allotted or to which the letter of renunciation relates is not less than 5*l.*," the duty is now 6*d.*; and (2), "a separate duty shall be chargeable in respect of letters of allotment and letters of renunciation, although they may be contained in the same document."

"*Scrip certificate, scrip*, or other document:—(1.) Entitling any person to become the proprietor of any share of any company or proposed company; (2.) Issued or delivered in the United Kingdom, and entitling any person to become the proprietor of any share of any foreign or colonial company or proposed company; (3.) Denoting or intended to denote, the right of any person as a subscriber in respect of any loan raised or proposed to be raised by any company or proposed company, or by any municipal body or corporation; (4.) Issued or delivered in the United Kingdom, and denoting, or intended to denote, the right of any person as a subscriber in respect of any loan raised or proposed to be raised by or on behalf of, any foreign or colonial state, government, municipal body, corporation, or company:—1*d.*"

By sect. 79 (1), the stamp duties of 1*d.* and 6*d.* respectively "on a letter of renunciation may be denoted by an adhesive stamp, which is to be cancelled by the person to whom the letter of renunciation is executed." [43 & 44 V. c. 20, s. 56.]

## Letter of Attorney.

“Letter, or power of attorney, and commission, faculty, mandate, or other instrument in the nature thereof:

“(1.) For the sole purpose of appointing or authorizing a proxy to vote at any one meeting at which votes may be given by proxy, whether the number of persons named in such instrument be one or more:—1*d.*

“(3.) For the receipt of the dividends or interest of any stock:

“Where made for the receipt of one payment only:—1*s.*

“In any other case:—5*s.*

“(4.) For the receipt of any sum of money, or any bill of exchange or promissory note for any sum of money not exceeding 20*l.*, or any periodical payments not exceeding the annual sum of 10*l.* (not being hereinbefore charged):—5*s.*

“(5.) For the sale, transfer, or acceptance of any of the Government or Parliamentary stocks or funds”:

Where the nominal amount of the stocks or funds does not exceed 20*l.*—2*s.* 6*d.* (58 & 59 V. c. 16, s. 11).

“In any other case:—10*s.*

“(6.) Of any kind whatsoever not hereinbefore described:—10*s.*”

*Exemptions.*] “(1.) Letter or power of attorney for the receipt of dividends of any definite and certain share of the Government or Parliamentary stocks or funds producing a yearly dividend less than 3*l.* (2.) Letter or power of attorney or proxy filed in the Probate Division of the High Court of Justice in England or Ireland, or in any ecclesiastical court. (3.) Order, request or direction under hand only from the proprietor of any stock to any company or to any officer of any company, or to any banker, to pay the dividends or interest arising from the stock to any person therein named.”

Sect. 81. “A letter or power of attorney for the sale, transfer, or acceptance of any of the Government or Parliamentary stocks or funds, duly stamped for that purpose, is not to be charged with any further duty by reason of containing an authority for the receipt of the dividends on the same stocks or funds.”

*Voting paper, adhesive stamp, &c.*] Sect. 80. “(1.) Every letter or power of attorney for the purpose of appointing a proxy to vote at a meeting, and every voting paper, hereby respectively charged with the duty of 1*d.*, is to specify the day upon which the meeting at which it is intended to be used is to be held, and is to be available only at the meeting so specified, and any adjournment thereof. (2.) The duty of 1*d.* may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is executed, and a letter or power of attorney or voting paper charged with the duty of 1*d.* is not to be stamped after the execution thereof by any person.” (3.) A penalty is imposed on every person making or voting under a letter or power of attorney or voting paper, not being duly stamped, and every vote given or tendered under the authority or by means of the letter, &c., shall be void. [S. Act, 1870, s. 102.]

Where a company, with the notice of a meeting, sent each of its members a proxy form and a circular asking him for a proxy in favour of a resolution to be proposed at the meeting, and some returned the proxies stamped and signed, but with the day of meeting in blank, it was held that the secretary might fill in the date before they were used. *Ernest v. Loma Gold Mines*, (1897) 1 Ch. 1, C. A. So when even the date of the meeting was uncertain. *Sudgrove v. Bryden*, (1907) 1 Ch. 318.

The prohibition in sect. 80 (2) is confined to the *Id.* stamp, the proxy paper may be stamped with a 10s. stamp after execution. *In re English, &c., Bank*, (1893) 3 Ch. 385, C. A.

Voting papers used under 45 & 46 V. c. 50, ss. 14, 60, at the meeting of the town council of a municipal borough for the election of an alderman do not require a stamp under this act. See *R. v. Strachan*, L. R., 7 Q. B. 463, decided under 7 W. 4 & 1 V. c. 78, ss. 13, 14.

### *Loan Capital.*

By 62 & 63 V. c. 9, s. 8.—(1.) “Where any local authority, corporation, company, or body of persons formed or established in the United Kingdom propose to issue any loan capital they shall, before the issue thereof, deliver to the commissioners a statement of the amount proposed to be secured by the issue.

“(2.) Subject to the provisions of this section every such statement shall be charged with an *ad valorem* stamp duty of 2s. 6d. for every 100*l.* and any fraction of 100*l.* over any multiple of 100*l.* of the amount proposed to be issued, and the amount of the duty shall be a debt due to Her Majesty.

“(3.) The duty under this section shall not be charged to the extent to which it is shown to the satisfaction of the commissioners that the stamp duty payable in respect of a mortgage or marketable security has been paid on any trust deed or other document securing the loan capital proposed to be issued,” *vide post*, p. 262.

“(5.) In this section the expression ‘loan capital’ means any debenture stock, county stock, corporation stock, municipal stock, or funded debt, by whatever name known, or any capital raised by any local authority, corporation, company, or body of persons formed or established in the United Kingdom, which is borrowed, or has the character of borrowed money, whether it is in the form of stock or in any other form,” . . . “and the expression ‘local authority’ includes any county council, municipal corporation, district council, dock trustees, harbour trustees, or other local body by whatever name called.”

As to when the issue takes place, and when the statement is to be delivered under sub-sect. (1) see *A.-G. v. Liverpool Cor.*, (1902) 1 K. B. 411. The section applies where there has been a consolidation of the debenture stocks of a railway company, bearing different rates of interest by the issue in exchange thereof to the holders of each of such stocks, a new debenture stock paying an equal amount of interest. *A.-G. v. Regent's Canal & Docks Co.*, (1904) 1 K. B., 263, C. A.

### *Marketable Security.*

The schedule as amended by 56 & 57 V. c. 7, s. 4 (1), and 61 & 62 V. c. 46, s. 7 (3), imposes the following stamp duties:—

(1.) *Marketable security* (a) being a colonial government security or (b) being a security not transferable by delivery or (c) being a security transferable by delivery and bearing date or signed before or on the 6th August, 1885—for or in respect of the money thereby secured—the same *ad valorem* duty according to the nature of the security as upon a mortgage, *vide post*, p. 262.

(2.) *Transfer, Assignment, Disposition, or Assignment* of a marketable security of any description:—

Upon a sale thereof, see *Conveyance or transfer on sale, ante*, p. 249.

Upon a mortgage thereof, under hand only, see sect. 23, *post*, p. 263, by deed, see *Mortgage, post*, p. 262.

In any other case than a sale or mortgage, 10s.

(3.) Marketable security (except a colonial government security) being a security transferable by delivery and bearing date or signed or offered for subscription after the 6th August, 1885—for every 10*l.*, and also for any fractional part of 10*l.* of the money thereby secured 1s.

(4.) Marketable security (except a colonial government security) being such security as last aforesaid given in substitution for a like security duly stamped in conformity with the law in force at the time when it became subject to duty—for every 20*l.*, and also for any fractional part of 20*l.*, of the money thereby secured, 6*d.*

(5.) and (6.) are repealed by stat. 56 & 57 V. c. 7, s. 4 (1).

*Definition of Marketable Security.*] S. Act, 1891, s. 122. “The expression ‘marketable security’ means a security of such a description as to be capable of being sold in any stock market in the United Kingdom.”

Sect. 82. (1.) Marketable securities for the purpose of the charge of duty thereon include—(a.) A marketable security, made or issued by or on behalf of any company or body of persons corporate or unincorporate formed or established in the United Kingdom; and (b.) a marketable security by or on behalf of any foreign state or government, or foreign or colonial municipal body, corporation, or company (hereinafter called a foreign security), bearing date or signed after the 3rd June, 1862; (i.) which is made or issued in the United Kingdom, or (ii.) which, though originally issued out of the United Kingdom, has been, after the 6th August, 1885, or is offered for subscription, and given or delivered to a subscriber in the United Kingdom, or (iii.) which, the interest thereon being payable in the United Kingdom, is assigned, transferred, or in any manner negotiated in the United Kingdom; and (c.) a marketable security by or on behalf of any colonial government which if the borrower were a foreign government would be a foreign security (hereinafter called a colonial government security). [34 & 35 V. c. 4, s. 2.] (2.) is repealed by stat. 56 & 57 V. c. 7, s. 4 (2).

By 62 & 63 V. c. 9, s. 4.—(1.) “There shall be charged on every marketable security made or issued by or on behalf of any foreign state or government, or foreign or colonial municipal body, corporation, or company, being a security transferable by delivery, which (a) is after 1st August, 1899, assigned, transferred, or in any manner negotiated in the United Kingdom, and (b) is not, under the law existing at the passing of this act, chargeable with stamp duty as a marketable security transferable by delivery,” a stamp duty of 1s. for every 10*l.*, and also for any fractional part of 10*l.* of the money thereby secured.

(2.) “There shall be charged on every instrument to bearer, not being a share warrant or stock certificate to bearer charged under the foregoing provision, by means of which any share or stock of any company or body of persons formed or established out of the United Kingdom is, after 1st August, 1899, assigned, transferred, or in any manner negotiated in the United Kingdom, a stamp duty of 3*d.* for every 25*l.*, and also for every fractional part of 25*l.* of the nominal value of the share or stock.”

Sub-sect. (4), *post*, p. 275, defines the terms “share warrant” and “stock certificate.”

By sect. 6. “For the purposes of this part of this act” (*i.e.*, sects. 4–14) “an instrument used for the purpose of assigning, transferring, or in any manner negotiating the right to any marketable security, share, or stock shall, if delivery thereof is by usage treated as sufficient for the purpose of a sale on the market, whether that delivery constitutes a legal assignment, transfer, or negotiation or not, be deemed a marketable security transferable

by delivery, or an instrument to bearer, as the case may be, and the delivery thereof an assignment, transfer, or negotiation."

By stat. 58 & 59 V. c. 16, s. 14, in the case of certain foreign securities on payment of the stamp duty, actual stamping may be dispensed with.

By stat. 60 & 61 V. c. 24, s. 8, county council or municipal bills payable not more than 12 months from their date although charged on property, &c., are to be stamped as promissory notes and not as marketable securities.

A security is "issued" when the company part with the possession and control of it, it being then in a perfect state. *Grenfell v. Inl. Rev. Comrs.*, 1 Ex. D. 242; explained in *Baring v. Inl. Rev. Comrs.*, (1898) 1 Q. B. 78, 90, 92, C. A.

Where bonds of a foreign company executed abroad, and then delivered to a trustee, T., for the bondholders, contained a declaration that they should not be valid until certified by T., and he in England certified and handed them to the bondholders, the bonds were held to be made and issued in England, S. C.; affirm. in D. P., *sub nom. Ld. Revelstoke v. Id.*, (1898) A. C. 565. See further as to the issue of bonds and their offer for subscription *Brown v. Id.* and *Gordon v. Id.*, 84 L. T. 71, Mich. Sit., 1900, C. A.

Instruments in the form of promissory notes issued by an American railway company, payable with interest in England, and each containing a statement that it is one of a series secured by a deposit of bonds held under a trust deed, are, if dealt in on the London Stock Exchange, to be stamped as marketable securities. *Brown, Shipley & Co. v. Id.*, (1895) 2 Q. B. 598, C. A. So are foreign treasury notes payable to bearer, with interest coupons attached issued in a series and so dealt in, although no property is hypothesized to them as security. *Speyer Bros. v. Id.*, (1907) 1 K. B. 246, C. A.

As to the giving of a security "in substitution" within sched. (4) *ante*, p. 261, see *Mount Lyell, &c., Co. v. Inl. Rev. Coms.*, (1905) 1 K. B. 161, C. A.

### Memorial.

"*Memorial* to be registered pursuant to any act for the time being in force relating to the public registering of deeds in England or Ireland."

"Where the instrument registered is chargeable with any duty not amounting to 2s. 6d.:—The same duty as the registered instrument.

"In any other case:—2s. 6d."

### Mortgage.

"*Mortgage, bond, debenture, covenant* (except a marketable security otherwise specially charged with duty), and *warrant of attorney* to confess and enter up judgment.

"(1.) Being the only or principal or primary security, other than an equitable mortgage, for the payment or repayment of money not exceeding 10*l.*—3*d.*; exceeding 10*l.* and not exceeding 25*l.*—8*d.*; exceeding 25*l.* and not exceeding 50*l.*—1*s.* 3*d.*; 50*l.* and not 100*l.*—2*s.* 6*d.*; 100*l.* and not 150*l.*—3*s.* 9*d.*; 150*l.* and not 200*l.*—5*s.*; 200*l.* and not 250*l.*—6*s.* 3*d.*; 250*l.* and not 300*l.*—7*s.* 6*d.*; exceeding 300*l.*—for every 100*l.*, and also for any fractional part of 100*l.* of the amount secured, 2*s.* 6*d.*

"(2.) Being a collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage), or by way of further assurance for the above-mentioned purpose where the principal or primary security is duly stamped—for every 100*l.*, and also for any fractional part of 100*l.*, of the amount secured:—6*d.*;" but by 3 E. 7, c. 46, s. 7, this duty is not to exceed 10*s.*

"(3.) Being an equitable mortgage" (*vide* sect. 86 (2), *post*, p. 264), "for every 100*l.* and any fractional part of 100*l.* of the amount secured—1*s.*"

"(4.) *Transfer, assignment, disposition, or assignation* of any mortgage, bond, debenture, or covenant" (except a marketable security), "or of any money or stock secured by any such instrument, or by any warrant of attorney to enter up judgment, or by any judgment:—for every 100*l.*, and also for any fractional part of 100*l.*, of the amount transferred, assigned, or disposed, exclusive of interest which is not in arrear:—6*d.*; and also where any further money is added to the money already secured:—the same duty as a principal security for such further money."

"(5.) *Re-conveyance, release, discharge, surrender, re-surrender, warrant to vacate, or renunciation* of any such security as aforesaid, or of the benefit thereof, or of the money thereby secured—for every 100*l.*, and also for any fractional part of 100*l.*, of the total amount or value of the money at any time secured:—6*d.*"

*Mortgages under hand only on deposit of share warrants, &c.*] By sect. 23. (1.) "Every instrument under hand only (not being a promissory note or bill of exchange), given upon the occasion of the deposit of any share warrant, or stock certificate to bearer, or foreign or colonial share certificate, or any security for money transferable by delivery, by way of security for any loan, shall be deemed to be an agreement, and shall be charged with duty accordingly.

"(2.) Every instrument under hand only (not being a promissory note or bill of exchange), making redeemable or qualifying a duly stamped transfer, intended as a security, of any registered stock or marketable security, shall be deemed to be an agreement and shall be charged with duty accordingly.

"(3.) A release or discharge of any such instrument shall not be chargeable with any *ad valorem* duty."

*Definition of Mortgage.*] Sect. 86. (1.) "For the purposes of this act the expression, 'mortgage,' means a security by way of mortgage for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable, or for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be; and includes—(a) conditional surrender by way of mortgage, further charge," . . . "of or affecting any lands, estate, or property, real or personal" . . . "whatsoever: and

"(c) Any conveyance of any lands, estate, or property whatsoever in trust to be sold or otherwise converted into money, intended only as a security, and redeemable before the sale or other disposal thereof, either by express stipulation or otherwise, except where the conveyance is made for the benefit of creditors generally, or for the benefit of creditors specified who accept the provision made for payment of their debts in full satisfaction thereof, or who exceed five in number: and

"(d) Any defeasance," . . . "declaration, or other deed or writing for defeating or making redeemable or explaining or qualifying any conveyance, transfer disposition," . . . "of any lands, estate, or property whatsoever, apparently absolute but intended only as a security: and

"(e) Any agreement (other than an agreement chargeable with duty as an equitable mortgage), contract, or bond accompanied with a deposit of title-deeds for making a mortgage," . . . "or any other security or conveyance as aforesaid of any lands, estate, or property comprised in the title-deeds, or for pledging or charging the same as a security" [S. Act, 1870, s. 105]: "and

"(g) Any deed operating as a mortgage of any stock or marketable security.

"(2.) For the purpose of this act the expression 'equitable mortgage' means an agreement or memorandum under hand only relating to the deposit of any title-deeds or instruments constituting or being evidence of the title to any property whatever (other than stock or marketable security), or creating a charge on such property." [51 & 52 V. c. 8, s. 15 (1).]

Sect. 87. (1.) A security for the transfer or retransfer of stock, and a transfer, &c., of such security is chargeable with the same duty as if the instrument were in respect of money equal to the value of the stock.

"(2.) A security for the payment of any rentcharge, annuity, or periodical payments, by way of repayment, or in satisfaction or discharge of any loan, advance, or payment intended to be so repaid, satisfied, or discharged, is to be charged with the same duty as a similar security for the payment of the sum of money so lent, advanced, or paid.

"(3.) A transfer of a duly stamped security and a security by way of further charge for money or stock, added to money or stock previously secured by a duly stamped instrument, is not to be charged with any duty by reason of its containing any further or additional security for the money or stock transferred or previously secured, or the interest or dividends thereof, or any new covenant, proviso, power, stipulation, or agreement in relation thereto, or any further assurance of the property comprised in the transferred or previous security." [S. Act, 1870, s. 109.]

"(4.) Where any copyhold or customary lands or hereditaments are mortgaged alone by means of a conditional surrender or grant, the *ad valorem* duty is to be charged on the surrender or grant, if made out of court, or the memorandum thereof, and on the copy of court roll of the surrender or grant, if made in court." [S. Act, 1870, s. 110.] (5.) Where such lands are mortgaged with other property for securing the same money, &c., the *ad valorem* duty shall be on the instrument relating to the other property, and neither of the other instruments last above mentioned shall be charged with a higher duty than 10s.

(6.) A mortgage is not chargeable with further duty because the equity of redemption is conveyed or limited in any other manner than to a purchaser.

By sect. 88 (1.) Where the security is for payment of future advances, or a sum to become due on an account current with other without past advance, then if the ultimate amount secured is limited, the duty is on a security for the maximum amount. (2.) Where there is no such limit, the security is to be available only for the amount covered by the stamp impressed [S. Act, 1870, s. 107 (1, 2)]; but where any advance has been made in excess of that amount, the security for the purpose of stamp duty be deemed to be a new and separate instrument dated on the day when such advance was made. (3.) Provided that premiums for fire or life assurance policies, or fines for renewal of leases on the dropping of lives, when these relate to the security, are not to be charged with *ad valorem* duty.

[*Decisions on stamps on mortgages, &c.*] Where title-deeds were deposited by way of equitable mortgage, a mere memorandum stating the object of such deposit required no stamp; *Meek v. Bayliss*, 31 L. J., Ch. 448; nor an instrument reciting a *past* deposit, but not made for the purpose of creating a charge. *Pyle v. Partridge*, 15 M. & W. 20; see also *Fancourt v. Thorne*, 9 Q. B. 312. But such memoranda would seem to be liable to duty under sect. 86 (2), *supra*. A pledge of goods, as a bill of lading, is not within it. *Harris v. Birch*, 9 M. & W. 591. So, a memorandum



of the deposit of goods with a contingent power of sale does not require a mortgage stamp. *Re Attenborough*, 11 Exch. 461; S. C. *sub nom. Attenborough v. Inl. Rev. Coms.*, 25 L. J., Ex. 22. Where a deed is in substance a transfer of an existing mortgage, although in point of law the old debt and equity of redemption are extinguished, it need be stamped as a transfer only. *Wale v. Inl. Rev. Coms.*, 4 Ex. D. 270. An instrument issued by a company, not under seal, purporting on its face to be a "debenture," and containing an engagement to pay the amount thereof to P. W. A., or order, and also to pay interest to the holder on presentation of the coupons attached, is chargeable as a debenture and not as a promissory note. *British India St. Nav. Co. v. Inl. Rev. Coms.*, 7 Q. B. D. 165. See also *Speyer Bros. v. Inl. Rev. Coms.*, *ante*, p. 263. A deed whereby, in consideration of an advance made by U. to L., L. agreed to execute a mortgage or charge, in such form as U. should request, of all L.'s interest in certain property to secure repayment of the advance with interest, is chargeable as a mortgage, &c. *United Realization Co. v. Inl. Rev. Coms.*, (1899) 1 Q. B. 361. Where a company issues a series of debentures of 100*l.* each, redeemable, on notice by the company, at 103*l.*, stamp duty is payable on 100*l.* only. *Knight's Deep v. Id.*, (1900) 1 Q. B. 167, C. A. As to an auxiliary security, or by way of further assurance within *Mortgage, &c.*, (2) *ante*, p. 262, see *British Oil, &c. v. Inl. Rev. Coms.*, (1903) 1 K. B. 689, C. A. The sale of a perpetual annuity is not within sect. 87 (2), but is chargeable as a conveyance on sale. *Mersey Docks, &c., Board v. Id.*, *ante*, p. 251. Debentures issued by a company charged on its property, to be exchanged for its stamped debentures previously issued and similarly charged, are not within sect. 87 (3), and must be stamped. *City of London Brewery Co. v. Id.*, (1899) 1 Q. B. 121, C. A. On an indenture whereby redeemable debenture stock was secured, an instrument was indorsed and signed by the trustees for the debenture holders, acknowledging that the stock and interest thereon had been "redeemed, paid off and satisfied;" this is not a "discharge" within Sched. (5) *ante*, p. 263, but merely a receipt. *Frith & Sons v. Inl. Rev. Coms.*, (1904) 2 K. B. 205.

*Exemptions.*] By the general exemption (2) at the end of the schedule (*ante*, p. 250), instruments for the mortgage of a ship or vessel, or any share therein, are free from all stamp duty.

By 35 & 36 V. c. 93, s. 24, a special contract pawn-ticket, or its duplicate, in respect of a loan by a pawnbroker, above 40*s.* and not exceeding 10*l.*, requires no stamp.

Mortgages given to the trustees of building societies, established under 6 & 7 W. 4, c. 32, were by that act exempted from stamp duty. But by the Stamp Act, 1891, s. 89, this exemption was limited to mortgages made by members to secure sums not exceeding 500*l.*, and has, as to such societies incorporated under the Building Societies Act, 1874 (37 & 38 V. c. 42), been wholly repealed by *Id.*, ss. 7, 41. The receipt indorsed on a mortgage to a Building Society operating as a reconveyance under *Id.*, sect. 42, is by sect. 41 exempted from duty. *Old Battersea, &c. Building Society v. Inl. Rev. Coms.*, (1898) 2 Q. B. 294. The Friendly Societies Act, 1875 (38 & 39 V. c. 60), s. 15 (2, *d.*), does not exempt from duties, securities on which the funds of a friendly society are invested. See *Re R. Liver Friendly Society*, L. R., 5 Ex. 78. A conveyance by debtor to trustees in trust to sell and with the proceeds to discharge, first, debts due to the trustees and then debts due to other creditors, with a resulting trust for the original debtors, is within the exception in the Stamp Act, 1891, s. 86 (c), *ante*, p. 263. *Coates v. Perry*, 3 B. & B. 48.

A transfer of a mortgage to effect an appointment of new trustees is not,

by sect. 62 (*ante*, p. 249), to bear a higher stamp than 10s. See *Foley, Id. v. Inl. Rev. Coms.*, L. R., 3 Ex. 263.

### *Policies of Insurance.*

*Definitions.*] Sect. 91. "For the purposes of this act the expression 'policy of insurance' includes every writing whereby any contract of insurance is made, or agreed to be made, or is evidenced, and the expression 'insurance' includes assurance." [S. Act, 1870, s. 117 (1).]

*Sea insurance.*] *Policy of sea insurance*—(1.) Where the premium or consideration does not exceed the rate of 2s. 6d. per centum of the sum insured, *1d.*

(2.) In any other case—(a.) For or upon any voyage—in respect of every full sum of 100*l.*, and also any fractional part of 100*l.* thereby insured, *3d.*;

(b.) For time—in respect of every full sum of 100*l.*, and also any fractional part of 100*l.* thereby insured—where the insurance shall be made for any time not exceeding six months, *3d.*; where the insurance shall be made for any time exceeding six months and not exceeding twelve months, *6d.*

By 1 E. 7 c. 7, s. 11 (2) where a time policy contains a "continuation clause" *vide Id.* (4) *infra* there is a further duty of 6*d.* on the policy.

*Definition, &c.*] By sect. 92. (1.) For the purposes of this act the expression "policy of sea insurance" means any insurance (including re-insurance) made upon any ship or vessel, or on the machinery, tackle, or furniture thereof, or upon any goods, &c., on board, or upon the freight, or any other interest which may be lawfully insured in or relating to any ship or vessel, and includes any insurance of goods, &c., for any transit which includes not only a sea risk, but also any other risk incidental to the transit insured. [30 & 31 V. c. 23, s. 4.]

(2.) Where any person, in consideration of any sum for additional freight or otherwise, agrees to take any risk attending goods, &c., while on board any ship or vessel, or to indemnify the owner of the goods from any risk, loss, or damage, the agreement is to be deemed a contract for sea insurance. [30 & 31 V. c. 23, s. 12.]

By sect. 94, where the insurance is made for a voyage, and also for time, or to extend to or cover any time beyond 30 days after the ship shall have arrived at her destination, and there be moored at anchor, the policy is made chargeable with both voyage and time policy duty. [30 & 31 V. c. 23, s. 11.]

By 1 E. 7 c. 7, s. 11 (4) a "continuation clause" means an agreement "that in the event of the ship being at sea or the voyage otherwise not completed on the expiration of the policy, the subject matter of the insurance shall be held covered until the arrival of the ship or for a reasonable time thereafter not exceeding 30 days."

By sect. 95 (1.) a policy of sea insurance may not be stamped after it is signed, or underwritten by any person; except in the case—

(a.) Of mutual insurances not underwritten to an extent beyond that which the stamps already impressed warrant.

(b) Policies executed abroad chargeable with duty, *vide post*, p. 268. [30 & 31 V. c. 23, s. 9.]

Provided that a sea policy may be stamped after execution, the penalty being 100*l.* (*vide ante*, p. 229). [39 & 40 V. c. 6, s. 2.]

By 1 E. 7, c. 7, s. 11 (3), "if the risk covered by the continuation clause," *vide Id.* s. 11 (4) *supra*, "attaches and a new policy is not issued covering the risk the continuation clause shall be deemed to be a new and separate contract of sea insurance expressed on the policy in which it is

contained, but not covered by the stamp thereon, and the policy shall be stamped in respect of that contract accordingly, but may be so stamped without penalty at any time not exceeding 30 days after the risk has so attached."

Sect. 97, (2.) "Every broker, agent, or other person negotiating or transacting any sea insurance contrary to the true intent and meaning of this Act, or writing any policy of sea insurance upon material not duly stamped, shall for every such offence incur a" penalty, "and shall not have any legal claim to any charge for brokerage, commission, or agency, or for any money expended or paid by him with reference to the insurance, and any money paid to him in respect of any such charge shall be deemed to be paid without consideration, and shall remain the property of his employer." [30 & 31 V. c. 23, ss. 14, 16.] See *Roderick v. Hovil*, 3 Camp. 103.

*Form of Policy.*] Sect. 93 (1.) "A contract for sea insurance" (other than such insurance as is referred to in stat. 25 & 26 V. c. 63, s. 55, *vide infra*) "shall not be valid unless the same is expressed in a policy of sea insurance.

(2.) "No policy of sea insurance made for time shall be made for any time exceeding 12 months." As to the period now, see 1 E. 7, c. 7, s. 11 (1), *post*, p. 268.

(3.) "A policy of sea insurance shall not be valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and is made for a period not exceeding 12 months." [30 & 31 V. c. 23, s. 7.]

This section, read with the definition clause, sect. 91, *ante*, p. 266, now replaces 35 G. 3, c. 63, s. 2, which was similar in its terms. It was sufficient if the name of the underwriting firm was expressed in the policy. *Reid v. Allan*, 4 Exch. 326; *Dowdall v. Allan*, 19 L. J., Q. B. 41. And where each of the parties in a secret partnership underwrites in his own name, on account of the partnership, this is a compliance with the Act. *Brett v. Beckwith*, 26 L. J., Ch. 130. But a policy issued by the A. A. Association for mutual insurance, signed by the managers "*per proc.* of the several members of the A. A. Association for insuring each other's ships," the members liable being a fluctuating body, is void, for the policy does not state the names of the underwriters. *In re Arthur Average Assoc.*, L. R., 10 Ch. 542. Where an agent has insured goods in his own name on behalf of his principal, the latter is entitled to sue on the policy, although it does not show that the agent was insuring as such. *De Vignier v. Swanson*, 1 B. & P. 346, n.; followed in *Browning v. Provincial Insurance Co. of Canada*, L. R., 5 P. C. 263. But it must be proved that the policy was effected on behalf of the plaintiff. *Watson v. Swan*, 11 C. B., N. S. 756; 31 L. J., C. P. 210; *Boston Fruit Co. v. British &c. Marine Insur. Co.*, (1906) A. C. 336, D. P. The statute applies to agreements of mutual insurance. *Smith's case*, L. R., 4 Ch. 611; *In re Arthur Average Assoc.*, *supra*. As to what is sufficient description of the risk, see *Edwards v. Aberayron Mutual Ship Insur. Soc.*, 1 Q. B. D. 563. A defence arising from non-compliance with this section must now be pleaded specially. Rules, 1883, O. xix. r. 20, *post*, p. 310. The 25 & 26 V. c. 63, s. 55, now replaced by 57 & 58 V. c. 60, s. 506, to the same effect (see sect. 745 (c)), has reference to the following events, occurring without the actual fault or privity of the owners of the ship, *viz.*:—(a) loss of life or personal injury caused to any person carried in any ship; (b) damage or loss caused to any goods, merchandise, or other things whatsoever on board any ship; (c) loss of life or personal injury caused to any person carried in any other ship or boat by reason of the improper navigation of any ship; (d) loss or damage caused to any other ship or boat, or to any goods, merchandise, or other

things whatsoever on board any other ship or boat, by reason of the improper navigation of any ship.

By 1 E. 7, c. 7, s. 11 (1) a sea policy may contain a "continuation clause," *vide Id.* (4) *ante*, p. 266, and shall then not be invalid, on the ground only that by reason thereof, the policy may be available for more than 12 months.

By 3 E. 7, c. 46, s. 8, a policy on a ship or its machinery or fittings whilst under construction or repair or on trial may be stamped as a voyage policy though made for a time exceeding 12 months, and shall not be deemed a time policy.

*Effect of Slip.*] An insurance slip, when initialled by an insurance company or underwriters, is, in the ordinary course of business, treated as a contract to insure and to issue a policy in accordance with the slip; sects. 92, 93 (*ante*, pp. 266, 267), however, prevent it from being used as evidence of such a contract, and the contract is therefore only binding in honour; *Fisher v. Liverpool Marine Insurance Co.*, L. R., 9 Q. B. 418, Ex. Ch.; see *Home Marine Insur. Co. v. Smith*, (1898) 2 Q. B. 351, C. A.; but the slip is admissible in evidence for any other purpose, *e.g.*, to show the intention of the parties as to what risk was undertaken by the underwriters. *Ionides v. Pacific, &c., Insurance Co.*, L. R., 6 Q. B. 674; L. R., 7 Q. B. 517, Ex. Ch.; *Lishman v. N. Maritime Insur. Co.*, L. R., 8 C. P. 216; L. R., 10 C. P. 179, Ex. Ch. See also *Cory v. Patton*, L. R., 7 Q. B. 304; and L. R., 9 Q. B. 577, and 6 E. 7, c. 41, ss. 21, 89, *post*, p. 418. Apart from the initialling of the slip, there is no contract by an insurance company to forward the copy slip and to issue the policy. *Fisher v. Liverpool Marine Insur. Co.*, *supra*. A slip cannot be stamped after execution. *Home Marine Insur. Co. v. Smith*, (1898) 1 Q. B. 829.

*Executed abroad.*] By sect. 95, (1 *b*), a policy of sea insurance "made or executed out of, but being in any manner enforceable within, the United Kingdom, may be stamped at any time within *ten days* after it has been first received in the United Kingdom on payment of the duty only." [S. Act, 1870, s. 117 (2).]

*Alterations.*] By sect. 96, "nothing in this act shall prohibit the making of any alteration which may lawfully be made in the terms and conditions of any policy of sea insurance after the policy has been underwritten; provided that the alteration be made before notice of the determination of the risk originally insured, and that it do not prolong the time covered by the insurance thereby made beyond the period of six months, in the case of a policy made for a less period than six months, or beyond the period of twelve months in the case of a policy made for a greater period than six months, and that the articles insured remain the property of the same person or persons; and that no additional or further sum be insured by reason or means of the alteration." [30 & 31 V. c. 23, s. 10.]

The following cases were decided under 35 G. 3, c. 63, s. 13, now repealed, the provisions of which much resembled the above section. A mere extension of the time of sailing is within the above clause, and the alteration requires no new stamp. *Kensington v. Inglis*, 8 East, 273; *Brocklebank v. Sugrue*, 1 B. & Ad. 81. So a memorandum waiving the warranty of seaworthiness. *Weir v. Aberdeen*, 2 B. & A. 325. But where a policy on "a ship and outfit" was altered by inserting "ship and goods," it was held to require a new stamp, and to be void against the underwriters, though they had assented to the alteration. *Hill v. Patten*, 8 East, 373.

The Marine Insurance Act, 1906, 6 E. 7, c. 41, does not affect the provisions of the Stamp Acts, see sect. 91, *post*, p. 417.

*Life insurance.*] *Policy of life insurance*—Where the sum insured does not exceed 10*l.*—1*d.*; exceeds 10*l.* but does not exceed 25*l.*—3*d.*; exceeds 25*l.* but does not exceed 500*l.*—for every full sum of 50*l.*, and also for any fractional part of 50*l.*, of the amount insured, 6*d.*; exceeds 500*l.* but does not exceed 1,000*l.*—for every full sum of 100*l.*, and also for any fractional part of 100*l.*, of the amount insured, 1*s.*; exceeds 1,000*l.*—for every full sum of 1,000*l.*, and also for any fractional part of 1,000*l.*, of the amount insured, 10*s.*”

By sect. 98. (1.) “For the purposes of this act the expression ‘policy of life insurance’ means a policy of insurance upon any life or lives or upon any event or contingency relating to or depending upon any life or lives except a policy of insurance against accident.” See *Prudential Assur. Co. v. Inl. Rev. Coms.*, (1904) 2 K. B. 658.

By sect. 118 (1.), no assignment of such policy shall give the assignee any right to sue for the moneys assured, or to give a valid discharge therefrom, unless the assignment be duly stamped.

*Fire and accident insurance.*] *Policy of insurance against accident and policy of insurance for any payment agreed to be made during the sickness of any person, or his incapacity from personal injury, or by way of indemnity against loss or damage of or to any property:—1d.*

By sect. 98, for the purposes of this act, the expression “policy of insurance against accident” means a policy of insurance for any payment agreed to be made upon the death of any person only from accident or violence or otherwise than from a natural cause, or as compensation for personal injury, and includes any notice or advertisement in a newspaper or other publication which purports to insure the payment of money upon the death of or injury to the holder or bearer of the newspaper or publication containing the notice, only from accident or violence or otherwise than from a natural cause. [52 & 53 V. c. 42, s. 20.] (2.) A policy of insurance against accident is not to be charged with any further duty than 1*d.* by reason of the same extending to any payment to be made during sickness or incapacity from personal injury. [53 & 54 V. c. 8, s. 20.]

By sect. 99, this duty of 1*d.* may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the policy is first executed. [S. Act, 1870, s. 119.]

By stat. 58 & 59 V. c. 16, s. 13, “a policy of insurance for any payment agreed to be made during the sickness of any person or his incapacity from personal injury” . . . “includes a notice or advertisement in a newspaper or other publication which purports to insure such payment.”

By 62 & 63 V. c. 9, s. 11, the provisions contained in sect. 98, *supra*, “in reference to the expression ‘policy of insurance against accident’ shall extend to and include policies of insurance or indemnity against liability incurred by employers in consequence of claims made upon them by workmen who have sustained personal injury when the annual premium on such policies does not exceed 1*l.*” In other cases such policies are not policies of insurance against accident within the schedule. See *Lancashire Insur. Co. v. Inl. Rev. Coms.*, (1899) 1 Q. B. 353.

#### *Power of Attorney.*

See *Letter of attorney*, *ante*, p. 259.

#### *Probate and Letters of Administration.*

These duties were not affected by the Stamp Act, 1891. They were formerly payable on the instruments themselves, but under the Customs and

Inland Revenue Act, 1881 (44 & 45 V. c. 12), Part III., by which they are now regulated, they are, by sect. 27, payable instead on the affidavit received from the person applying for probate, &c.; and by sect. 30, the probate, &c., bears a certificate showing that the affidavit has been delivered duly stamped and stating the gross value of the estate and effects as shown by the account. By sect. 26, the probate, &c., having thereon such a certificate, "shall for all purposes be deemed to have been duly stamped in respect of the value stated in the certificate," and the provisions of former acts relating to probates, &c. (see 55 Geo. 3, c. 184, Part III.), so far as they are consistent with the provisions of this act, apply to the duties on affidavits imposed by this act.

By 57 & 58 V. c. 30, s. 1 and sched., probate, &c., duty is replaced by estate duty which is paid in like manner on the above-mentioned affidavit; sect. 6. The rates of duty are *ad valorem*; they are given in sect. 17. The rate applicable is determined by the whole value of the property passing on the death; sects. 2, 7. The value is calculated at the time of the testator's death, sect. 7 (5); an allowance being made for funeral expenses, debts and incumbrances; sect. 7 (1).

The duty attaches on all property (sect. 1), within the jurisdiction, whatever was the domicile of the deceased. See *Partington v. A.-G.*, L. R., 4 H. L. 100; *Fernandes' Executors' case*, L. R., 5 Ch. 314. As to what goods are within the jurisdiction, see *A.-G. v. Pratt*, L. R., 9 Ex. 140; *Stern v. The Queen*, (1896) 1 Q. B. 211.

The insufficiency of the stamp on the probate to cover the amount sued for was a fatal objection. *Doe d. Richards v. Evans*, 10 Q. B. 476; *Hunt v. Stevens*, 3 Taunt. 113; *Carr v. Roberts*, 2 B. & Ad. 905. And it seems that now where the certificate on the probate, &c., shows that stamp duty has been paid on a less amount of gross estate than that sued for the plaintiff cannot recover. 2 Wms. Exors., 10th ed. p. 1531. The objection must however be taken as early as possible at the hearing of the cause, and is too late after the document has been received in evidence without objection. *Robinson v. Vernon, Ltd.*, 7 C. B., N. S. 235; 29 L. J., C. P. 310, cited *ante*, p. 230.

Probate was admissible in evidence though not stamped within six months. *Lacy v. Rhys*, 4 B. & S. 873, Ex. Ch.

#### *Promissory Note.*

See *Bank note, Bill of Exchange, &c.*, *ante*, pp. 238, 239.

#### *Protest and Notarial Act.*

"*Protest* of any bill of exchange or promissory note:—

"Where the duty on the bill or note does not exceed 1s.:—the same duty as the bill or note. In any other case:—1s.

"*Notarial act* of any kind whatsoever (except a protest of a bill of exchange or promissory note):—1s."

*Adhesive stamp.*] Sect. 90. "The duty upon a notarial act, and upon the protest by a notary public of a bill of exchange or promissory note, may be denoted by an adhesive stamp, which is to be cancelled by the notary." [S. Act, 1870, s. 116.]

#### *Proxy.*

See *Letter of attorney, ante*, p. 259.

*Receipt.*

“*Receipt* given for, or upon the payment of, money amounting to 2*l.* or upwards:—*Id.*”

*Exemptions.*] “(1.) Receipt given for money deposited in any bank, or with any banker, to be accounted for and expressed to be received of the person to whom the same is to be accounted for. (2.) Acknowledgment by any banker of the receipt of any bill of exchange or promissory note for the purpose of being presented for acceptance or payment. (3.) Receipt given for or upon the payment of any parliamentary taxes or duties, or of money to or for the use of Her Majesty.”

“(7.) Receipt given for any principal money or interest due on an exchequer bill.”

(9.) Receipt given upon any bill or note of the Bank of England or of Ireland. (10.) Receipt given for the consideration money for the purchase of any share in any of the Government stocks or funds, or in India stocks, or bank stock, or for any dividend paid on any share of the said stocks or funds respectively. (11.) “Receipt indorsed or otherwise written upon or contained in any instrument liable to stamp duty, and duly stamped, acknowledging the receipt of the consideration money therein expressed, or the receipt of any principal money, interest or annuity thereby secured or therein mentioned.” Other exemptions relate to payments made by various departments of the government.

Exemption (8.) “Receipt written upon a bill of exchange or promissory note duly stamped,” or upon a bill drawn under the authority of the Admiralty, upon the Accountant General of the navy, was repealed by 58 & 59 V. c. 16, s. 9 (1), which provides “that neither the name of a banker (whether accompanied by words of receipt or not), written in the ordinary course of his business as a banker upon a bill of exchange or promissory note duly stamped, nor the name of a payee written upon a draft or order, if payable to order shall constitute a receipt chargeable with stamp duty.”

The exemptions are extended by 61 & 62 V. c. 46, s. 8 to “(14.) Receipt given by an officer of a county court for money received by him from a party to any proceeding in the court,” and to “(15.) Receipt given by or on behalf of a clerk to justices or a magistrate, for money received in respect of a fine.”

*Definition of receipt.*] Sect. 101. (1.) “For the purposes of this act the expression ‘receipt’ includes any note, memorandum, or writing whereby any money amounting to 2*l.* or upwards, or any bill of exchange or promissory note for money amounting to 2*l.* or upwards, is acknowledged or expressed to have been received, or deposited, or paid, or whereby any debt or demand, or any part of a debt or demand, of the amount of 2*l.* or upwards, is acknowledged to have been settled, satisfied, or discharged, or which signifies or imports any such acknowledgment, and whether the same is or not signed with the name of any person.” [S. Act, 1870, s. 120.]

*Adhesive stamp.*] Sect. 101. (2.) “The duty upon a receipt may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the receipt is given before he delivers it out of his hands.” [S. Act, 1870, s. 121.]

*Penalty for stamping.*] Sect. 102. “A receipt given without being stamped may be stamped with an impressed stamp upon the terms following,

that is to say:—(1.) Within 14 days after it has been given, on payment of the duty and a penalty of 5*l.*; (2) After 14 days, but within one month, after it has been given, on payment of the duty and a penalty of 10*l.*; and shall not in any other case be stamped with an impressed stamp.” [S. Act, 1870, s. 122.]

*Legacy receipt.*] By 36 G. 3, c. 52, s. 27, no evidence may be given of payment of the legacy without producing the stamped receipt, or giving proof of the actual payment of the duty; but a copy of the entry in the books of the Commissioners of the stamps, of the payment of such duty, shall be admitted as evidence thereof. This section has a special provision with regard to the duty payable on annuities bequeathed.

It was held that the copy here referred to was an examined copy; and that a copy made and signed by the Comptroller of Stamps was not admissible in evidence under the above section; *Harrison v. Borwell*, 10 Sim. 380; but such copy would now be evidence under 14 & 15 V. c. 99, s. 14, *ante*, p. 101.

By 36 G. 3, c. 52, s. 29; 48 G. 3, c. 149, s. 44; and 55 G. 3, c. 184, Sched. Part III., receipts for legacies may be stamped with the amount of legacy duty payable thereon, without penalty, within 21 days after they are signed; they may be stamped afterwards on payment of the duty, and a penalty of 10*l.* per cent. on the duty.

*Decisions on receipts.*] In referring to decisions before 1871, it must be borne in mind that the provisions of the Stamp Act, 1891, as to receipts, are much more comprehensive than those prior to the Stamp Act, 1870. An acknowledgment of having received acceptances, with an undertaking to provide for them, has been held to require a receipt stamp. *Scholey v. Walsby*, Peake, 24. So a bill of parcels, subscribed “settled by two bills, one at nine, the other at twelve months,” was held by Ld. Ellenborough to be an acquittance which could not be evidence unless stamped. *Smith v. Kelly*, Peake, 25, n.; S. C. (ill-reported), 4 Esp. 249. So the word “settled” under a bill. *Spawforth v. Alexander*, 2 Esp. 621. So when on payment to a bank B., by a solicitor S., of sums of money recovered by him for B., entries made by S., in a book kept by him, of the amounts so paid by him were from time to time initialled by B.’s clerk, who received the money, with or without the word “settled,” these acknowledgments were held to require stamps. *A.-G. v. Carlton Bank*, (1899) 2 Q. B. 158, *cor.* Ld. Russell, C.J. The signature by a counsel on his brief acknowledging the payment of the fee, requires a stamp. *General Council of the Bar v. Ind. Rev. Coms.*, (1907) 1 K. B. 462. “Memorandum. That any demand we have against G. W. for ironwork is this day discharged in consideration of services rendered by him to us: our account shall be delivered with a stamped receipt,”—requires a stamp. *Livingstone v. Whiting*, 15 Q. B. 722. An account containing acknowledgments of sums received, made at successive times upon the payment of the money, requires a stamp; it differs from an account current, where the sums stated to be received are not written in the account at and upon the receipt of the money, but long after, and only amount to admissions of money received at an antecedent time. *Wright v. Shawcross*, 2 B. & A. 501, n. See *Jacob v. Lindsay*, 1 East, 460; *Hawkins v. Warre*, 3 B. & C. 690. A mere acknowledgment, not of the payment of money, but of a sum due and owing (as an I O U, signed by the party), requires no receipt stamp. *Fisher v. Leslie*, 1 Esp. 426; *Israel v. Israel*, 1 Camp. 499; *Childers v. Boulnois*, D. & Ry. N. P. S. And such an acknowledgment, though in form a receipt (being in fact for money received long before), requires no stamp: thus, “Received by B. T. 170*l.*, for which I promise to pay at the rate of 5*l.* per cent.” (signed), is neither a receipt nor promissory note, nor



an agreement of the value of 20*l.* *Taylor v. Steele*, 16 M. & W. 665. Where it is made solely to avoid the Statute of Limitations, it is expressly exempted from an agreement stamp. 9 G. 4, c. 14, s. 8, ante, p. 234. An instrument in these terms, "Mr. T. has left in my hands 200*l.*;" *Tomkins v. Ashby*, 6 B. & C. 541; or in these, "I have in my hands three bills which amount to 120*l.* 10*s.* 6*d.*, which I have to get discounted or return on demand;" *Mullett v. Huchison*, 7 B. & C. 639; or in these, "Mr. M. has this day left me 10*l.* on account of debt, interests, and costs," *Levy v. Alexander*, 4 Exch. 485, requires no stamp. So, the acknowledgment of the correctness of an account, containing a statement of sums advanced and disbursements made, has been held to require no stamp. *Wellard v. Moss*, 1 Bing. 134. So, "balancing up to this day. S. F., 19 Nov.," written on the back of an unstamped receipt, is evidence against S. F. of an admission of the state of account on that day, though the receipt itself is not admissible. *Finney v. Tootel*, 5 C. B. 504. And an unstamped receipt at the foot of a debtor and creditor account, signed by the party who received the balance, is evidence against him of the state of the account, the payment not being disputed. *Matheson v. Ross*, 2 H. L. C. 286. A receipt is not inadmissible as such, because it notices the terms and consideration upon which the money was paid. *Watkins v. Hewlett*, 1 B. & B. 1. Nor because it contains subsequent matter of agreement and has no agreement stamp; *Odye v. Cookney*, 1 M. & Rob. 517; unless the agreement controls or qualifies what goes before, when the paper will be inadmissible without an agreement stamp. *Grey v. Smith*, 1 Camp. 387. Receipts for instalments of the price of shares paid under the terms of the allotment letter are, if written on the duly stamped letter, within exemption 11. *L. & Westminster Bank v. Inl. Rev. Comrs.*, (1900) 1 Q. B. 167, C. A., see also *Firth & Sons v. Id.*, (1904) 2 K. B. 205. Where the indorsements of receipts on a bond have left no blank spaces for receipts of subsequent payments, such receipts written on an unstamped piece of paper annexed to the bond are within exemption 11. *Orme v. Young*, 4 Camp. 336. It should be noticed that although exemption 8, as to receipts written on stamped bills and notes, is repealed, such receipts fall under exemption 11.

#### Release.

"Release or renunciation of any property, or of any right or interest in any property:—

"Upon a sale. See *Conveyance on Sale*," ante, p. 249.

"By way of security. See *Mortgage, &c.*," ante, p. 262.

"In any other case:—10*s.*"

A receipt for compensation paid by a railway company to a mineral owner under 8 & 9 V. c. 20, s. 78, is not a release "upon a sale" and is liable to the duty of 10*s.* only. *Gt. N. Ry. Co. v. Inl. Rev. Comrs.*, (1899) 2 Q. B. 652; (1901) 1 K. B. 416, C. A. The term "renunciation" here refers only to certain Scotch documents. S. C., (1899) 2 Q. B. 666, 671.

#### Scrip Certificate, Scrip, &c.

See *Letter of allotment*, ante, p. 258.

#### Settlement.

"Settlement. Any instrument, whether voluntary or upon any good or valuable consideration, other than a *bonâ fide* pecuniary consideration, whereby any definite and certain principal sum of money (whether charged

or chargeable on lands or other hereditaments or heritable subjects or not, or to be laid out in the purchase of lands or other hereditaments or heritable subjects or not), or any definite and certain amount of stock, or any security, is settled or agreed to be settled in any manner whatsoever:—for every 100*l.*, and also for any fractional part of 100*l.*, of the amount or value of the property settled or agreed to be settled:—5*s.*”

*Exemption.*] “Instrument of appointment relating to any property in favour of persons specially named or described as the objects of a power of appointment, where duty has been duly paid in respect of the same property upon the settlement creating the power or the grant of representation of any will or testamentary instrument creating the power.” See *Russell v. Inl. Rev. Coms.*, (1902) 1 K. B., 142, C. A.

Sect. 104. “(1.) Where any money which may become due or payable upon any policy of life insurance, or upon any security not being a marketable security, is settled or agreed to be settled, the instrument whereby the settlement is made, or agreed to be made, is to be charged with *ad valorem* duty in respect of that money.

“(2.) Provided as follows:—(a) Where, in the case of a policy, no provision is made for keeping up the policy, the *ad valorem* duty is to be charged only on the value of the policy at the date of the instrument; (b) If in any such case the instrument contains a statement of the said value, and is stamped in accordance with the statement, it is, so far as regards the policy, to be deemed duly stamped, unless or until it is shown that the statement is untrue, and that the instrument is, in fact, insufficiently stamped.” [S. Act, 1870, s. 124.]

See also sects. 105, 106.

A settlement of contingent and reversionary interests only, in certain securities, which may be varied at the discretion of the trustees, is within the schedule. *Onslow v. Inl. Rev. Coms.*, 24 Q. B. D. 584; (1891) 1 Q. B. 239, C. A.

#### *Share Warrant and Stock Certificate to Bearer.*

*Share Warrant* issued under the provisions of “The Companies Act, 1867,” and *Stock Certificate to bearer*:—A duty of an amount equal to three times the amount of the *ad valorem* stamp duty which would be chargeable on a deed transferring the share or shares or stock specified in the warrant or certificate if the consideration for the transfer were the nominal value of such share or shares or stock, *vide ante*, p. 249.

Sect. 108. “For the purposes of this act the expression ‘stock certificate to bearer’ includes every stock certificate to bearer issued after the 3rd day of June, 1881, under the provisions of the Local Authorities Loans Act, 1875, or of any other act authorizing the creation of debenture stock, county stock, corporation stock, municipal stock, or funded debt, by whatever name known.” [44 & 45 V. c. 12, s. 46.]

By 62 & 63 V. c. 9, s. 5 (1), this stamp duty on share warrants “shall extend to any instrument to bearer issued by or on behalf of any company or body of persons formed or established in the United Kingdom and having a like effect as such a share warrant, and the stamp duty charged on stock certificates to bearer as ‘above defined’ shall extend to any instrument to bearer issued by or on behalf of any company or body of persons formed or established in the United Kingdom, and having a like effect as such a stock certificate to bearer.”

By sect. 4 (1), there shall be charged “on every share warrant or stock

certificate to bearer by means of which any share or stock of any company or body of persons formed or established out of the United Kingdom is, after" August 1st, 1899, "assigned, transferred, or in any manner negotiated in the United Kingdom, a stamp duty of 1s. for every 10*l.*, and also for any fractional part of 10*l.*, of the nominal value of the share or stock to which the warrant or certificate relates." . . . (4.) For the purposes of this section—(a) the expression "share warrant to bearer" includes any instrument, by whatever name called, having the like effect as a share warrant issued under the provisions of the Companies Act, 1867; and (b) the expression "stock certificate to bearer" includes any instrument, by whatever name called, having the like effect as a stock certificate to bearer.

See also sect. 4 (2), *ante*, p. 261.

*Surrender.*

"*Surrender*—of copyholds. See *Copyhold*," *ante*. p. 253.

"Of any other kind whatsoever not chargeable with duty as a conveyance on sale or mortgage:—10*s.*"

Where some of the executors of a tenant from year to year signed an instrument "renouncing and disclaiming, and also surrendering and yielding up" to the landlord all right, title, &c., in the premises; and the landlord thereupon brought ejectment; held that such instrument was a surrender and not a disclaimer, and therefore could not be put in evidence for the plaintiff without a surrender stamp. *Doe d. Wyatt v. Stagg*, 5 N. C. 564.

*Transfer of Shares in Cost-Book Mine.*

"*Transfer*. Any request or authority to the purser or other officer of any mining company, conducted on the cost-book system, to enter or register any transfer of any share, or part of a share, in any mine, or any notice to such purser or officer of any such transfer:—6*l.*"

*Adhesive stamp.*] Sect. 110. (1) This duty "may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the request, authority, or notice is written or executed." [S. Act, 1870, s. 128 (1).]

The cost-book mine companies referred to in this Act are certain unregistered companies or partnerships, within the Stannaries of Devon and Cornwall. Such companies elsewhere must, if consisting of more than twenty members, be registered and incorporated under the Companies Act, 1862, see sect. 4. Whether the company be such a cost-book company is a question of fact and not a matter of law. See *ante*, p. 83. As to what constitutes such a company, see the Introductory Notice to Procedure of the Stannary Court, ed. 1856, and *Collier on Mines*, 2nd ed., Ch. 3; and the Stannaries Act, 1869 (32 & 33 V. c. 19). The written request, or notice mentioned in the Stamp Act, 1891, is the usual (but not the only) form of transfer of shares in such a mine. See *Toll v. Lee*, 4 Exch. 230, cited *ante*, p. 252, where the mine was, in fact, a cost-book mine.

*Warrant of Attorney.*

"*Warrant of attorney* to confess and enter up a judgment given as a security for the payment or repayment of money, or for the transfer or re-transfer of stock. See *Mortgage, &c.*," *ante*, p. 262.

"*Warrant of attorney* of any other kind:—10*s.*"

## Warrant for Goods.

Warrant for goods:—3d.

*Exemptions.*] “(1.) Any document or writing given by an inland carrier acknowledging the receipt of goods conveyed by such carrier. (2.) A weight note issued together with a duly stamped warrant, and relating solely to the same goods, wares, or merchandise.”

*Definition.*] Sect. 111, “(1.) For the purposes of this act the expression ‘warrant for goods’ means any document or writing, being evidence of the title of any person therein named, or his assigns, or the holder thereof, to the property in any goods, wares, or merchandise lying in any warehouse or dock, or upon any wharf, and signed or certified by or on behalf of the person having the custody of the goods, wares, or merchandise.”

*Adhesive stamp.*] Sect. 111. (2.) The duty may be denoted by an adhesive stamp which is to be cancelled by the person by whom the instrument is made, executed, or issued. [S. Act, 1870, ss. 88, 89.]

## COURSE OF EVIDENCE AND PRACTICE AT NISI PRIUS.

Prior to the C. L. P. Act, 1854, trials were always held before a judge and jury. Under sect. 1 of that Act, a trial might by consent of the parties and leave of court take place before a judge alone. Now under Rules, 1883, O. xxxvi. r. 7, the mode of trial is in general by a judge without a jury; provided that in any such case the court or a judge may at any time order any cause, matter, or issue to be tried by a judge with a jury or by a judge sitting with assessors or by an official referee with or without assessors. By r. 2, in actions of slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage, either party is entitled on notice to have a trial by jury. By r. 3, causes or matters assigned by the J. Act, 1873, s. 34, to the Chancery Division, shall be tried by a judge without a jury unless the court or a judge shall otherwise order. By r. 4, “the court or a judge may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact or partly of fact and partly of law arising in any cause or matter which previously to the passing of the” J. Act, 1873, “could without any consent of parties have been tried without a jury.” By r. 5, “the court or a judge may direct the trial without a jury of any cause, matter, or issue requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot in their or his opinion conveniently be made with a jury.” By r. 6, “in any other cause or matter upon the application *within 10 days after notice of trial has been given* of any party thereto for a trial with a jury of the cause or matter, or any issue of fact, an order shall be made for a trial with a jury.” By r. 8, “subject to the provisions of the preceding rules of this order the court or a judge may in any cause or matter at any time, or from time to time, order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others, and may appoint the places for such trials, and in all cases may order that one or more issues of fact be tried before any other or others.” By r. 9, “every trial of any question or issue of fact with a jury shall be by a single judge unless such trial be specially ordered to be by two or more judges.” The words in italics in r. 6 were added by R. S. C., December, 1885, r. 11.

Trials before referees are subject to the provisions of the Arbitration Act, 1889, ss. 13-16 (which replace the J. Act, 1873, ss. 57, 58), *post*, pp. 280 *et seq.*, where the decisions on these sections are collected.

Before whichever tribunal the cause is tried the rules of practice at the trial are nearly the same.

The following was the course of practice before the C. L. P. Act, 1854:—When the jury was sworn, the junior counsel for the plaintiff opened the pleadings; after which, if the proof of the issue rested on the plaintiff, the senior counsel stated the case to the jury, and after witnesses had been examined in support of it, the counsel for the defendant was heard. If he called any witness, the plaintiff's counsel had the general reply.

By Rules, 1883, O. xxxvi. r. 36 (which replace the C. L. P. Act, 1854, s. 18, in similar terms), it is provided that, "upon a trial with a jury, the addresses to the jury shall be regulated as follows: the party who begins, or his counsel, shall be allowed at the close of his case, if his opponent does not announce any intention to adduce evidence, to address the jury a second time for the purpose of summing up the evidence; and the opposite party, or his counsel, shall be allowed to open his case, and also to sum up the evidence, if any, and the right to reply shall be the same as heretofore." As to the right to reply, *vide post*, p. 287.

This rule merely allows the defendant's counsel to sum up his evidence, and does not permit the counsel to comment generally on the case; *Gilford v. Davis*, 2 F. & F. 23; but it must be observed that the summing-up usually amounts to a general reply. Where a counsel has not announced his intention to adduce evidence, in consequence of which the party who began sums up his case, he cannot afterwards be permitted to alter his mind and adduce evidence. *Darby v. Ouseley*, 1 H. & N. 1; 25 L. J., Ex. 227. The same course of practice is usually adopted on a trial before a judge alone; *Metzler v. Wood*, 47 L. J., Ch. 139, one counsel only being heard on questions of fact; *S. C.*; *Conington v. Gilliat*, 1 Ch. D. 694. A trial before a referee is conducted in the same manner as a trial before a judge. Rules, 1883, O. xxxvi. r. 49, *post*, p. 282.

Where there are several issues, some of which are incumbent on the plaintiff and others on the defendant, it is usual for the plaintiff to begin and to prove those which are essential to his case; *Jackson v. Hesketh*, 2 Stark. 521; the defendant then does the same; and the plaintiff is then entitled to go into evidence to controvert the defendant's affirmative proofs. The defendant's counsel is entitled to comment by way of reply upon such last-mentioned evidence in support of his own affirmative; and the plaintiff's counsel has a general reply. Where the judge decides that there is no evidence to go to the jury on the plaintiff's case, his counsel will not be entitled to sum up. *Hodges v. Ancrum*, 11 Exch. 214; 24 L. J., Ex. 257.

It was formerly laid down as a general rule, that when, by pleading or notice, the defence is known, the counsel for the plaintiff is bound to open the whole case in chief and cannot proceed in parts unless some specific fact be adduced by the defendant to which the plaintiff can give an answer; and that he cannot go into general evidence in reply. *Rees v. Smith*, 2 Stark. 31. And this appears to be still the rule where a single fact or transaction forms the whole subject of dispute between the parties on the pleadings, which is affirmed on one side and denied on the other. Thus where the plaintiff's title to a mine was in issue, and the plaintiff relied on *primâ facie* evidence from possession, he was considered not to be entitled to support his case in reply by general evidence of his title. *Rowe v. Brenton*, 3 M. & Ry. 139, 281 (on a trial at bar; but the objection was waived by the defendant); *Lacon v. Higgins*, 3 Stark. 178. But where the defendant traverses, and also justifies, the plaintiff may reserve his case on the justification until the

defendant has proved it. *Brown v. Murray*, Ry. & M. 254, and note *II*. Or he may enter upon the disproof thereof in the first instance; in which case he will not be allowed to give further evidence of the same kind in reply. *Id.*; *Accord. Shaw v. Beck*, 8 Exch. 392. And plaintiff is entitled so to reserve his answer to the defendant's case, although his witnesses have been cross-examined so as to disclose the nature of the defence relied upon. *Id.* So where there are cross-demands, and the defendant pleads a set-off, the plaintiff has the option of proving, in the first instance, the balance only he claims, and after the defendant has proved his set-off, of proving other parts of his account to show that a larger sum was due. *Williams v. Davies*, 1 Cr. & M. 464. Upon the trial of issues in a patent case, the plaintiff was held entitled to call evidence in reply for the purpose of rebutting a case of prior user set up by the defendant. But after the evidence for the defence was summed up, the defendant was not allowed to adduce further evidence in answer to that given by the plaintiff in reply. *Penn v. Jack*, L. R., 2 Eq. 314.

The general rule was recognized in *Jacobs v. Turleton*, 11 Q. B. 421, where, in an action against acceptor, the issue was on the indorsement of a bill to the plaintiff. The plaintiff proved the handwriting of the indorser; the defendant, *à contra*, gave evidence that the plaintiff was too poor to have given value for the bill; that he had disclaimed knowledge of it, and had denied any authority from himself to bring the action: in reply the plaintiff offered proof that he was able to discount, and had in fact discounted the bill; it was held that the proof in reply was merely confirmatory and ought not to have been received. It is observable on the report of this case that neither the evidence in defence nor in reply seems to have been pertinent to the issue: but another report (17 L. J., Q. B. 194) shows that fraud and want of consideration by the plaintiff were also in issue on the record. In *Wright v. Wilcox*, 9 C. B. 650; 19 L. J., C. P. 333, it was held that the plaintiff might, and (*ut semble*) ought to, be allowed to explain by evidence a fact which appears for the first time on the defendant's evidence; and that the judge has a discretion in admitting evidence in reply. And where the judge allowed the plaintiff to put in additional proof of title at the close of the case, and when he was about to sum up, the court above refused to interfere with his discretion. *Doe d. Nicoll v. Bower*, 16 Q. B. 805.

Where a party tenders documentary evidence *primâ facie* admissible, the other party will not, except under the rule mentioned below, be allowed to interpose with evidence for the purpose of excluding it. Thus, where plaintiff tendered an examination of defendant taken before bankruptcy commissioners, the defendant was not permitted to call witnesses to prove, before the examination was read, that it was incomplete, and therefore inadmissible. Such evidence, if not obtained by cross-examination, must be postponed as part of the defendant's case. *Jones v. Fort*, M. & M. 196. But evidence to disprove possession of an instrument, of which secondary evidence is tendered; *Harvey v. Mitchell*, 2 M. & Rob. 366; or to show that a contract about which the witness is questioned is in writing; *Cox v. Couvless*, 2 F. & F. 139, Martin, B.; may be given immediately.

It seems that under Rules, 1883, O. xxxi. r. 15 (*ante*, p. 13), the opposite party may show that the document sought to be put in evidence was referred to in the pleadings or affidavits of the party seeking to put it in, and was not produced on notice, and is therefore inadmissible, unless the non-production be excused under the rule. See *Quilter v. Heatly*, 23 Ch. D. 42, C. A., explaining *Webster v. Whewall*, 15 Ch. D. 120.

Where the judge has expressed an opinion adverse to the admissibility in evidence of a document, the counsel seeking to put it in must formally tender it in evidence and require a note to be taken of the tender, and if this

course is neglected the rejection cannot afterwards be relied on. *Campbell v. Loader*, 34 L. J., Ex. 50.

Both parties are bound by the view taken of their respective cases, and the mode of conducting them, by their counsel at the trial; and they cannot move for a new trial upon grounds omitted to be urged at N. P. See *Doe v. Gord v. Needs*, 2 M. & W. 129; *Henn v. Neck*, 3 Dowl. 163; *Short v. Kalloway*, 11 Ad. & E. 28; *Haslor v. Carpenter*, 3 C. B., N. S. 172; *Macdougall v. Knight*, 14 Ap. Ca. 194, D. P.; *Seaton v. Burnand*, (1900) A. C. 135, D. P. And where counsel offers evidence for one purpose which the judge rejects, he will not, after the trial, be permitted to rely upon it as admissible for another purpose. *R. v. Grant*, 5 B. & Ad. 1081. Nor can he complain of misdirection upon a point which he has, in effect, waived at N. P. *Robinson v. Cook*, 6 Taunt. 336. And misstatement of facts by the judge should be adverted to by counsel at the time, though counsel need not object to the law as laid down by him. *Payne v. Ibbotson*, 27 L. J., Ex. 311. And where evidence has been admitted, without objection, as relevant to the issue, it cannot be objected to as inapplicable after the judge has begun to sum up. *Abbot v. Parsons*, 7 Bing. 563. Where the judge has, in the opinion of counsel, omitted to submit some material point or view of the case to the jury, he ought, it seems, to be reminded of it. *Magor v. Chadwick*, 11 Ad. & E. 584, 585; *Wedge v. Berkeley*, 6 Ad. & E. 663. But counsel will not, it is apprehended, be taken to have acquiesced in the summing-up of the judge in point of law, merely because he has not interposed at the time. See *Hughes v. Gt. W. Ry. Co.*, 14 C. B. 637; 23 L. J., C. P. 153, *per* Cresswell, J. Where the point relied upon by counsel has been distinctly brought under the notice of the judge in the course of the cause, it would be very inconvenient to require that counsel should again advert to it, by way of protest, while the judge is charging the jury.

A party appearing in person must examine the witnesses as well as address the jury. *Shuttleworth v. Nicholson*, 1 M. & Rob. 254. The party in person may conduct his own cause, examine witnesses, and give evidence in his own favour. *Cobbett v. Hudson*, 1 E. & B. 11; 22 L. J., Q. B. 11. But his wife cannot claim to conduct it in his absence. S. C., 15 Q. B. 988. A barrister has no privilege to be heard both personally and by his counsel in his own cause. *Newton v. Chaplin*, 10 C. B. 356; 19 L. J., C. P. 374; *New Brunswick & Canada Ry. & Land Co. v. Conybeare*, 9 H. L. C. 711; 31 L. J. Ch. 297.

The leading counsel has a right, in his discretion, to interpose and take the examination of a witness out of the hands of his junior; but after one counsel has brought the examination to a close, a question cannot regularly be put to the witness by another counsel on the same side. *Doe v. Roe*, 2 Camp. 280.

Counsel for the defendant, in addressing the jury, has no right to ask them whether they are satisfied that defendant is entitled to a verdict as the case stands, without calling witnesses. *Moriarty v. Brooks*, 6 C. & P. 684, *per* Ld. Lyndhurst, C.B.

A judge at N. P. is not bound, at the request of counsel, to put insulated questions to the jury not distinctly raised by the issue on the record, although the verdict may turn upon them; nor is the jury bound to answer them; but with the consent of parties, and where the question is simple and decisive, a judge may in his discretion put it to the jury; *per Cur.* in *Walton v. Potter*, 3 M. & Gr. 411, 433, 444; and it may be proper to do so; as where it is desirable to know on which of several grounds the verdict is given. *Id.* 433. Where distinct and divisible wrongs, *ex. gr.*, several imprisonments under different warrants are complained of, the jury may be directed to make a separate assessment of damages; and this is desirable

where the legality of each warrant stands on a different footing. *Eggington v. Mayor of Lichfield*, 5 E. & B. 100; 24 L. J., Q. B. 360.

*Trial of several causes together.*] Where there are several different actions all depending on the same point—*e.g.*, whether defendant was guilty of negligence whereby each of the several plaintiffs was injured—all the causes may, by consent, be tried together by the same jury; but *semb.* they must be sworn in each of the causes. *Pike v. Polytechnic Institution*, 1 F. & F. 712.

*Trial of several issues separately.*] By Rules, 1883, O. xviii. r. 1, a judge may order the separate trial of causes of action, united in the same action, if they cannot be conveniently tried together. See *Frcan v. Watley*, 4 F. & F. 1038.

*Power to refer.*] Generally, the counsel and attorneys in a cause were at common law presumed to have power to consent to refer the cause at N. P., and the court would not set aside an award made under such order; *Filmer v. Delber*, 3 Taunt. 486; *Faviell v. E. Counties Ry. Co.*, 2 Exch. 344; but enforced it, though the client repudiated the reference and did not attend. *Smith v. Troup*, 7 C. B. 757. But although counsel have this implied power of reference (see *Neale v. Lennox*, (1902) 1 K. B. 843, 849, C. A.), yet where the plaintiff consented to the reference of an action for defamation on the express terms of the withdrawal by the defendant's counsel I., of all imputations against her moral character, but her counsel C. agreed to the reference, omitting by mistake, to require the withdrawal of the imputations, the reference was set aside, although the restriction on C.'s authority was not known to I. S. C. in D. P., (1902) A.C. 465. And as between the attorney and his client, the former might be liable if he referred improperly, or against the will of the latter; and it was certainly inexpedient to refer at N. P. without the consent of parties. And where a party was an infant, *Biddell v. Dowse*, 6 B. & C. 255; or a lunatic, *Cumming v. Ince*, 11 Q. B. 112; there was no adequate authority to refer, so as to bind that party. See cases cited *post*, p. 283.

The Arbitration Act, 1889 (52 & 53 V. c. 49), has repealed the provisions of the C. L. P. Act, 1854, and of the J. Act, 1873, which in some cases gave the judge the power compulsorily to refer an action or some question arising therein to arbitration. The Arbitration Act, 1889, contains similar provisions, but somewhat extends the judge's powers.

By sect. 13 (1) (replacing J. Act, 1873, s. 56), "subject to rules of court and to any right to have particular cases tried by a jury, the court or a judge may refer any question arising in any cause or matter (other than a criminal proceeding by the crown) for inquiry or report to any official or special referee."

By sect. 14 (replacing and extending the powers of C. L. P. Act, 1854, s. 3, and J. Act, 1873, s. 57), "in any cause or matter (other than a criminal proceeding by the crown),—(a) if all the parties interested who are not under disability consent: or, (b) if the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the court or a judge conveniently be made before a jury or conducted by the court through its other ordinary officers: or, (c) if the question in dispute consists wholly or in part of matters of account; the court or a judge may at any time order *the whole cause or matter*, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the court."



By Rules, 1883, O. xxxvi. rr. 46, 47, official referees take references in rotation unless (r. 47), the court or a judge direct a reference to a particular official referee, and the reference is usually so directed at the request of both parties. As to procedure on trial under this Act before a referee, *vide post*, pp. 281 *et seq.*

By Rules, 1883, O. xxxiii. r. 2, "the court or a judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for, or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner."

By J. Act, 1873, s. 66, a judge may order any accounts to be taken or inquiries made in the office of a district registrar for report to the court.

Sect. 13 (1), *ante*, p. 280, allows only a reference of such questions as have already arisen, or are certain to arise in the action. *Weel v. Ward*, 40 Ch. D. 555, C. A. It includes an inquiry by examination of witnesses. *Wenlock, Ly. v. R. Dee Co.*, 19 Q. B. D. 155, C. A.; decided under J. Act, 1873, s. 56. Sect. 14 expressly provides that in the cases mentioned therein, even the *whole cause* may be tried before a referee or arbitrator. It seems that "prolonged examination of documents" in sect. 14 (6), means an examination required by the judge to enable him to leave questions of fact to the jury, and not to determine the legal right. See *Ormerod v. Todmorden Mill Co.*, 8 Q. B. D. 674, 677, *per Brett, L.J.* Under sect 14 (c) an order may be made although in certain events it may become unnecessary to determine the matter of accounts; *Hurlbutt v. Barnett*, (1893) 1 Q. B. 77, C. A.; before making it however, the Court should be satisfied that there is a substantial dispute between the parties and not unlikely to be a matter of account; S. C., *Id.* 80, 81, following *Knight v. Coales*, 19 Q. B. D. 296, C. A. The judge may, under sects. 13, 14, refer any scientific question in issue to an expert agreed on by the parties, for experiment and report to him. *Badische Anilin, &c., Fabrik v. Levinstein*, 24 Ch. D. 156. See also *National Telephone Co. v. Baker*, (1893) 2 Ch. 186, 190.

[*Trial before a referee.*] The Arbitration Act, 1889, s. 13 (1), *ante*, p. 280, enables a judge to refer any question arising in any cause for inquiry or report to any official or special referee.

By sect. 13 (2), "the report of an official or special referee may be adopted wholly or partially by the court or a judge, and if so adopted may be enforced as a judgment or order to the same effect."

In certain cases defined by sect. 14, *ante*, p. 280, the judge may order the whole cause or any question of fact therein to be tried by a referee or arbitrator.

By sect. 15 (1) (replacing J. Act, 1873, s. 58), in all cases of reference to an official or special referee or arbitrator under an order of the court or a judge in any cause or matter, the official or special referee or arbitrator shall be deemed to be an officer of the court, and shall have such authority, and shall conduct the reference in such manner, as may be prescribed by Rules of Court, and subject thereto as the court or judge may direct. (2.) The report or award of any official or special referee or arbitrator on any such reference shall, unless set aside by the court or a judge, be equivalent to the verdict of a jury. (3.) The remuneration to be paid to any special referee or arbitrator to whom any matter is referred under order of the court or a judge shall be determined by the court or a judge.

By sect. 16, "the court or a judge shall, as to references under order of the court or a judge, have all the powers, which are by this Act conferred on the court or a judge as to references by consent out of court." This section refers to sects. 9, 10, 11, which give power to enlarge the time for making

the award, to remit the award, and to set it aside, and also, it seems, to sect. 12, by which "an award on a submission may, by leave of the court or a judge, be enforced in the same manner as a judgment or order to the same effect."

Sect. 19 gives power to state a special case.

The rules in relation to such references are as follows: By O. xxxvi. r. 48, "where any cause or matter, or any question in any cause or matter, is referred to a referee, he may, subject to the order of the court or a judge, hold the trial at or adjourn it to any place which he may deem most convenient, and have any inspection or view, either by himself or with his assessors (if any), which he may deem expedient for the better disposal of the controversy before him. He shall, unless otherwise directed by the court or a judge, proceed with the trial *de die in diem*, in a similar manner as in actions tried with a jury." R. 49: "Subject to any order to be made by the court or judge ordering the same, evidence shall be taken at any trial, before a referee, and the attendance of witnesses may be enforced by subpoena; and every such trial shall be conducted in the same manner, as nearly as circumstances will admit, as trials are conducted before a judge." R. 50: "Subject to any such order as last aforesaid, the referee shall have the same authority with respect to discovery and production of documents, and in the conduct of any reference or trial, and the same power to direct that judgment be entered for any or either party, as a judge of the High Court," (r. 51) except the power to commit or enforce any order. R. 52: "The referee may, before the conclusion of any trial before him, or by his report under the reference made to him, submit any question arising therein for the decision of the court, or state any facts specially, with power to the court to draw inferences therefrom, and in any such case the order to be made on such submission or statement shall be entered as the court may direct; and the court shall have power to require any explanation or reasons from the referee, and to remit the cause or matter, or any part thereof, for re-trial or further consideration to the same or any other referee; or the court may decide the question referred to any referee on the evidence taken before him, either with or without additional evidence as the court may direct."

By O. lix. r. 3, "where a compulsory reference to arbitration has been ordered, any party to such reference may appeal from the award or certificate of the arbitrator or referee upon any question of law; and on the application of any party the court may set aside the award on any ground on which the court might set aside the verdict of a jury. Such appeal shall be to a divisional court who shall have power to set aside the award or certificate, or to remit all or any part of the matter in dispute to the arbitrator or referee, or to make any order with respect to the award or certificate or all or any of the matters in dispute that may be just." The J. Act, 1884, s. 8, extends the provisions of the J. Act, 1873, s. 45, to such appeals, but not to an appeal after a trial before a referee by order under sect. 14, *ante*, p. 280. *Munday v. Norton*, (1892) 1 Q. B. 403, C. A.

A referee has power to fix a peremptory appointment for the hearing. *Wenlock v. R. Dee Co.*, 49 L. T. 617, Mich. S. 1883, C. A. A report under sect. 13, *ante*, pp. 280, 281, requires confirmation, but one under sect. 14, *ante*, p. 280, can only be set aside, like a verdict, on the ground that it is against the weight of evidence. *Mansfield Union v. Wright*, 9 Q. B. D. 686, *per* Jessel, M.R. Where on a reference the referee has directed judgment for the plaintiff under O. xxxvi. r. 52, the Court may on the evidence set it aside and enter judgment for the defendant. *Clark v. Sonnenschein*, 25 Q. B. D. 226, 464, C. A. He is not bound to take accounts sent to him for report in the same way that a chief clerk usually takes them

in the Chancery Div. *In re Taylor*, 44 Ch. D. 128. An award, made under a consent order, to refer an action and all matters in difference is still final. *Darlington Wagon Co. v. Harding*, (1891) 1 Q. B. 245, C. A. As to costs see *Minister v. Apperly*, p. 297.

[*Power to compromise.*] At common law the parties were bound by the "conduct" of the suit in court by their counsel or attorney: thus, in an action of trespass counsel might, in the absence of the parties, consent to the amount of damages; *per* Pollock, C.B., *Thomas v. Harris*, 27 L. J., Ex. 353; and in an action for malicious prosecution the defendant's counsel may also consent to withdraw all imputations from the plaintiff. *Matthews v. Munster*, 20 Q. B. D. 141, C. A. So in an action for libel counsel may consent to the withdrawal of a juror. *Strauss v. Francis*, L. R., 1 Q. B. 279. So, where the party was present and did not dissent from a compromise, he was bound thereby. *Chambers v. Mason*, 5 C. B., N. S. 59; 28 L. J., C. P. 10; *Rumsey v. King*, 33 L. T. 728, Q. B., H. S. 1876. And generally, an attorney acting *bonâ fide*, reasonably, and skilfully, and not having express instructions not to compromise, was justified in doing so. *Per* Ld. Campbell, C.J., *Fray v. Voules*, 1 E. & E. 832; 28 L. J., Q. B. 232; *Chown v. Parrott*, 14 C. B., N. S. 74; 32 L. J., C. P. 197; *Prestwich (or Pristwick) v. Poley*, 18 C. B., N. S. 806; 34 L. J., C. P. 189. Where the plaintiff's attorney, in an action to recover the price of a piano, agreed to settle the action by the return of the piano and payment of costs, the court upheld the compromise. S. C. This principle applies to the solicitor's agent, whether country or London, on the record, although there is no privity between him and the lay client. *In re Newen*, (1903) 1 Ch. 812. The power of counsel or attorney to compromise was much discussed on rules for attachment in the case of *Swinfen v. Swinfen*, 18 C. B. 485; 25 L. J., C. P. 303; 1 C. B., N. S. 364; 26 L. J., C. P. 97. In S. C. in Equity, it was held that neither counsel nor attorney could compromise the suit at N. P.; 24 Beav. 549; 2 De G. & J. 381; 27 L. J., Ch. 35, 491; though the L.J.J. in so deciding declined to lay down any general principle on the subject. See also *Green v. Crockett*, 34 L. J., Ch. 606. It was not suggested in *Matthews v. Munster*, *supra*, that the common law rules above stated were affected by the J. Act, 1873, s. 25 (11), *post*, p. 308. And a counsel has an implied authority to consent to a reference of the action, *vide ante*, p. 280. Consent given by counsel, by the authority of his client, to an order, there being no mistake or surprise, cannot be arbitrarily withdrawn, although the order has not been drawn up. *Harvey v. Croydon Sanitary Authority*, 26 Ch. D. 249, C. A. A compromise may, however, be set aside, *e.g.*, on the ground of mistake or fraud, *Wilding v. Sanderson*, (1897) 2 Ch. 534, C. A. See further *Neale v. Lennox*, (1902) A. C. 473, D. P., *ante*, p. 280. But a fresh action has been held necessary, where the order has been passed and entered, *Ainsworth v. Wilding*, (1896) 1 Ch. 673; but *semble*, not otherwise. *Id.* 680, *per* Romer, J. See, however, (1902) A. C. 473, *per* Ld. Lindley. The compromise will bind, although the solicitor of the party seeking to enforce it did not, when it was made, disclose to the opposite party all the material facts he knew: *Turner v. Green*, (1895) 2 Ch. 205. No compromise entered into by the next friend of an infant plaintiff is valid unless it be for the infant's benefit. Thus, an agreement not to appeal from a nonsuit on the terms of the defendant foregoing costs is invalid, the infant being impecunious. *Rhodes v. Swithebanc*, 22 Q. B. D. 577, C. A. A solicitor has not, before action brought, implied authority to compromise a claim he has been instructed to make. *Macaulay v. Polley*, (1897) 2 Q. B. 122, C. A.

As to what liability a counsel or solicitor incurs to his client by settling an action contrary to his client's wishes, see *Swinfen v. Chelmsford, Ld.*,

5 H. & N. 890; 29 L. J., Ex. 382; *Fray v. Voules*, and *Chown v. Parrott*, ante, p. 283.

*Who is to begin.*] It is often a subject of inquiry whether the plaintiff or the defendant is to open the facts and evidence to the jury. This may be an advantage, and is then claimed as a *right*; as where evidence is anticipated on the opposite side which will give a right to reply generally on the whole case; or it may be a *burden*; as where a party relies on the witness of his opponent, or on the difficulty of the proofs incumbent on him.

The right or obligation to begin generally depends on the nature of the issue, and also on the rules respecting the *onus probandi* at the commencement of the trial (see ante, pp. 94 *et seq.*); and the test has been said to be, not on which side the affirmative lies, but *which side will be entitled to a verdict if no evidence be given*. *Leete v. Gresham Insurance Co.*, 15 Jurist, 1161, Ex. M. T. 1851; Best on Evid., 10th ed., § 268. Thus, where the plaintiff declared for unworkmanlike execution of a contract, and defendant pleaded that it was executed in a workmanlike way, and thereupon issue was joined, it was held that plaintiff was to begin; for it was not to be assumed that the work was bad. *Per Alderson, B., Amos v. Hughes*, 1 M. & Rob. 464. This test, however, is only another way of stating the common rule that he on whom the burden of proof lies must begin; for this must be ascertained before it can be determined which side is entitled to the verdict. As a general rule the proof lies on him who affirms, except in cases where the presumption of law or fact is in favour of the affirmative. It must, however, be borne in mind that regard must be had to the effect and substance of the issue and not to its grammatical form. *Soward v. Leggatt*, 7 C. & P. 615, *per* Ld. Abinger; *Amos v. Hughes*, *supra*.

It will be seen, by a careful comparison of the cases collected below, that the most general criterion that can be given as to the right to begin is, that "he begins who in the absence of proof on either side would substantially fail in the action." This includes those actions for unliquidated damages noticed below, in which the plaintiff must give some evidence in order to get substantial damages, although he would, if no evidence were given on either side, be entitled to a verdict for a nominal amount, for such a verdict would be a substantial failure. See 45 Law Times, pp. 196, 219, on *The Right to begin*.

Where, in an action by indorser against acceptor, defendant pleaded that the bill was for the drawer's accommodation, and that plaintiff did not give any consideration to the drawer, to which plaintiff replied that it was indorsed to him by the drawer for a good consideration: held, that as a consideration is presumed, the defendant must begin by proving the want of it, or some suspicious circumstances to throw the proof on the plaintiff. *Mills v. Barber*, 1 M. & W. 425; *Accord. Lewis v. Parker*, 4 Ad. & E. 838. In a declaration on a policy on a life, the plaintiff averred that the deceased had led a temperate life, which was denied by the plea; held that the *onus probandi*, and therefore the right to begin, was with the plaintiff, as he was bound to give some evidence that the life was insurable, though it was contended that intemperance was not to be presumed. *Huckman v. Fernie*, 3 M. & W. 505; *Accord. Rawlins v. Desborough*, 2 M. & Rob. 70. And the same point was ruled in two other cases in which the issue raised on the plea was respecting the health of the insured; *Geech v. Ingall*, 14 M. & W. 95; *Ashby v. Bates*, 15 M. & W. 589; although the plea, alleging a specific complaint, ended with a verification in the last case. Where an issue on the sanity of a person was directed by Chancery, the court presumed that the person ordered to be plaintiff was to begin. *Frank v. Frank*, 2 M. & Rob. 314.

So, in general, if the affirmative of the issue lie on the defendant, and the

plaintiff do not seek to recover unascertained damages within the rule on that subject presently noticed, the defendant's counsel begins (after the pleadings have been opened by the plaintiff), and has the general reply. *Cotton v. James*, M. & M. 275; *Jackson v. Hesketh*, 2 Stark. 518. So, where *lib. ten.* was pleaded, and no general issue. *Pearson v. Coles*, 1 M. & Rob. 206. So, where the defendant, a constable, being sued in trespass, pleaded a justification without the general issue, it was held, that his counsel, admitting a demand of a copy and perusal of the warrant (24 G. 2, c. 44) *vide post*, p. 1133, and the damages claimed, was entitled to begin. *Burrell v. Nicholson*, *Id.* 305. To trespass *q. c. f.* the defendant pleaded a right to a watercourse and entry to remove obstructions, the plaintiff traversed the right: held, that the judge might properly allow the defendant to begin, unless the plaintiff undertook to prove substantial damage. *Chapman v. Rawson*, 8 Q. B. 673. So, where a defendant in replevin pleads property in a third person, A., and not in the plaintiff, to which the plaintiff replies that the property is not in A., but in the plaintiff, the defendant is entitled to begin. *Colstone v. Hiscolbs*, 1 M. & Rob. 301. And where, to an action of covenant for repayment of money, the defendant pleaded that the deed was given to secure money lost by gambling, it was ruled that the defendant was entitled to begin. *Hill v. Fox*, 1 F. & F. 136.

But where by order of court the defendant is under an obligation to admit the plaintiff's case, this does not necessarily deprive the plaintiff of his right to begin. *Thwaites v. Sainsbury*, 5 C. & P. 69. Nor does the admission by the defendant's counsel of all the facts, the proof of which are on the plaintiff, give the defendant the right to begin, where the admission of these facts might have been made in pleading. *Pontifex v. Jolly*, 9 C. & P. 202; *Price v. Seaward*, Car. & M. 23.

In many cases where damages, and not the decision of a mere right, have been the object of an action, defendants used so to plead as to take an affirmative issue on themselves, and thereby attempt to exclude the plaintiff's right to a general reply. The judges, however, came to a resolution that "In actions for libel, slander, and injuries to the person, the plaintiff shall begin, although the affirmative issue is on the defendant." *Mercer v. Whall*, *per* Ld. Denman, C.J., 5 Q. B. 447, 462. The resolution, however, is not to be taken as confined to those actions, or introducing a new practice, but as declaratory of a principle applicable to other actions. See *Id.* 456, 463. The general rule, therefore, as laid down in this case, is, that wherever the record shows that something, even damages only, is to be proved by the plaintiff, he ought to begin, whether the action be in contract or tort. Where the damages are of *ascertained amount* or *must be nominal*, then it seems that the defendant may begin, if the pleading will admit of it. See *Id.* 455, 465. See further as to this resolution *Cannam v. Farmer*, *infra*, and cases cited in *Mercer v. Whall*, *supra*. Thus, in covenant for dismissing a clerk, the defendant pleaded misconduct, and plaintiff replied *de injuriâ*, &c.; held, that plaintiff ought to begin. S. C. So, in an action on a promissory note to which defendant pleads, *inter alia*, payment into court, and issue is joined as to damages *ultra*, the plaintiff is to begin, though other issues lie on the defendant. *Booth v. Millus*, 15 M. & W. 669. On a note by the defendant, to which she pleaded coverture when she made it, on which issue is joined, the defendant was to begin, although the plaintiff sought to recover interest, not mentioned on the note. *Cannam v. Farmer*, 3 Exch. 698. In replevin and avowry for rent, plaintiff pleaded discontinuance of receipt for 20 years, and no distress within 20 years after the right accrued: replication, distress within 20 years and issue: held, that plaintiff should begin, because he must show *when* the distress was made. *Collier v. Clarke*, 5 Q. B. 467. In trespass *q. c. f.*, where the defendant pleaded a custom to divert water, which

was traversed by the plaintiff, the defendant was allowed to begin, though the plaintiff's counsel asserted his intention of asking for heavy damages. *Bastard v. Smith*, 2 M. & Rob. 129; and *per Tindal, C.J.*, "The plaintiff might have traversed the custom and new assigned excess, and then would have had a right to begin." *Id.* 132. Under the present practice the plaintiff, instead of new assigning, would amend his statement of claim, or reply specially, *vide post*, p. 310. In a similar action the defendant was also held entitled to begin, as the plaintiff's counsel would not pledge himself to go in for substantial damage. *Chapman v. Rawson*, 8 Q. B. 673. In *Cann v. Facey, cor. Gurney, B.*, Exeter Sum. Ass. 1835, in an action of trespass for shooting a dog, where a defendant justified to prevent it from trespassing, the plaintiff was held entitled to begin, though the defendant offered to admit the value of the dog; for, *per Cur.*, "the defendant may have damages beyond that amount;" and a similar ruling by *Ld. Tenterden* was cited. *Accord.* in a case of justification for shooting a mad dog; *Shaplund v. Cockram*, Exeter Sum. Ass. 1844, *per Patteson, J.*, after consulting *Wightman, J.* So, in *Mills v. Stephens*, Exeter Spring Ass. 1838, *Bosanquet, J.*, held that plaintiff had a right to begin in a case of trespass for breaking into his house, where the issue was on a plea of leave and licence.

Under Rules, 1883, O. xxi. r. 4, "no denial or defence shall be necessary as to damages claimed, or their amount, but they shall be deemed to be put in issue in all cases unless expressly admitted." See also O. xix. r. 17, *post*, p. 310. But where the damages sought to be recovered are unliquidated, yet if the defendant admit at the trial the amount claimed in the plaintiff's particulars, he will be entitled to begin, provided the material allegations in the defence are affirmative only. *Lacon v. Higgins*, 3 Stark. 178; *Morris v. Loton*, 1 M. & Rob. 233; *Bonfield v. Smith*, 2 M. & Rob. 519; S. C., 3 C. & P. 463; *Woodgate v. Potts*, 2 Car. & K. 258; *Tindull v. Baskett*, 2 F. & F. 644, and 1 Taylor, Ev., 10th ed. § 383.

Where the affirmative of any one material issue is on the plaintiff, and he undertakes to give evidence upon it, he has a right to begin as to all; *Rawlins v. Desborough*, 2 M. & Rob. 328; *Collier v. Clarke*, 5 Q. B. 467; and it seems that judgment by default as to part has the same effect, though the defendant pleads affirmatively as to the residue. See *Wood v. Pringle*, 1 M. & Rob. 277. But where to an action on a bill and on an account stated, defendant pleaded payment to the first and non assumpsit to the second count, it was held that the plaintiff had no right to begin unless his counsel undertook to give some evidence of the account stated besides the bill. *Smart v. Rayner*, 6 C. & P. 721; *Mills v. Oddy, Id.* 728; overruling *Homan v. Thompson, Id.* 716, *omn. cor.* Parke, B.; *Frith v. McIntyre*, 7 C. & P. 44; *Oakeley v. Oobleen*, 2 F. & F. 656; S. P. ruled by *Cresswell, J.*, in *Lanyon v. Davey*, Bodmin Summer Ass. 1842. The plaintiff in replevin has the same right as in other actions, though both parties are actors. *Curtis v. Wheeler*, M. & M. 493.

In the Admiralty Division, in an action of damage by collision, the defendant begins when the *onus* is on him of rebutting a *prima facie* case of negligence. *The Merchant Prince*, (1892) P. 9.

[Who is to begin in action for recovery of land.] In the now superseded action of ejectment the defendant might in some cases, by admitting a title in the plaintiff, entitle himself to begin, and the same principle will apply to the action for recovery of possession of land introduced by the J. Acts, notwithstanding the use of pleadings therein. Thus, where the plaintiff claims as heir-at-law, and defendant as devisee, it is a settled rule that the defendant, by admitting plaintiff's pedigree, and the dying seised, may entitle himself to begin and to reply. *Goodtitle d. Revett v. Braham*, 4 T. R. 497; *Acc.*

*Fenn v. Johnson*, Adam's Eject., 2nd ed. 256, and *Mercer v. Whall*, 5 Q. B. 464, *per Cur.* And the same principle applies though one of the plaintiffs had, since the death of the testator, become assignee of an outstanding term in part of the land; for "the real question in dispute is the validity of the will." *Doe d. Smith v. Smart*, 1 M. & Rob. 476, *per Gurney, B.*, after conferring with Pattenon, J. For the same reason, where the plaintiff claimed as heir of C. and as devisee and heir of R., who was C.'s heir, and the defendant claimed as devisee of C., the defendant's counsel was permitted to begin on admitting that plaintiff was heir of C. and of R., and entitled to recover, unless defendant proved C.'s will. *Doe d. Wollaston v. Barnes*, *Id.* 386, *cor.* Ld. Denman, C.J. See observations on this case in *Doe d. Bather v. Brayne*, 5 C. B. 655. Where the plaintiff claims as devisee of A., and the defendant as devisee under a subsequent will of A., the defendant cannot, by admitting the seisin of A. and the *primâ facie* title of the plaintiff, entitle himself to begin. S. C., overruling *Doe d. Corbett v. Corbett*, 3 Camp. 368.

Generally, in order to entitle the defendant to begin by admitting the plaintiff's case, he must admit the *whole* without qualification. *Doe d. Pill v. Wilson*, 1 M. & Rob. 323. Therefore, where the plaintiff claims as the heir of A., and defendant under a conveyance by A. in his lifetime, the latter cannot deprive the plaintiff of the right to begin by only admitting the heirship of the plaintiff and seisin of A. unless defeated by the conveyance; *Doe d. Tucker v. Tucker*, M. & M. 536; for it is part of the plaintiff's case that A. died seised. So, where each party claimed as heir, and defendant admitted that plaintiff was entitled as heir *if* defendant were not legitimate: held, that he could not by so doing obtain a right to begin. *Doe d. Warren v. Bray*, *Id.* 166.

[*Direction of judge as who is to begin.*] An erroneous ruling of the judge as to the proper party to begin will not, as a matter of course, entitle the party to a new trial. *Brandford v. Freeman*, 5 Exch. 734; *Burrell v. Nicholson*, 1 M. & Rob. 304; *Bird v. Higginson*, 2 Ad. & E. 160. But a clear case of error, by which an undue advantage may have been given to the successful party, or injustice done, is ground of new trial; *Ashby v. Bates*, 15 M. & W. 589; *Edwards v. Matthews*, 4 D. & L. 721; and one was accordingly granted in *Doe d. Bather v. Brayne*, *supra*.

[*Right to reply.*] In general, the party who begins has a right to the general reply when the opposite party calls witnesses. See *Cluck v. Cluck*, (1906) 1 K. B. 483, 485. Where the defendant brings evidence to impeach the plaintiff's case, and also sets up an entirely new case, which again the plaintiff controverts by evidence, the defendant's reply is confined to the new case set up by him, for upon that relied on by the plaintiff the defendant's counsel has already commented in the opening of his own case; and the plaintiff is then entitled to the general reply. 1 Stark. Ev., 4th ed. 609 *et seq.* In strictness, Rules, 1883, O. xxxvi., r. 36, *ante*, p. 277, makes no difference in this respect, for it only enables the defendant to sum up his case; but this rule is not closely adhered to; *vide ante*, p. 277.

Unless the defendant give evidence, the plaintiff is not entitled to reply, there being no new facts upon which his counsel can comment. Where the defendant, on being called on by the plaintiff to produce a document, interposes with evidence to show it is not in his possession, this gives no general reply. *Harvey v. Mitchell*, 2 M. & Rob. 366.

Where the counsel for the defendant opened material facts to the jury, which he called no witness to prove, it was in the discretion of the judge to permit the plaintiff's counsel to reply. *Crerar v. Sodo*, M. & M. 85. And, where the defendant's counsel in a crown case read a paper or made statements

of material facts likely to have weight with the jury without attempting to prove them, both *Ld. Kenyon* and *Ld. Tenterden* permitted a general reply. *R. v. Bignold*, D. & Ry. N. P. C. 59. As, however, under O. xxxvi. r. 36 (*ante*, p. 277), the defendant's counsel has to announce his intention to call witnesses at the close of the plaintiff's case, if he did not do so, he would not be allowed to open fresh facts in his speech, for it has been held that when he has allowed the plaintiff's counsel to sum up, he cannot afterwards change his mind. *Darby v. Ouseley*, 1 H. & N. 1; 25 L. J., Ex. 227.

*Rule where money is paid into court.*] By R.S.C., O. xxii. r. 22, Nov., 1893, "Where a cause or matter is tried by a judge with a jury no communication to the jury shall be made until after the verdict is given, either of the fact that money has been paid into court, or of the amount paid in. The jury shall be required to find the amount of the debt or damages, as the case may be, without reference to any payment into court." This rule is valid. *Williams v. Goose*, (1897) 1 Q. B. 471, C. A.

*Arguments of counsel.*] When points of law arise incidentally, all the counsel on both sides are usually heard by the court; and the leading counsel of the party making the objection, or submitting the point, alone replies. But, on the claim of a right to begin, *Ld. Denman* ruled that one counsel only was to be heard on each side. *Rawlins v. Desborough*, 2 M. & Rob. 70. This rule, however, is not always adhered to. See *Bastard v. Smith*, *Id.* 132. If the defendant's counsel apply for judgment for the defendant on a point of law, and the plaintiff's counsel answer it, the defendant's counsel has a right to reply upon the law only. *Arden v. Tucker*, 1 M. & Rob. 192.

The objection of a witness to a question which he considers himself not bound to answer is not a point on which counsel in the cause are heard. *R. v. Adey*, 1 M. & Rob. 94, *ante*, p. 174. Nor is his obligation to produce documents, *ante*, p. 158.

Where the party conducts his case, addresses the jury and examines witnesses in person, it is questionable whether counsel can be heard for him on a point of law. *Shuttleworth v. Nicholson*, 1 M. & Rob. 254; *Moscatti v. Lawson*, *Id.* 454. In the latter case, *Alderson, B.*, said that, though there were many precedents, it was a very objectionable practice. It has been decided that a party, who conducts his own case, cannot on that account be excluded from giving evidence as a witness. *Cobbett v. Hudson*, 1 E. & B. 11.

See Rules, 1883, O. xxv. r. 2, *post*, p. 295, as to points of law.

*Separate defence of co-defendants.*] In an action for the price of goods, in which the defendants appeared and pleaded non assumpsit by separate attorneys and counsel, but relied on the same defence (*viz.* payment), it was ruled by *Gibbs, C.J.*, that the senior counsel could alone address the jury, and the witnesses were to be examined by the counsel successively, in the same manner as if the defence were joint and not separate: "It cannot be left in the power of defendants, whose interests are the same, to make twenty cases out of one." *Chippendale v. Masson*, 4 Camp. 174. And, in ejectment, where the defendants defended in the same right, but by different attorneys and counsel, *Ld. Tenterden* ruled that only one counsel could address the jury. *Doe d. Hogg v. Tindal*, M. & M. 314. So in *Mason v. Ditchbourne*, 1 M. & Rob. 462, n., in debt on bond, plea *non est factum* and fraud, *Ld. Abinger* refused to allow two counsel to address the jury, "for there could not be a verdict for one, and against the other, defendant."

But, in an action *ex delicto*, where defendants have pleaded and appeared by separate attorneys and counsel, separate cross-examinations and addresses



have been permitted by Abbott, C.J.; *King v. Williamson*, 3 Stark. 162; and by Tindal, C.J., in *Massey v. Goyder*, 4 C. & P. 162, and in *Southey v. Tuff*, C. P. sittings after T. T. 1834, MS.; and even in *assumpsit*, under similar circumstances, the same course was allowed and was approved by the court in *banc* in *Ridgway v. Philip*, 1 C. M. & R. 415; in which case, however, it appears, by another report, that one of the defences was misjoinder of defendants as partners. S. C., 3 Dowl. 154.

Where the defendants appear by the same solicitor and plead a joint defence, the practice is to hear one counsel only. So held in trover, plea, not guilty. *Perring v. Tucker*, M. & M. 392. And in debt, where the defence under plea of never indebted was that *all* the defendants were not parties to the contract, the court would not hear more than one counsel. *Nicholson v. Brooke*, 2 Exch. 213. It seems, however, to be a matter of discretion with the judge at N. P. S. C. A defendant does not, by appearing at the trial in person, acquire any right to address the jury, which he would not have if he appeared by counsel. *Perring v. Tucker*, *supra*. In *King v. Williamson*, *supra*, only one counsel was allowed to examine those witnesses, who had been subpoenaed by both defendants. In cases where the defendants have no right to a separate address or examination, yet the counsel of any will be heard on a legal objection; as that there is no evidence against one of them; *per* Tindal, C.J., in *Poole v. Siddeu and another*, C. P. sittings after M. T. 1832, MS. (on the general issue to *indeb. assumpsit*).

When two were made defendants in an issue out of Chancery whose interests were at variance with each other, the counsel of each was allowed to address the jury and prove his case separately and in succession; the witnesses of each might be cross-examined by the co-defendant's as well as the plaintiff's counsel; and the plaintiff had the general reply. *Phillips v. Willetts*, 2 M. & Rob. 319, and *Wynne v. Wynne*, cited *Id.* 321. The order in which co-defendants shall examine and address seems to be in the judge's discretion. *Fletcher v. Crosbie*, *Id.* 417.

Where it was ordered, on an issue out of Chancery, that a third party "should be at liberty to attend the trial," the counsel for such party might cross-examine and suggest points of law, but could not call witnesses or address the jury. *Wright v. Wright*, 7 Bing. 458.

As to practice where the plaintiff has joined defendants with the view of obtaining relief against them in the alternative, see *Child v. Stenning*, 7 Ch. D. 413.

*Set-off and counter-claim.*] Set-off and counter-claim are now in the same position as if they formed a statement of claim by the defendant against the plaintiff; and under Rules, 1883, O. xxi. r. 16, although the action is stayed, discontinued, or dismissed, the counter-claim may be proceeded with; and by r. 17, *post*, p. 295, judgment may be given for the defendant for any balance found to be due to him.

*Third party.*] Where the defendant claims to be entitled to contribution or indemnity over against any party not a party to the action, the defendant may bring him in under Rules, 1883, O. xvi. rr. 48—53. Under these rules the plaintiff may bring in such person to enforce indemnity against a claim raised by the defendant's counter-claim. *Levi v. Anglo-Continental Gold Reefs of Rhodesia*, (1902) 2 K. B. 481, C. A. The directions for trial given by the court or judge under r. 52, will regulate the manner in which the questions are to be tried, and under r. 53 the third party may have leave to defend the action. Under r. 54, *post*, p. 300, the court or a judge has power to decide all questions of costs. R. 55 places a co-defendant against

whom a defendant seeks contribution or indemnity in the same position as a third party. Under this rule contribution may be ordered between co-defendants. *Sawyer v. Sawyer*, 28 Ch. D. 600.

Where the question of liability of the third party is ordered to be tried as soon as may be convenient after the trial of the action, the third party who has entered an appearance only, may attend the trial by counsel, and cross-examine the witnesses; and the question will be tried as soon as the trial of the action between the plaintiff and defendant is concluded. *Blore v. Ashby*, 42 Ch. D. 682.

*Inspection of property by Judge.*] By Rules, O. l. r. 4. "It shall be lawful for any judge by whom any cause or matter may be heard or tried with or without a jury" . . . "to inspect any property or thing concerning which any question may arise therein." This rule does not entitle the judge to put a view in the place of evidence; a view is for the purpose of enabling the tribunal to understand the questions that are being raised, and to follow and apply the evidence. *L. General Omnibus Co. v. Lavell*, (1901) 1 Ch. 135, C. A.

*Direction of Judge—exception for misdirection.*] The J. Act, 1875, s. 22, enacts that nothing in the J. Act, 1873, "nor in any rule or order made under the powers thereof or of this act shall take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the judge to the jury before whom the same shall come for trial with a proper and complete direction to the jury upon the law, and as to the evidence applicable to such issues. Provided also, that the said right may be enforced either by motion in the High Court of Justice, or by motion in the Court of Appeal, founded upon an exception entered upon or annexed to the record." Under the provisions of the J. Act, 1890, s. 1, the motion must be made in the Court of Appeal, and not in a Divisional Court. The Rules, 1883, O. lviii. r. 1, direct that all appeals to the Court of Appeal shall be by way of rehearing, and shall be brought by notice of motion in a summary way. As to the duty of the judge in directing the jury, see *Edmonds v. Prudential Assur. Co.*, 2 Ap. Ca. 487, 507, *per* Ld. Blackburn. The judge is bound to direct a verdict for the defendant, unless there is some evidence on which the jury may reasonably act; a mere scintilla of evidence is not sufficient. *Ryder v. Wombwell*, L. R., 4 Ex. 32, 39, Ex. Ch.; *Giblin v. McMullen*, L. R., 2 P. C. 317, 335; *Steward v. Young*, L. R., 5 C. P. 122, 128; *Daniel v. Metropolitan Ry. Co.*, L. R., 5 H. L. 45; *Jackson v. Id.*, 3 Ap. Ca. 193, D. P. See further *Slattery v. Dublin, Wicklow, &c., Ry. Co.*, *Id.* 1155, D. P.; *Davey v. L. & S. W. Ry. Co.*, 11 Q. B. D. 213; 12 *Id.* 70, C. A.; *Wakelin v. Id.*, 12 Ap. Ca. 41, D. P. The rule is, that if the evidence be such that the jury could conjecture only, not judge, it ought not to go to the jury, and the onus lies on the party offering the evidence; and if he offer only evidence consistent with either supposition of fact, he is not entitled to have it put to the jury; *per* Ld. Tenterden, C.J., referred to by Cresswell, J., in *Avery v. Bowden*, 6 E. & B. 953, 974; 26 L. J., Q. B. 3, and cited by Willes, J., in *Phillipson v. Hayter*, L. R., 6 C. P. 42, 43.

The judge may assist the jury, at their request, with his opinion on a question of fact, which he expressly left for them to decide. *Smith v. Dart*, 14 Q. B. D. 105.

The judge cannot direct a verdict for the defendant on the opening of the plaintiff's counsel, without his consent, without hearing the evidence. *Fletcher v. L. & N. W. Ry. Co.*, [1892] 1 Q. B. 122, C. A.

*Discontinuance.*] By Rules, 1883, O. xxvi. r. 1, "save as in this rule otherwise provided, it shall not be competent for the plaintiff to withdraw the record or discontinue the action without leave of the court or a judge, but the court or a judge may, before, or at, or after the hearing or trial upon such terms as to costs, and as to any other action, and otherwise as may be just, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out. The court or a judge may, in like manner and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counter-claim to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave." This rule deprives the plaintiff of his common law right to elect to be nonsuit; and if he offer no evidence the defendant is entitled to a verdict. *Fox v. Star Newspaper Co.*, (1900) A. C. 19, D. P. It may be observed that it does not in terms prohibit a defendant from withdrawing his counter-claim. By r. 2, a cause may be withdrawn by either party "upon producing to the proper officer a consent in writing signed by the parties."

The discontinuance of an action does not affect a counter-claim, *vide ante*, p. 289.

*Effect of opposite party not appearing at trial.*] By Rules, 1883, O. xxxvi. r. 31, "if, when a trial is called on, the plaintiff appears, and the defendant does not appear, the plaintiff may prove his claim so far as the burden of proof lies upon him." If the burden of proof is on the defendant, the plaintiff need not, it seems, in this case have the jury sworn. See *Lane v. Eve*, *infra*.

By r. 32, "if, when a trial is called on, the defendant appears, and the plaintiff does not appear, the defendant, if he has no counter-claim, shall be entitled to judgment dismissing the action; but if he has a counter-claim, then he may prove such counter-claim so far as the burden of proof lies upon him." In the former case, the defendant need not have the jury sworn. *Lane v. Eve*, W. N., 1876, p. 86, *per* Deuman, J. And judgment will be given under this rule dismissing the action. *Armour v. Bate*, (1891) 2 Q. B. 233, C. A.

By r. 33, "any verdict or judgment obtained where one party does not appear at the trial may be set aside, by the court or a judge, upon such terms as may seem fit, upon an application made within six days after the trial. Such application may be made either at the assizes or in Middlesex." Where the default arises from inadvertence, the application will be granted on payment of the costs of the day, including all costs that have been wasted, and the costs of the application. *Burgoine v. Taylor*, 9 Ch. D. 1, C. A.

Where one party appears, but the opposite party does not appear, the former may proceed and obtain judgment without proving service of notice of trial. *James v. Crow*, 7 Ch. D. 410, following *Ex pte. Lows*, *Id.* 160, C. A.

*Amendment at Nisi Prius.*] By Rules, 1883, O. xxviii. r. 1, "The court or a judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." By r. 6, application for leave to amend may be made "to the judge at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise as may be just." By r. 12, "the court or a judge may at any time, and on such terms as to costs or otherwise

as the court or judge may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings." An amendment may be allowed at the trial, so as to raise a new case requiring fresh evidence. *Budding v. Murdoch*, 1 Ch. D. 42; *King v. Corke*, *Id.* 57. See also *Roe v. Davies*, 2 Ch. D. 729. The provisions of the C. L. P. Acts, 1852, s. 222; 1854, s. 96; and 1860, s. 36, which were repealed by 46 & 47 V. c. 49, s. 3, are expressed in very similar terms. Under those repealed sections many of the cases collected below were decided. They have been selected from the very large group of decisions as to amendment.

All amendments ought to be made that are necessary and proper, for the object of the rules is to meet cases in which, by mistake or oversight, the real matter in issue is not raised by the pleadings, and under it the matter may be put on the record which was not on it before, if it be shown to the satisfaction of the judge to be the existing matter in controversy. What that matter in controversy may be is a matter of fact to be determined by the judge upon the evidence and pleadings before him. See Maule, J., in *Wilkin v. Reed*, 15 C. B. 192; 23 L. J., C. P. 193; *Blake v. Done*, 7 H. & N. 465; 31 L. J., Ex. 100; *Kurtz v. Spence*, 36 Ch. D. 770, 773, C. A. Leave to amend should always be given, unless the judge is satisfied that the party applying is acting *malâ fide*, or that by his blunder he has done some injury to his opponent which cannot be compensated for by costs or otherwise. *Tildesley v. Harper*, 10 Ch. D. 393, 396, 397, *per* Bramwell, L. J.; *accord. per Cur. in Steward v. N. Metropolitan Tramways Co.*, *post*, p. 293. See also *Laird v. Briggs*, 19 Ch. D. 22, C. A.; *Cropper v. Smith*, 26 Ch. D. 710, 711, *per* Bowen, L. J. An amendment should not be allowed for the purpose of trying a question which has arisen at the trial, but it is not that which the parties came to try. *Wilkin v. Reed*, *supra*; *Lucas v. Turleton*, 3 H. & N. 116; 27 L. J., Ex. 246; *Ritchie v. Van Gelder*, 9 Exch. 762; *Ellis v. Manchester Carriage Co.*, 2 C. P. D. 13. Thus, where the action was for fraudulently misrepresenting to the plaintiff the cause for which the defendant had discharged a servant from his service, and it turned out at the trial that the defendant had improperly suppressed the fact of the servant's dishonesty, but had truly stated the cause of his discharge, it was held that, as this suppression was not in fact the ground of the plaintiff's complaint, but only the supposed misrepresentation, which was negatived, the judge had rightly refused to amend by substituting a charge of fraudulent suppression. *Wilkin v. Reed*, *supra*. So leave to amend the defence by denying an allegation not denied by the defence was refused, where the defendant knew the facts all along. *Louther v. Heaver*, 41 Ch. D. 248; affirmed in C. A. on the additional ground that the amendment would have been useless; *vide Id.* 262. See also *Edevain v. Cohen*, 41 Ch. D. 563; 43 Ch. D. 187, C. A.

No amendment will be allowed so as to prejudice the other party. The plaintiff ought at first to state his cause of action, if there were one, truly and in substance according to the facts, in order that the defendant may know whether he should object to their sufficiency in point of law, admitting the facts, or, denying them, go to trial. It would be better that there should be no trial at all, than that a plaintiff should be allowed to state one cause of action, and then, on any difficulty arising as to his maintaining it on the evidence, to amend so as to raise another and different cause of action. It would be far better to require no pleadings at all, than to allow pleadings which could only operate as a snare. *Bradworth v. Foshaw*, 10 W. R. 760, Ex. T. T. 1862, *per Cur.* See also *Riley v. Buxendale*, 30 L. J., Ex. 87, 88, *per* Martin, B.; *Newby v. Sharpe*, 8 Ch. D. 39, C. A.; *New*

*Zealand, &c., Co. v. Watson*, 7 Q. B. D. 374, 382; *Edevain v. Cohen*, ante, p. 292; *Raleigh v. Goschen*, (1898) 1 Ch. 73, 81. An amendment was refused, the object of which was to throw the liability on a third party A., the right of action against A. having become barred by lapse of time. *Steward v. N. Metropolitan Tramways Co.*, 16 Q. B. D. 178, 556, C. A.

Where a tenant in common brought an action of trespass and trover against his co-tenant for cutting and carrying away the whole produce of the common property, and the action was held not maintainable, the court refused to mould the action into one of account, on the ground that such an action was so distinct from the one stated in the declaration, that the amendment would not do justice between the parties. *Jacobs v. Seward*, L. R., 4 C. P. 328; L. R., 5 H. L. 464. If the amendment be to insert in the breach a claim on which the plaintiff can recover only nominal damages, and in respect of which defendant would probably not have defended the action, the judge will be justified in refusing it. *Times Insurance Co. v. Hawke*, 28 L. J., Ex. 317. See also *Spoor v. Green*, L. R., 9 Ex. 99. Where the amendment would evade the real question in controversy, it should be refused. Thus, where the plaintiff claimed a larger easement than he proved at the trial, the judge would not allow him to limit it by amendment, if in fact the larger claim was the one really claimed and asserted by plaintiff and resisted by defendant. *Cawkwell v. Russell*, 26 L. J., Ex. 34.

In an action against the directors of a building society who had signed a loan note on behalf of the society, brought for the money lent, a count alleging breach of warranty of authority in the directors to borrow money for the society was added. *Richardson v. Williamson*, L. R., 6 Q. B. 276. See also *Mountstephen v. Lakeman*, L. R., 5 Q. B. 613, 614; L. R., 7 H. L. 17.

An injury to the possession may be altered to an injury to the reversion. *May v. Footner*, 5 E. & B. 505; 25 L. J., Q. B. 32. In a count for falsely representing the value of defendant's business at 100l. per month, the judge inserted the words "over the counter," that being the real question to be tried. *Roles v. Davis*, 4 H. & N. 484; 28 L. J., Ex. 287. In an action to recover instalments of an annuity, an amendment of the claim was allowed so as to include a later instalment due before action. *Knowlman v. Bluett*, L. R., 9 Ex. 1. But the plaintiff will not in general be allowed to amend by alleging fresh causes of action, which since writ issued have become barred by the Statute of Limitations. *Weldon v. Neal*, 19 Q. B. D. 394, C. A. An amendment of the statement of claim may be allowed in an action of libel, on the ground of variance with the libel proved. *Rainy v. Bravo*, L. R., 4 P. C. 287.

In like manner the statement of defence may be amended at the trial, in order to meet the facts proved at it. *Mitchell v. Crasweller*, 13 C. B. 237; 22 L. J., C. P. 100. A plea of payment was added to other pleas in an action on a guarantee, in *Laurie v. Scholefield*, L. R., 4 C. P. 622. In an action for wrongful dismissal of the manager of plaintiff's business, a defence by reason of plaintiff's dismissal for misconduct was added on the trial by Cresswell, J., though no misconduct was alleged in the other pleas. *Hobson v. Cowley*, 27 L. J., Ex. 205. In an action for false imprisonment the defendant was allowed to amend the grounds of suspicion alleged in his plea of justification. *Haites v. Marks*, 7 H. & N. 56; 30 L. J., Ex. 389. A plea of "not guilty by statute" was amended by inserting the proper statutes in the margin. *Edwards v. Hodges*, 15 C. B. 477; 24 L. J., M. C. 81. So a defence raising a statutory ouster of jurisdiction has been allowed to be added by amendment. *Joseph Crosfield & Sons v. Manchester Ship Canal Co.*, (1904) 2 Ch. 123, C. A. A plea of payment into court has been allowed to a count added at the trial. *Robson v. Turnbull*, 1 F. & F. 365.

It seems that the time to apply for an amendment by either party is at

the close of his case. See *Rainy v. Bravo*, L. R., 4 P. C. 287, 298. It is not unusual for amendments to be made at the trial without imposing any condition of payment of costs, or of giving further time. Where, however, it will be evidently proper to give more time to the opposite party, the trial will be adjourned. See *Riding v. Hawkins*, 14 P. D. 56, 59, and the applicant will probably be made to pay the costs of the day. See *Edwards v. Hodges*, 15 C. B. 477, 492.

The courts are very unwilling to disturb decisions of judges made in the exercise of discretion vested in them. *Schuster v. Wheelright*, 8 C. B., N. S. 383; 29 L. J., C. P. 222; *Byrd v. Nunn*, 7 Ch. D. 284, C. A. And a new trial will not be directed upon the ground of surprise occasioned by an amendment at the trial, unless substantial injustice has been done. *White v. S. E. Ry. Co.*, 10 W. R. 564, E. T. 1862, Ex.

A judge at Nisi Prius may amend an erroneous entry of the verdict. See *Baker v. Lawrence*, 18 W. R. 835, T. T. 1870, C. P. And even after a verdict, and upon argument on motion for judgment or new trial, the court has, of its own authority and without consent, so amended a plea as to make the issue correspond with that which was really tried at N. P. *Parsons v. Alexander*, 5 E. & B. 263. And in *Clough v. L. & N. W. Ry. Co.*, L. R. 7 Ex. 26, a plea was added by the Ex. Ch. setting up matters that had arisen after action, and the plaintiff was considered to have taken issue on it.

It seems that this rule does not extend to proceedings made specially amendable under other rules, *e.g.*, those relating to the joinder of parties. *Wickens v. Steel*, 2 C. B., N. S. 488; 26 L. J., C. P. 241; *Holden v. Ballantyne*, 29 L. J., Q. B. 148; *Garrard v. Giubilei*, 11 C. B., N. S. 616; 31 L. J., C. P. 131; and in 13 C. B., N. S. 832; 31 L. J., C. P. 270, Ex. Ch.

*Amendment of parties at Nisi Prius.*] *Vide ante*, pp. 89 *et seq.*

*Withdrawing a juror.*—Sometimes a juror is withdrawn, or the jury discharged, by consent, either for the convenience of the parties or at the suggestion of the judge. In such cases each party pays his own costs; but, in the last-mentioned case, the action is not thereby determined. *Everett v. Youells*, 3 B. & Ad. 349. The jury may by consent, but not otherwise, be discharged from giving a verdict on certain issues. If the jury cannot agree at the close of the assizes, the judge may, in his discretion, and without consent, discharge them. *Newton's case*, 13 Q. B. 716. Counsel had at common law a general authority to withdraw a juror. *Strauss v. Francis*, L. R., 1 Q. B. 379. Now see J. Act, 1873, s. 25 (11), *post*, p. 308, and cases cited *ante*, p. 283. Where a juror has been withdrawn on terms, which the defendant afterwards refuses to carry out, such refusal does not terminate the action, and the court will grant a new trial. *Norburn v. Hillman*, L. R., 5 C. P. 129. In such cases the judge at N. P. may, where feasible, order a new trial to take place at the same assizes. *Thomas v. Exeter Flying Post Co.*, 18 Q. B. D. 822.

*Adjournment of trial.*] By Rules, 1883, O. xxxvi. r. 34, "the judge may, if he think it expedient for the interests of justice, postpone or adjourn a trial for such time, and to such place and upon such terms, if any, as he shall think fit." The words in italics are new. At the trial of a cause copies of material documents, which had been found one day before the trial, too late for due service of notice to produce on plaintiff, were offered in evidence by defendant, and plaintiff objected to copies. Cockburn, C.J., adjourned the trial on the terms of paying the costs of the day by defendant,

and re-summoning the same jury. At the subsequent sitting the judge read to the jury the notes of the preceding sitting, and the trial proceeded with defendant's case. *Cahill v. Dawson*, 1 F. & F. 291. Where a material witness of plaintiff did not appear on subpoena, and the judge thought he should be examined, he adjourned the cause on condition that defendant's costs of the day should be his costs in the cause. *Bikker v. Beeston*, per Martin, B.; *Il.* 685. As to costs, see *Lydall v. Martinson*, 5 Ch. D. 780.

*Damages.*] By Rules, 1883, O. xxxvi. r. 58, "Where damages are to be assessed in respect of any continuing cause of action they shall be assessed down to the time of the assessment." A "continuing cause of action" is one arising from the repetition of a series of acts of the same kind, as in the case of the pollution of a stream. *Hole v. Chard Union*, (1894) 1 Ch. 293, C. A.

*Injunction.*] The right to an injunction is considered under the various causes of action in which it is usually applicable. Where under an agreement the defendant undertook not to do certain acts, and in case of breach was liable to liquidated damages, if on breach the plaintiff is entitled to an injunction, he must elect between that remedy and the damages. *General Accident Assur. Co. v. Noel*, (1902) 1 K. B. 377. An injunction will now be granted in a direct mandatory form where such form is appropriate. *Jackson v. Normanby Brick Co.*, (1899) 1 Ch. 438, C. A.

*Points of Law.*] By Rules, 1883, O. xxv. r. 1, "no demurrer shall be allowed," and by rule 2, "any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the judge who tries the cause, at or after the trial." As to arguments of counsel on points of law, *vide ante*, p. 288.

*Order to enter judgment.*] By Rules, 1883, O. xxxvi. r. 39, "the judge shall at or after trial, direct judgment to be entered as he shall think right, and no motion for judgment shall be necessary in order to obtain such judgment." (R. S. C., Feb. 1892, r. 1, which annulled the former r. 39).

By Rules, 1883, O. xxi. r. 17, "where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the court or a judge may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case." The "balance" is that which results on the hearing of the action. *Rolfe v. Maclaren*, 3 Ch. D. 106. See further cases cited *post*, p. 302.

The rights of the parties as to costs are not affected by the entry of judgment for the defendant under this rule. *Shrapnel v. Laing*, 20 Q. B. D. 334, C. A. Where the defendant denies liability and pays money into court as an alternative defence, and the defendant succeeds on the latter defence and fails on the former, the defendant is entitled to judgment in the action; *Wheeler v. United Telephone Co.*, 13 Q. B. D. 597, C. A.; but the plaintiff is entitled to judgment for costs against a co-defendant who had severed in pleading, and failed in his defence, not having paid money into court. *Penny v. Wimbledon, &c., Council*, (1899) 2 Q. B. 72, C. A.

*Application to stay execution.*] By Rules, 1883, O. xlii. r. 17, in the case of money or costs being payable under a judgment or order, execution by *fi. fa.* or *elegit* may be issued so soon as such money or costs shall be payable, but (a) not until the period within which the judgment required the money to be paid has expired; and (b) "the court or judge may, at or

after the time of giving judgment or making an order, stay execution until such time as they or he shall think fit." The successful party is, therefore, in the case of a judgment for money or costs, entitled to immediate execution; and if the other party desire delay, he must apply that the judgment should be for payment after a limited time, or that execution should be stayed.

By O. xlvii. r. 2, where the judgment is to recover possession of land, the plaintiff may "sue out a writ of possession on filing an affidavit showing due service of such judgment or order, and that the same has not been obeyed." Subject therefore to the requirements of this rule, the execution is immediate, and there seems no express power given to delay the execution; the same end may, however, be attained by the judge postponing the entry of judgment till after the lapse of a certain time.

[*Order for delivery of specific chattels.*] Rules, 1883, O. xlviii. r. 1, allow a judgment for the delivery of specific chattels to be enforced by a writ of delivery, which the court or a judge may order to issue. It is still a necessary condition that the value of the goods should have been first assessed by the jury, or by the judge if tried without a jury, as it was under the C. L. P. Act, 1854, s. 78. *Corbett v. Lewin*, W. N., 1884, p. 62, *cor.* Field, J., following *Chilton v. Carrington*, 15 C. B. 730; 24 L. J., C. P. 78.

[*Order as to costs.*] By Rules, 1883, O. lxx. r. 1, "Subject to the provisions of the acts and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee, who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division; provided also that, where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the court, shall for good cause otherwise order." This rule replaces Rules, 1875, O. lv. r. 1, under which many of the cases collected below were decided. The provisions of the Acts herein referred to are contained in the J. Act, 1873, s. 67. These are now superseded by the County Courts Act, 1888, s. 116, *post*, p. 301, and the rule is now subject to the provisions of that section.

By rule 2, amended by R. S. C. Jan. & July, 1902, "when issues in fact and law are raised upon a claim or counter-claim, the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event. *And an order giving a party costs, except so far as they have been occasioned or incurred by, or relate to, some particular issue or part of his proceedings, shall be read and construed as excluding only the amount by which the costs have been increased by such issue or proceedings: but the court or a judge, if the whole costs of the action or other proceeding are not intended to be given to the party, may wherever practicable, by the order direct taxation of the whole costs and payment of such proportion thereof as the court or judge shall determine.*"

Rule 1, which impliedly repeals 21 J. 1, c. 16, s. 6, and 3 & 4 V. c. 24, ss. 2, 3, governs the right to costs in every case in which the plaintiff is not deprived of them by the County Courts Acts, 1888, s. 116, or some subsequent statute. *Garnett v. Bradley*, 3 Ap. Ca. 944, D. P. But provisions relating to costs in statutes passed for the protection of *special classes of persons*, are not affected by rule 1. *Id.* 970, *per* Ld. Blackburn; *accord.* In *re Mills Estate*, 31 Ch. D. 24, 40, *per* Bowen, L.J.; *Ilasker v. Wood*, 51 L. J.,



Q. B. 419, C. A. See also *Reeve v. Gibson*, (1891) 1 Q. B. 650, C. A. In the particular case of special constables, cited by Ld. Blackburn, *ante*, p. 296, this principle no longer applies as 1 & 2 W. 4, c. 41, s. 19, has been repealed by 56 & 57 V. c. 61.

The rule has also been altered in special cases by subsequent statutes, *e.g.*, the Copyright (Musical Compositions) Act, 1888 (51 & 52 V. c. 17), and the Slander of Women Act, 1891 (54 & 55 V. c. 51).

By the J. Act, 1890, s. 5, subject to the J. "Acts and the rules of court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent such costs are to be paid." But this section does "not alter the law with respect to the discretion of a judge as to costs, or with respect to the powers of the C. A. in dealing with that discretion;" *Civil Service Co-operative Soc. v. General S. Nav. Co.*, (1903) 2 K. B. 756, 765, *per* Ld. Alverstone, C. J.

Where the action is tried by a judge alone, the costs are absolutely in his discretion, and neither party can get them from the other without an order. But where an action was brought to enforce a legal right, and there had been no misconduct on his part, as to which *vide infra*, a successful plaintiff is entitled to an order for his costs under O. lxx. r. 1. *Cooper v. Whittingham*, 15 Ch. D. 501. So in the case of a successful defendant. *Civil Service Co-operative Soc. v. General S. Nav. Co.*, (1903), and *F. King & Co. v. Gillard & Co.*, *infra*. But although this is in general a good working rule, the discretion of the judge in each case must be unfettered. *Walter v. Steinkopff*, (1892) 3 Ch. 489. "Where costs have been given to a person who has no right to them there is an appeal, but where there is no right, and they are in the discretion of the persons who have to award them, then there is no appeal except by leave." See J. Act, 1873, s. 49; *Minister v. Apperly* (1902) 1 K. B. 643, 645. This applies where the whole of an action has been referred by order of court to an official referee without any directions as to costs. S. C. Where, however, a successful party has not been allowed his costs on a wrong principle an appeal lies. Thus, where the defendant was not allowed them on the ground that he had refused to consent to the case being decided by the judge as arbitrator to say what should be done; *Civil Service Co-operative Soc. v. General S. Nav. Co.*, (1903) 2 K. B. 756, C. A.; or that he had been guilty of improper conduct, *e.g.* a misrepresentation to the public, not connected with the issue between him and the plaintiff. *F. King & Co. v. Gillard & Co.*, (1905) 2 Ch. 7, the C. A. allowed them to him.

The defendant cannot be ordered to pay the whole costs of a plaintiff who has no right to sue. *Dicks v. Yates*, 18 Ch. D. 76, C. A., followed in *Re Foster*, 8 Q. B. D. 515, C. A. In matters of equitable jurisdiction the judge may give costs as between solicitor and client; *Andrews v. Barnes*, 39 Ch. D. 133; and perhaps under J. Act, 1890, s. 5, *supra*, in other actions also. Express power is given in some statutes, *e.g.*, 56 & 57 V. c. 61, s. 1 (*d*) (*post*, p. 1131), in certain cases, to award such costs.

Where an action is tried by a jury, there is "good cause" for making an order under the proviso, "whenever it is fair and just as between the parties that it should be so." *Forster v. Farquhar*, (1893) 1 Q. B. 564, 567, C. A. It may appear from the conduct of the parties prior to and conducing to the litigation. *Harnett v. Wise*, 5 Ex. D. 307, C. A.; *Bostock v. Ramsey Urban Council*, *post*, p. 298. So where the plaintiff supported an extravagant and extortionate demand by fraudulent statements, and, claiming 3,000*l.*, recovered 50*l.* only, good cause was held to exist. *Huxley v. W. London, &c., Ry. Co.*, 14 Ap. Ca. 26, D. P. See also *Roberts v. Jones and Willey v. Gt. N. Ry.*

*Co.*, (1891) 2 Q. B. 191. So where the plaintiff used his right to name the place of trial in an oppressive manner, S. C.C.; and even although the Court had refused to change it at the defendant's instance. S. C. In these two cases, Hawkins, J., made special orders as to the division of the costs between the parties. And the judge may even order a plaintiff who has recovered only a nominal sum to pay the defendant's costs. *Harris v. Petherick*, 4 Q. B. D. 611, C. A. So where the plaintiff failed on three out of four distinct items of damage, involving separate evidence, though not technically distinct issues, he was ordered to pay the defendant's costs of those in which he failed. *Forster v. Farquhar*, *ante*, p. 297. But letters or conversations "without prejudice" cannot be taken into consideration. *Walker v. Wilsher*, 23 Q. B. D. 335, C. A. The judge may *ex mero motu* make an order to deprive the plaintiff of costs, though no application has been made to him on the part of the defendant. *Turner v. Heyland*, 4 C. P. D. 432; *Collins v. Welch*, 5 C. P. E. 27, C. A. The judge may make an order as to costs after the trial, and though it would seem he must make it within a reasonable time (see *Bowey v. Bell*, *infra*); yet an order depriving the plaintiff of costs on an application made to the judge five or six weeks after the trial was held good. *Huxley v. W. London, &c., Ry. Co.*, *ante*, p. 297. The power to make such order is not affected by stat. 56 & 57 V. c. 61, s. 1 (b), *post*, p. 1131. *Bostock v. Ramsey Urban Council*, (1900) 2 Q. B. 616, C. A. And *semble* the judge may in such case allow the defendant costs as between party and party only. S. C. (1900) 1 Q. B. 364, *per* Ld. Russell, C.J.

Where no application has been made to the judge an application may be made to a divisional court to deprive a successful party of his costs; *Myers v. Defries*, *Siddons v. Lawrence*, 4 Ex. D. 176, C. A.; provided such application be made within a reasonable time; *Brooks v. Israel*, 4 Q. B. D. 95; but not otherwise. *Bowey v. Bell*, *Id.*

The jurisdiction of the judge or court to interfere, by order, with the rule of costs of an action tried with a jury, only arises where there is "good cause;" an appeal therefore lies from such order to the C. A. as to the existence of facts constituting good cause. *Jones v. Curling*, 13 Q. B. D. 262, C. A.; *Wright v. Shaw*, 19 Q. B. D. 396, C. A.; *Huxley v. W. London, &c., Ry. Co.*, *ante*, p. 297. It is not "good cause" that the defendant has succeeded only on a statutory defence, *e.g.* the Gaming Acts, *post*, p. 617. *Granville & Co., v. Firth*, 19 T. L. R. 213, Feb. 3rd, 1903, C. A. A trustee is entitled to his costs unless he has been guilty of misconduct; whether he has been so guilty is a matter on which an appeal lies. *In re Knight's Will*, 26 Ch. D. 82, C. A. Where, however, the facts give the judge jurisdiction under this rule, no appeal lies from his discretion; *Huxley v. W. London, &c., Ry. Co.*, *ante*, p. 297; unless he acted under some rule which he considered to exclude it. *Bew v. Bew*, (1899) 2 Ch. 467, C. A.

In any case in which there is but one issue between the parties no difficulty can arise as to the meaning of the term "event" in O. lxx. r. 1. Where there are several distinct causes of action on which the plaintiff and defendant respectively succeed, the term is to be taken distributively, and the defendant is entitled to the costs of the issues found for him. *Myers v. Defries*, 5 Ex. D. 15, 180, C. A.; *Hoyes v. Tute*, (1907) 1 K. B. 656, C. A. Where the defendant, in an action for unliquidated damages, has paid money into Court with a denial of the cause of action, and the plaintiff proves it, but recovers less than the amount paid in, but enough to carry costs, he is entitled to the whole costs of the action down to the time of the payment into court, and to the subsequent costs of the issue on which he has succeeded, although the defendant receives the general costs of the action, for the liability and the amount of damages are distinct issues. *Goutard v. Carr*, 13 Q. B. D. 598, n., C. A.; *Wagstaffe v. Bentley*, (1902) 1 K. B. 824 C. A.; *Powell v. Vickers, &c.*,

(1907) 1 K. B. 71, C. A. And this rule applies where in an action by several plaintiffs suing in different interests, a sum of money was paid into court without appropriation. *Benning v. Ilford Gas Co.*, (1907) W. N. 106, K. B. D. So even where the issue on which the plaintiff succeeds does not go to the whole cause of the action. *Hubback v. British N. Borneo Co.*, (1904) 2 K. B. 473, C. A.

Where the defendant succeeds on a simple set-off, or on a counter-claim founded on matters that would have been a defence prior to the J. Acts, and to an amount not less than the plaintiff's claim, he has a complete defence to the action, and is therefore entitled to his costs. See *Lund v. Campbell*, 14 Q. B. D. 821, C. A.; *Stooke v. Taylor*, 5 Q. B. D. 569, 576 *et seq.*, per Cockburn, C.J.; *Baines v. Bromley*, 6 Q. B. D. 691, 694, per Brett, L.J.; *Lowe v. Holme*, 10 Q. B. D. 286; *Chatfield v. Sedgwick*, 4 C. P. D. 459, C. A. But the plaintiff is entitled to the costs of the issues on which he has succeeded. *Lund v. Campbell*, *supra*.

Where, however, the counter-claim is in the nature of a cross action and the plaintiff is successful on his claim, and the defendant also on his counter-claim, the plaintiff is entitled to the costs of his claim, less the costs of the issues on which he has failed, and the defendant is entitled to the costs of the counter-claim, less the costs of the issues on which he has failed, as if the claim and counter-claim had been separate actions. *Shrapnel v. Lainsy*, 20 Q. B. D. 334, C. A.; and see *Atlas Metal Co. v. Miller*, (1898) 2 Q. B. 500, C. A. Where the claim and counter-claim are both dismissed with costs, the plaintiff pays the general costs of the action, and the defendant the amount only by which the costs have been increased by the counter-claim; S. C.; and not costs saved because there is an action existing which enables the defendant to raise his counter-claim; S. C.; but costs incurred in support of, or in opposition to, both the defence and counter-claim are to be apportioned; S. C.

The distinction above pointed out between set-off and counter-claim, as to which, see further *Defences to Actions on Simple Contract—Set-off and Counter-claim*, *post*, p. 704, was overlooked in many of the earlier cases on the subject. See judgments in *Stooke v. Taylor*, 5 Q. B. D. 569. It should be observed that the rights of the parties as to costs may be seriously affected by an incorrect entry of the judgment. See *Baines v. Bromley*, 6 Q. B. D. 691, C. A. The assessment of damages by a jury where judgment has been signed against the defendant by default, is not within the proviso, and the costs do not follow the event. *Gath v. Howarth*, W. N., 1884, p. 99, Field, J.

By Rules, 1883, O. xvi. r. 1, "the defendant, though unsuccessful, shall be entitled to his costs occasioned by" joining under that rule (*vide ante*, p. 89), "any person who shall not be found entitled to relief, unless the court or a judge, in disposing of the costs, shall otherwise direct." See *D'Hormusgee v. Grey*, 10 Q. B. D. 13. Where under *Id.* r. 4 relief is claimed by the plaintiff S., against co-defendants B. & H., in the alternative, and he succeeds against B. and fails against H., the court may order B. to pay the costs of H., and then add those costs to the costs which B. is ordered to pay S. *Sanderson v. Blyth Theatre Co.*, (1903) 2 K. B. 533, C. A. The latter is the proper course when the action is tried with a jury and the judge does not decide that there is "good cause" for depriving H. of costs. S. C. See *Accord. Bullock v. L. Gen. Omnibus Co.*, (1907) 1 K. B. 264, C. A.

The Public Authorities Protection Act, 1893, 56 & 57 V. c. 61, s. 1, *post*, p. 1131, now regulates the defendant's costs in an action brought for any act done in pursuance or execution, or intended execution of an Act of Parliament, or any public duty or authority, or in respect of any alleged neglect or default in execution of such duty or authority.

*Order as to costs of or occasioned by third party.*] Where a third party, C., has been brought in under Rules, 1883, O. xvi. rr. 48—53, rule 54 provides that “the court or a judge may decide all questions of costs as between a third party and the other parties to the action, and may order any one or more to pay the costs of any other or others, or give such direction as to costs as the justice of the case may require;” and by rule 55, a co-defendant against whom a defendant seeks contribution or indemnity is in the same position as a third party. Thus, costs have been ordered to be paid to C. by the plaintiff; *Witham v. Vane*, 28 W. R. 812, T. S. 1880, Fry, J.; or, by the defendant; *Beynon v. Godden*, 4 Ex. D. 246, 317, *cor.* Huddleston, B.; *Dawson v. Shepherd*, 49 L. J., Ex. 529, C. A.; or, C. has been allowed to bear his own costs. *Williams v. S. E. Ry. Co.*, 96 W. R. 352, H. S., 1878, Q. B. So again, C. has been ordered to pay to an unsuccessful defendant the costs payable by him to the plaintiff: *Hornby v. Cardwell*, 8 Q. B. D. 329, C. A.; or, to pay the plaintiff the costs occasioned by his defence. *Piller v. Roberts*, 21 Ch. D. 198; *Edison, &c., Electric Light Co. v. Holland*, 41 Ch. D. 28, C. A. Where in an action for specific performance the defendant was held liable on his contract, which he had denied, and C. liable to indemnify him, C. was ordered to pay the costs of the third party proceedings, but not of the action, as the defence was for the defendant’s benefit alone. *Blore v. Ashby*, 42 Ch. D. 682. Many of these orders were made under Rules, 1875, O. lv. r. 1, which was similar in terms to Rules, 1883, O. lxxv. r. 1, *ante*, p. 296; and O. xvi. r. 54, *supra*, is explicit on the matter. The liability of C. to costs is not affected by the County Courts Act, 1888, s. 116, *post*, p. 301. *Bates v. Burchell*, and *Lewin v. Trimming*, cited *post*, p. 302.

*Order for costs on higher scale.*] Under Rules, 1883, O. lxxv. r. 8, costs are in general to be allowed on the “lower scale,” given in *Id.*, App. N.; but by rule 9, the court or a judge may at the trial or hearing or further consideration of the cause or matter or at the hearing of any application therein, on special grounds arising out of the nature and importance or the difficulty or urgency of the case, order, either generally in any cause or matter, or as to the costs of any particular application made or business done therein, that the costs shall be allowed on the “higher scale.” In an action against a port and harbour authority for damages to a ship from the nature of the bed on which she grounded in the harbour, an order was made under rule 9 for costs on the higher scale, on the ground that “the case was special in its nature. It has involved the calling of a number of scientific witnesses, the preparation of plans, and the case has been presented so as greatly to facilitate its trial.” *The Robin*, (1892) P. 95, *cor.* Jeune, J. See also as to this latter ground, *Davies v. Davies*, 36 Ch. D. 359, 374.

There must, however, be something special in the case to justify the order. The mere largeness of the sum recovered is not sufficient. *The Horace*, 9 P. D. 86, *cor.* Hannen, P. So where the action was for the establishment of a valuable right, involving difficult questions of law and fact, and took five days to try, the C. A. held there were no special grounds for an order. *Williamson v. N. Staffordshire Ry. Co.*, 32 Ch. D. 399. *Rivington v. Garden*, (1901) 1 Ch. 561. So, in an action for infringement of a patent where the evidence was not scientific. *American Braided Wire Co. v. Thomson*, 44 Ch. D. 274, 296. In an action for the fraudulent misrepresentation of the value of a public house, the trial of which lasted seven days, the defendant succeeded: the judge ordered costs on the higher scale, but the C. A. set aside his order, on the ground that the case was not within rule 9; *Paine v. Chisholm*, (1891) 1 Q. B. 531, C. A.; for an appeal

lies on the question whether there were special grounds empowering the judge to make the order; but not, if they exist, as to the manner in which he has exercised his discretion. S. C.

As to certificates for costs on the High Court scale, in those cases in which the plaintiff would by reason of the County Courts Act, 1888, s. 116, receive them on the county court scale, *vide infra*, and *post*, p. 303.

[Certificate or order for costs under the County Courts Act, 1888, &c.] The County Courts Act, 1888 (51 & 52 V. c. 43), s. 116, as amended by *Id.* 1903 (3 E. 7, c. 42), s. 3, enacts that—

“With respect to any action brought in the High Court which could have been commenced in a county court, the following provisions shall apply:—

“(1.) If in an action founded on contract the plaintiff shall recover a sum less than 20*l.*, he shall not be entitled to any costs of the action, and if he shall recover a sum of 20*l.* or upwards, but less than 100*l.*,” formerly 50*l.*, “he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county court; and

“(2.) If in an action founded on tort the plaintiff shall recover a sum less than 10*l.*, he shall not be entitled to any costs of the action; and, if he shall recover a sum of 10*l.* or upwards, but less than 20*l.*, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county court; unless in any such action, whether founded on contract or on tort, a judge of the High Court certifies that there was sufficient reason for bringing the action in that court, or unless the High Court or a judge thereof at chambers shall by order allow costs. Provided that, if in any action founded on contract the plaintiff shall, within 21 days after the service of the writ, or within such further time as may be ordered by the High Court or a judge thereof, obtain an order under Order xiv. of the Rules of the Supreme Court empowering him to enter judgment for a sum of 20*l.* or upwards, he shall be entitled to costs according to the scale for the time being in use in the Supreme Court.” This section replaces the County Courts Act, 1867 (30 & 31 V. c. 142), s. 5, as amended by 45 & 46 V. c. 57, s. 4, and applied by the J. Act, 1873, s. 67.

By sects. 56, 57, the county court has jurisdiction in all personal actions unless the title “to any toll, fair, market, or franchise shall be in question,” where the claim does not exceed 100*l.*, “formerly 50*l.*,” whether on balance of account or otherwise, or after an admitted set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff, but it has no original jurisdiction in any action for libel or slander, seduction, or breach of promise of marriage. By sect. 58 it has jurisdiction to recover a demand not exceeding 100*l.*, “formerly 50*l.*,” whether the whole or part of the unliquidated balance of a partnership account, or the share under an intestacy or legacy under a will. By sects. 56, 59, 60, its powers of trying actions of ejectment and those in which the title to corporeal or incorporeal hereditaments comes into question, are limited to those in which the annual value or rent of the lands, tenements, or hereditaments in dispute does not exceed 100*l.*, “formerly 50*l.*,” or, in the case of an easement, where neither the dominant nor servient tenement exceeds that value. By sect. 67, in cases within the equitable jurisdiction of the county court, the limit of value is 500*l.* To fall within sect. 57, it seems sufficient that the set-off should be admitted by the plaintiff only. *Lovejoy v. Cole*, (1894) 2 Q. B. 861, dissenting from *Hubbard v. Goodley*, 25 Q. B. D. 156. “Hereditaments” in sect. 56 includes every estate in land. *Tomkins v. Jones*, 22 Q. B. D. 599, C. A. As to when the title to such hereditaments comes into dispute see *Howarth v. Sutcliffe*, (1895) 2 Q. B. 358, C. A.

“Franchise” includes letters patent for an invention. *R. v. Cy. Ct. Judge of Halifax*, (1891) 2 Q. B. 263, C. A. The county court cannot entertain an action for an injunction to restrain an infringement of a registered trade mark. *Bow v. Hart*, (1905) 1 K. B. 592, C. A.

By the J. Act, 1873, s. 89, the county court can in all causes within its jurisdiction grant relief and give effect to defence and counter-claim as fully as the High Court of Justice could have done.

Money paid into court under a defence of payment into court is *recovered* within the meaning of the County Courts Act, 1888, s. 116; *Boulding v. Tyler*, 3 B. & S. 472; 32 L. J., Q. B. 95; *Parr v. Lillicrap*, 1 H. & C. 615; 32 L. J., Ex. 150; *Hewitt & Co. v. Cory*, L. R., 5 Q. B. 418; but it is otherwise where the defence is tender. *James v. Vane*, 2 E. & E. 883; 29 L. J., Q. B. 169. As to cases in which the payment of money into court and the recovery at the trial are in respect of different causes of action, see *Palmer v. Garrett*, 1 R., 5 C. L. 412, C. P.; *Byrne v. M'Evoy*, *Id.* 568; *Leonard v. Brownrigg*, 1 R., 6 C. L. 161, Q. B., and cases there cited.

The first paragraph in sect. 116 refers both to the “character of the action and the amount really involved”; so, however large is the amount claimed, that which the plaintiff substantiates is alone to be considered. *Solomon v. Mulliner*, (1901) 1 Q. B. 76, 83, C. A. Where the plaintiff's claim was proved to be 114*l.* and the defendant's set-off to be 109*l.*, it was held, that as the county court had no jurisdiction to entertain the plaintiff's claim, he was not deprived of his costs. *Potter v. Chambers*, 4 C. P. D. 457; *Neale v. Clarke*, 4 Ex. D. 286; *Goldhill v. Clarke*, 68 L. T. 414, Mich. S. 1892, *cor.* Charles, J. Though it would have been otherwise if the set-off had been admitted. See *Lovejoy v. Cole*, *ante*, p. 301. Sect. 116 (1) applies to the plaintiff's costs against the defendant from whom he has recovered less than 100*l.* although he has recovered a larger sum against another defendant, see *Duxberry v. Barlow*, (1901) 2 K. B. 23, C. A.

Where the plaintiff proved a claim of 35*l.* for rent and damages, and the defendant a counter-claim of 20*l.* for damages, the plaintiff was held entitled to recover the costs of his claim and the defendant the costs of his counter-claim. *Stooke v. Taylor*, 5 Q. B. D. 569; not following *Staples v. Young*, 2 Ex. D. 324, where it was held that if the plaintiff proved a claim and the defendant proved a counter-claim of less amount, the plaintiff *recovered* the balance only. The provisions of the County Courts Act, 1888, s. 116, do not affect the right to costs of a defendant who has succeeded on a counter-claim. *Blake v. Appleyard*, 3 Ex. D. 195; *Chatfield v. Sedgwick*, 4 C. P. D. 383, 459, C. A. Hence in the same action the plaintiff, though successful, may be deprived of his costs on his claim, while the defendant recovers costs on his counter-claim. S. C.; *Ahrbecker v. Frost*, 17 Q. B. D. 606. Nor does the section apply where the defendant succeeds on a counter-claim against a third party. *Bates v. Burchell*, W. N. 1884, p. 108, Field, J.; see also *Lewin v. Trimming*, 21 Q. B. D. 230. Nor does it apply to the plaintiff's costs of a counter-claim on which he has succeeded, although he has recovered less than 50*l.* on his claim. *Amon v. Bobbett*, 22 Q. B. D. 543, C. A.

In order to decide for the purposes of the County Courts Act, 1888, s. 116 (2), whether an action is founded on contract or on tort, the substantial nature of the action alone, and not its form, is to be considered; see *Kelly v. Metropolitan Ry. Co.*, (1905) 1 K. B. 944, 946, *per* Ld. Esher, M.R. The principle for determining such nature, in the case of negligence or breach of duty, is, after some conflicting decisions, now settled to be as follows, *viz.*—Where the cause of action falls within the common law liability arising from the relation between the parties, although such relation was established by contract, the action is one of tort, if it does not, and the plaintiff must

rely on the breach of some particular stipulation in the contract, the action is one of contract. *Sachs v. Henderson*, (1902) 1 K. B. 612, C. A., following *Turner v. Stallibrass*, (1898) 1 Q. B. 56, 59, 60. Thus an action founded on the common law liability of a bailee is one of tort. S. C. So is an action by a passenger against a railway company for personal injury caused by negligence of their servants. *Kelly v. Metropolitan Ry. Co.*, *ante*, p. 302. So is an action by the consignor against the carrier for delivering the goods to the consignee, after the consignor has given a notice to stop them *in transitu*. *Pontifer v. Midland Ry. Co.*, 3 Q. B. D. 23. So is an action for the detention of goods; *Bryant v. Herbert*, 3 C. P. D. 389, C. A.; *Du Pasquier v. Cadbury, Jones, & Co.*, *infra*; or for the removal by the landlord of fixtures from a house agreed to be let by him to the plaintiff. *Sachs v. Henderson*, *supra*. The section does not apply to an action, which though brought nominally in respect of a tort, in respect of which less than 10*l.* is recovered, includes a successful claim for an injunction as the main part of the relief sought. *Keates v. Woodward*, (1902) 1 K. B. 532, C. A. Nor to an action of detinue claiming the return of goods, which were delivered to the plaintiff after action, but before trial, at which the plaintiff recovered 3*l.* in respect of a claim founded on contract. *Du Pasquier v. Cadbury, Jones, & Co.*, (1903) 1 K. B. 104, C. A.

The plaintiff is, it would seem, in ordinary cases, entitled to a certificate, under sect. 116, that there was sufficient reason for bringing the action in the High Court, where the defendant is abroad, and could not therefore be served with county court process. See *Mendelssohn v. Hoppe*, W. N., 1884, p. 31, Mathew, J. Where in an action of contract, the plaintiff claimed 18*l.*, and obtained an order under Rules, 1883, O. xiv., to sign judgment for 45*l.*, and on proceeding to trial recovered 3*l.* more, he is entitled, under the proviso in sect. 116, *ante*, p. 301, to all the costs of the action on the High Court scale. *Barker v. Hempstead*, 23 Q. B. D. 8.

The judge was not bound to certify, although the plaintiff had commenced a suit in the county court, which the defendant stayed by proceedings under 19 & 20 V. c. 108, s. 39, now replaced by 51 & 52 V. c. 43, s. 62. *Flitters v. Alfrey*, L. R., 10 C. P. 29. The order of a judge under sect. 116, allowing costs on the High Court scale, is made under a discretionary power, and therefore by reason of J. Act, 1873, s. 49, no appeal lies therefrom. *Bazett v. Morgan*, 24 Q. B. D. 48.

Where an action is referred to an arbitrator "with all the powers of certifying of a judge at N. P.," he cannot certify after his award has been made. *Bedwell v. Wood*, 2 Q. B. D. 626. But where an action has been referred, costs to abide the event, a judge at chambers may certify after award made. *Hyde v. Beardstey*, 18 Q. B. D. 244.

Sect. 116 seems not to apply to an action commenced in an inferior court and removed by *certiorari* into the superior court, for the wording of the section avoids the construction put upon the County Courts Act, 1867, s. 5, in *Pellus v. Breslauer*, L. R., 6 Q. B. 438, B. C.

The cases in which plaintiffs were deprived of costs by reason of the verdict not amounting to a sufficient sum, were formerly extended by certain obscure enactments contained in the stats. 31 & 32 V. c. 71, and 32 & 33 V. c. 51, which conferred admiralty jurisdiction on the county courts; see 31 & 32 V. c. 71, s. 9; but these are now repealed by Rules, 1883, O. lxx. r. 1. *Rockett v. Clippingdale*, (1891) 2 Q. B. 293, C. A., following *Garnett v. Bradley*, 3 Ap. Ca. 944, D. P., *ante*, p. 296.

[*Order to disallow unnecessary costs.*] By Rules, 1883, O. lxx. r. 27 (20), "The court or judge may, at the hearing of any cause or matter" . . . "and whether the same is objected to or not, direct the costs of any indorsement on a writ of summons, pleading, summons, affidavit, evidence," &c., "or

other proceeding, or any part thereof, which is improper, vexatious, unnecessary, or contains vexatious or unnecessary matter, or is of unnecessary length, or caused by misconduct or negligence, to be disallowed, or may direct the taxing officer to look into the same, and to disallow the costs thereof, or of such part thereof as he shall find to be improper, unnecessary, vexatious, or to contain unnecessary matter, or to be of unnecessary length, or caused by misconduct or negligence."

*Order as to costs occasioned by refusal to admit.*] By Rules, 1883, O. xxi. r. 9, "Where the court or a judge shall be of opinion that any allegations of fact, denied or not admitted by the defence, ought to have been admitted, the court or judge may make such order as shall be just with respect to any extra costs occasioned by their having been denied or not admitted." We have seen, *ante*, p. 73, tit. *Admissions*, that the judge may relieve a party, called upon to admit a document or fact, under Rules, 1883, O. xxxii. rr. 2, 4, from the costs occasioned by his refusal, by a certificate that his refusal was reasonable. This is to be given at the trial; but the court or a judge may at any time allow the costs of proving facts included in the notice to admit: there is no similar provision as to documents.

It seems to be reasonable to refuse to admit a document which the party called upon has no opportunity of inspecting or verifying. *Rutter v. Chapman*, 8 M. & W. 391, *per Cur.*

*Order as to costs of discovery.*] By Rules, 1883, O. xxxi. r. 25, "the costs of discovery by interrogatories or otherwise shall, unless otherwise ordered by the court or a judge, be secured" by a deposit to be made (see rule 26), "by the party seeking such discovery, and shall be allowed as part of his costs where and only where such discovery shall appear to the judge at the trial, or if there is no trial to the court or a judge, or shall appear to the taxing officer, to have been reasonably asked for."

*Order of costs for shorthand writers' notes.*] Costs of shorthand writers' notes of the trial will not be allowed on taxation, unless a special direction to that effect is given in the judgment. Applications for such directions must be made at the hearing, or before the judgment is drawn up. *De la Warr, Earl, v. Miles*, 19 Ch. D. 80, C. A.

*Order for costs of proving original will.*] Where an original will is produced and proved, the judge shall order by which party the costs of the production and proof shall be paid. 20 & 21 V. c. 77, s. 65, *ante*, p. 151.

*Certificate of costs for special jury.*] The statute 6 G. 4, c. 50, s. 34, provides that the party who has obtained the special jury shall bear the costs thereof, and shall not on taxation be allowed the extra costs thereby caused, "unless the judge before whom the cause is tried shall, immediately after the verdict, certify under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury."

Where this certificate is necessary, it must be applied for immediately after the verdict or nonsuit. In *Waggett v. Shaw*, 3 Camp. 316, an application on the day after the trial was considered too late. Where the certificate was verbally granted immediately and indorsed on the record, but was not signed by the judge till the costs were undergoing taxation, it was held too late. *Grace v. Clinch*, 4 Q. B. 606. As to the word "immediate," the following decisions on 3 & 4 V. c. 24, s. 2, where the words were "unless the judge or presiding officer before whom such verdict shall be obtained



shall *immediately afterwards* certify on the back of the record," may be found useful. Under that section the judge might take a reasonable time to consider the application for a certificate. He was not bound to give it instantly at the close of the trial, nor before the adjournment of the court; *Thompson v. Gibson*, 8 M. & W. 281; *Page v. Pearce*, *Id.* 677; nor *semb. per* Ld. Abinger, C.B., *Id.*, even on the same day; the object of the legislature being only to exclude the operation of any intervening fact or discussion upon the judge's mind, and to make the certificate "the result of his impression at the time." And he might by consent or acquiescence of the parties at the trial, certify a long time afterwards. *Jones v. Williams*, 13 M. & W. 420. See *Heden v. Atlantic R. M. S. Navigation Co.*, 2 E. & E. 671; 29 L. J., Q. B. 191. But where no application for the certificate was made till ten days after, at the next assize town, and the certificate was then made, the court set it aside as being too late. *Forsdike v. Stone*, L. R., 3 C. P. 607. And it seems that when the judge had at the trial refused the certificate, he could not afterwards grant it. See *Folkard v. Metropolitan Ry. Co.*, L. R., 8 C. P. 470. The court above had no jurisdiction to review the discretion exercised by the judge at N. P. *Barker v. Hollier*, 8 M. & W. 513; *Richardson v. Barnes*, 4 Exch. 128.

## PART II.

## EVIDENCE IN PARTICULAR ACTIONS.

*Effect of the Judicature Acts, 1873, 1875.*

THE J. Acts, 1873, 1875, made great alterations in the practice and procedure of the courts. All the superior courts at Westminster were thereby constituted divisions of the High Court of Justice, each division having all the jurisdiction which was previously vested in each or either of the courts before they were consolidated. See *Pinney v. Hunt*, 6 Ch. D. 98; *Bradford v. Young*, 26 Ch. D. 656; *Priestman v. Thomas*, 9 P. D. 70, 210. And by the Bankruptcy Act, 1883 (46 & 47 V. c. 52), s. 93, the jurisdiction of the London Court of Bankruptcy has been also transferred to the High Court.

By the J. Act, 1873, effect is to be given by every division to equitable estates, interests, and principles, in the same way as they were previously recognized by the courts of equity; mortgages and assignees of choses in action may in general sue in their own names; stipulations as to time, &c., are not to be considered of the essence of a contract where they were not so in equity, and in general equity rules are to prevail. The principal provisions of the J. Act, 1873, relating to these subjects are as follows:—

Effect to be given to equitable estates and interests.

Sect. 24. "In every civil cause or matter commenced in the High Court of Justice, law and equity shall be administered by the High Court of Justice and the Court of Appeal respectively according to the rules following:—

(1.) "If any plaintiff or petitioner claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim whatsoever asserted by any defendant or respondent in such cause or matter, or to any relief founded upon a legal right, which heretofore could only have been given by a court of equity, the said courts respectively, and every judge thereof, shall give to such plaintiff or petitioner such and the same relief as ought to have been given by the Court of Chancery in a suit or proceeding for the same or the like purpose, properly instituted before the passing of this Act."

(2.) "If any defendant claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim asserted by any plaintiff or petitioner in such cause or matter, or alleges any ground of equitable defence to any claim of the plaintiff or petitioner in such cause or matter, the said courts respectively, and every judge thereof, shall give to every equitable estate, right, or ground of relief so claimed, and to every equitable defence so alleged, such and the same effect, by way of defence against the claim of such plaintiff or petitioner, as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that court for the same or the like purpose before the passing of this Act."

(3.) "The said courts respectively, and every judge thereof, shall also have power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff, or petitioner as such defendant shall have properly claimed by his pleading, and as the said courts respectively, or any judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of court or any order of the court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter with the same rights, in respect of his defence against such claim, as if he had been duly sued in the ordinary way by such defendant."

(4.) "The said courts respectively, and every judge thereof, shall recognize and take notice of all equitable estates, titles, and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court of Chancery would have recognized and taken notice of the same in any suit or proceeding duly instituted therein before the passing of this Act."

(6.) "Subject to the aforesaid provisions for giving effect to equitable rights and other matters of equity in manner aforesaid, and to the other express provisions of this Act, the said courts respectively, and every judge thereof, shall recognize and give effect to all legal claims and demands, and all estates, titles, rights, duties, obligations, and liabilities existing by the common law or by any custom, or created by any statute, in the same manner as the same would have been recognized and given effect to if this Act had not passed by any of the courts whose jurisdiction is hereby transferred to the said High Court of Justice."

(7.) "The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act, in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

By sect. 25 (5.) "A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person." See *Fairclough v. Marshall*, 4 Ex. D. 37, C. A.; *Van Gelder v. Sowerby Bridge, &c., Flour Soc.*, 44 Ch. D. 374, C. A., and *Mathews v. Usher*, *post*, p. 1008.

Mortgagor may sue in his own name.

(6.) "Any absolute assignment, by writing under the hand of the assignor

(not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor." This clause "has not made contracts assignable which were not assignable in equity before, but it has enabled assigns of assignable contracts to sue upon them in their own names without joining the assignor." *Tollhurst v. Assoc. Portland Cement Manufacturers*, (1903) A. C. 414, 424, *per* Ld. Lindley; *Torkington v. Magee*, (1902) 2 K. B. 427, which explained *May v. Lane*, (1894) 64 L. J., Q. B. 236, was reversed on other grounds; (1903) 1 K. B. 644, C. A. A claim under the Lands Clauses Act, 1845 (8 & 9 V. c. 18, s. 68), for injurious affection of land is assignable; *Dawson v. Gl. N. and City Ry. Co.*, (1905) 1 K. B. 260, C. A. "An assignment of a mere right of litigation is bad, but an assignment of property is valid, even although that property may be incapable of being recovered without litigation." *Id.* 271. The decisions hereon relating to debts will be found *post*, p. 620, *sub tit.* *Action for money had and received—On transfer of debt.*

(7.) "Stipulations in contracts as to time or otherwise, which would not, before the passing" (August 5th, 1873) "of this Act, have been deemed to be or to have become of the essence of such contracts in a court of equity, shall receive in all courts the same construction and effect as they would have heretofore received in equity." See hereon *post*, pp. 323, 324.

(11.) "Generally, in all matters not hereinbefore particularly mentioned in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail." For instance of the application of this rule, see *Bustros v. White*, *ante*, p. 156; *Grant v. Holland*, 3 C. P. D. 180; *Lowe v. Dixon*, *post*, p. 595; and *Vibart v. Coles*, 24 Q. B. D. 364, C. A. It must, however, be observed that the effect of the Act is not to abolish the distinction between legal and equitable estates. *Clements v. Matthews*, 11 Q. B. D. 814, *per* Cotton, L.J.; *Joseph v. Lyons*, 15 Q. B. D. 286, *per* Cotton, L.J.; and see *Swain v. Ayres*, 21 Q. B. D. 293, 295, *per* Ld. Esher, M.R., and Lindley, L.J.

By the J. Act, 1875, s. 10 [repealing J. Act, 1873, s. 25 (1)] "in the administration by the court of the assets of any person who may die after the commencement of this Act" (1st Nov. 1875), "and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding-up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding-up; the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person, or out of the assets of any such company, may come in under the

Assignee of chose in action may sue in his own name.

Stipulations in contracts as to time, &c.

Equity rules to prevail.

Rules as to creditors and debts provable.

decree or order for the administration of such estate, or under the winding-up of such company, and make such claims against the same as they may respectively be entitled to by virtue of this Act."

*Rules, 1883, relating to Pleading.*

It will be convenient here to give a summary of the Rules, 1883, so far as they affect pleading.

By Rules, 1883, O. xvi. rr. 1, 4, 11, *ante*, pp. 89, 90, objection on the ground of non-joinder or mis-joinder of parties is no longer a defence, and ample powers of amendment are given.

By O. xix. r. 4, "every pleading shall contain and contain only a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved."

R. 5 provides that the forms given in Appendices C., D., and E. shall be used where applicable.

R. 6. "In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items, if necessary), shall be stated in the pleading, provided that if the particulars be of debt, expenses, or damages," reference to particulars otherwise delivered shall be sufficient, if they exceed three folios.

R. 12. "Nothing in these rules contained shall affect the right of any defendant to plead not guilty by statute. And every defence of not guilty by statute shall have the same effect as a plea of not guilty by statute has heretofore had, but if the defendant so plead, he shall not plead any other defence to the same cause of action without the leave of the court or a judge." See further O. xxi. r. 19, *post*, p. 310.

R. 13. "Every allegation of fact in any pleading not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind not so found by inquisition."

R. 14. "Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant (as the case may be); and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading."

R. 15. "The defendant or plaintiff (as the case may be) must raise by his pleading all matters which show the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds." The particular section of the last statute need not be stated, but if stated the defendant will be bound by it, and an amendment has been refused at the trial. *James v. Smith*, (1891) 1 Ch. 384.

R. 16. "No pleading, not being a petition or summons, shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same."

R. 17. "It shall not be sufficient for a defendant in his statement of

defence to deny generally the grounds alleged by the statement of claim, or for a plaintiff in his reply to deny generally the grounds alleged in a defence by way of counter-claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth, except damages."

R. 19. "When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with divers circumstances, it shall not be sufficient to deny it along with those circumstances."

R. 20. "When a contract, promise, or agreement is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract, promise or agreement alleged, or of the matters of fact from which the same may be implied by law, and not as a denial of the legality or sufficiency in law of such contract, promise, or agreement, whether with reference to the Statute of Frauds, or otherwise."

O. xxi. r. 1, 2, 3, 5, will be found *sub. tit. Defences to simple contracts*, *post*, p. 658.

R. 4. "No denial or defence shall be necessary as to damages claimed, or their amount: but they shall be deemed to be put in issue in all cases unless expressly admitted." Hence any evidence may be given in mitigation of damages, although its effect have not been raised by the defence. See *Wood v. Durham, Earl of*, 21 Q. B. D. 501.

R. 19. "In every case in which a party shall plead the general issue, intending to give the special matter in evidence, by virtue of an act of parliament, he shall insert in the margin of his pleading the words 'by statute,' together with the year of the reign in which the act of parliament on which he relies was passed, and also the chapter and section of such act, and shall specify whether such act is public or otherwise, otherwise such defence shall be taken not to have been pleaded by virtue of any act of parliament." By O. xix. r. 12, *ante*, p. 309, the defence of "not guilty by statute," is retained.

R. 20. "No plea or defence shall be pleaded in abatement."

O. xxiii. r. 1 (1) "Except in Admiralty actions no reply shall be delivered unless the same be ordered." (R. S. C., July, 1902, r. 7, which annulled the former O. xxiii.)

R. 6. "No new assignment shall be necessary or used. But everything which was formerly alleged by way of new assignment may hereafter be introduced by amendment of the statement of claim or by way of reply." This rule is annulled, *vide supra*, but it correctly describes the form of pleading which now takes the place of a new assignment. See Bullen & Leake's *Proc. Pleading*, 6th ed., p. 553, n.

O. xxv. r. 2. "Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the judge who tries the cause, at or after the trial." As to arguments on points of law, *vide ante*, p. 288.

O. xxvii. r. 13. "If the plaintiff does not deliver a reply, or any party does not deliver any subsequent pleading within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and all the material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue."

O. xxxvi. r. 58. "Where damages are to be assessed in respect of any continuing cause of action, they shall be assessed down to the time of the assessment." As to a "continuing cause of action," *vide ante*, p. 295.

Under R. S. C., Nov., 1893, O. xviii. A, *post*, p. 659, the plaintiff may without pleadings proceed to trial, subject to the rules in the order, on the statement of the nature of his claim, and of the relief or remedy required in the action.

The Rules relating to Set-off and Counter-claim will be found *sub tit. Set-off and Counter-claim*, *post*, p. 704.

Reference is made in appropriate parts of this work to the various sections of the J. Acts, and the Rules, S. C., affecting principles of law or the practice at N. P.

## ACTIONS FOUNDED ON SIMPLE CONTRACT.

In the early editions of this work an alphabetical arrangement of particular actions, in the order of the known forms of action, was adopted for convenient reference. These forms have now become obsolete, and this arrangement has therefore been recast in the following pages, and the actions are distributed under the two heads still recognized for some purposes, namely, of actions on *contracts*, simple or by specialty, and actions for *wrongs* independent of contract. The legal reader, however, will not require to be told that a strict adherence to this, or any other distribution of the subject, is practically impossible, and he will occasionally find under one head decisions which are also applicable to another and different head.

## ACTION ON SALE OF REAL PROPERTY.

### VENDOR AGAINST VENDEE.

In an action by the vendor of real property on the purchaser's default in completing the contract, the plaintiff may be called upon by the defence to prove the contract; the performance by himself of all conditions precedent; and the defendant's default.

*Proof of the Contract*—*Stat. of Frauds*, s. 4.] Where an offer to sell is accepted by letter, the vendor is bound from the time of posting the letter. *Potter v. Sanders*, 6 Hare, 1. So, an offer to sell, made and accepted by letter, binds both parties from the time the acceptance was posted; *Adams v. Lindsell*, 1 B. & A. 681; even though the letter was never received. *Household Insur. Co. v. Grant*, 4 Ex. D. 216, C. A. And "where the circumstances of the case are such that it must have been within the contemplation of the parties that according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted." *Henthorn v. Fraser*, (1892) 2 Ch. 27, 33, *per* Ld. Herschell. *Accord. Bruner v. Moore*, (1904) 1 Ch. 305. As to what amounts to an offer see *Harvey v. Facey*, (1893) A. C. 552, J. C. As to the distinction between an agreement for sale and an agency agreement see *Livingstone v. Ross*, (1901) A. C. 327, J. C.

If an offer be made to buy within a certain time, the offer may be retracted before acceptance; *Routledge v. Grant*, 4 Bing. 653; *Head v. Diggon*, 3 M. & Ry. 97; but the offer remains open until the other party has received notice of retraction thereof. *Stevenson v. McLean*, 5 Q. B. D. 346; *Henthorn v. Fraser*, *supra*. It is insufficient to post a letter of retraction

which is not in the ordinary course of post received till after a letter accepting the offer has been posted. S. C.; *Byrne v. Van Tienhoven*, 5 C. P. D. 344. Notice of sale to another person amounts to retraction of an offer to sell. *Dickinson v. Dodds*, 2 Ch. D. 463, C. A. If the offer be refused by letter, but the refusal be withdrawn and the offer accepted in a subsequent letter, the vendor is not bound by his offer, though he had not expressly withdrawn his original offer. *Hyle v. Wrench*, 3 Beav. 334. When the offer is made by an agent of the vendor, and the acceptance is notified by letter to such agent, the principal is bound, though the agent has neglected to notify to him. *Wright v. Bigg*, 15 Beav. 592. See further as to contracts by interchange of letters, *post*, pp. 531 *et seq.*, and p. 1100.

“The liability of a principal on a contract entered into by his agent within the terms of his authority cannot be affected by the unknown motives by which the agent was actuated in making the contract.” *Hambro v. Burnand*, (1904) 2 K. B. 10, 26, C. A. When an offer to purchase land was made by A. to B., who acted as agent to the owner C., but had no authority to sell, and was accepted by B., but withdrawn by A. before ratification by C., which did not take place till after action for specific performance brought by C., it was held that there was relation back to B.’s acceptance, and a contract which bound A. *Bolton Partners v. Lambert*, 41 Ch. D. 295, C. A., followed in *Ex pte. Badman*, 45 Ch. 16, C. A. *Sed quære*. See strictures thereon in Fry on Specific Performance, 4th ed., p. 677, note A; and *Fleming v. Bank of New Zealand*, (1900) A. C. 577, 587, *per J. C.* But a contract must at any rate, be ratified within a reasonable time after acceptance by an unauthorized person, and cannot be ratified after the date fixed for performance to begin. *Met. Asylums Board v. Kingham*, 6 T. L. R. 217, (1890) *cor.*, Fry, L.J. See also *Dibbins v. Dibbins*, (1896) 2 Ch. 348, *per Chitty, J.* Where a contract is made by R., who does not profess to act as agent, but is intending to contract on K.’s behalf, though without his authority, K. cannot ratify it. *Keightley, Maassted & Co. v. Durant*, (1901) A. C. 240, D. P.

As to the authority of an estate agent to contract to sell land, see *Chadburn v. Moore*, *post*, p. 319.

By the Stat. of Frauds, 29 C. 2, c. 3, s. 4, no action shall be brought whereby to charge any person [upon any agreement made] upon any contract, or sale of lands, tenements, or hereditaments, or any interest in, or concerning them, unless the agreement upon which such an action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. The words in brackets occur in a preceding part of the clause, and seem to belong to this part also. See Sugd. V. & P., 14th ed. 123.

A defence under this statute must now be pleaded specially. Rules 1883, O. xix. r. 20, *ante*, p. 310. When it is so pleaded it will be necessary to prove a contract in writing. A contract by deed seems not to be within the statute, and therefore requires no signature, *vide ante*, p. 138.

*What is an interest in land within Stat. of Frauds, s. 4.*] A question often arises as to what is an “interest in or concerning” land, &c., within this section. Where crops sold are of grass or growing fruit, and the terms of the sale imply the grant of an interest in the land, and not of a mere easement or right of entry, then the contract is within sect. 4. *Crosby v. Wadsworth*, 6 East, 602; *Jones v. Flint*, 10 Ad. & E. 753; *Rodwell v. Phillips*, 9 M. & W. 501. But if the crops be not natural, as grass, but industrial, as wheat, and are fit to cut when sold, the sale is not an interest in land within sect. 4, though it might have been within sect. 17 (now replaced by the Sale of Goods Act, 1893, s. 4, *post*, p. 526); and it is immaterial whether the cutting is to be by the buyer or seller. *Evans v. Roberts*,



5 B. & C. 829; *Parker v. Staniland*, 11 East, 362. Where timber is sold as such, to be cut by either the seller or the buyer, it has been held to be the sale of a chattel. *Smith v. Surman*, 9 B. & C. 561; *Marshall v. Green*, 1 C. P. D. 35. See further, 1 Wms. Saund. 277 c (f). But a contract for the sale of "the building materials" of a standing house, to be taken down and cleared off the ground within two months, after which date any materials then not cleared will be deemed a trespass and become forfeited, and the purchaser's right of access to the ground shall absolutely cease, is within the section. *Lavcry v. Pursell*, 39 Ch. D. 508.

Where the contract relates to an interest in land, any collateral contract, such as to provide additional furniture, cannot be enforced if the agreement be not in writing. *Mechelen v. Wallace*, 7 Ad. & E. 49; *Vaughan v. Hancock*, 3 C. B. 766. So, on an oral contract to give up a house and fixtures for a certain sum, payment of the sum agreed cannot be enforced, although the house has been given up pursuant to the agreement. *Kelly v. Webster*, 12 C. B. 283; 21 L. J., C. P. 163. But where there was an agreement between landlord and tenant that the landlord, at the expiration of the tenancy, would take at a valuation the fixtures, which the tenant had power to remove during his term, this was held not within the statute. *Hallen v. Runder*, 1 C. M. & R. 266; *Lee v. Gaskell*, 1 Q. B. D. 700. An agreement to take furnished lodgings is within sect. 4. *Inman v. Stamp*, 1 Stark. 42; *Edye v. Strafford*, 1 C. & J. 391. In those cases the contract, if carried out, would have amounted to a demise, and the occupier could have maintained trespass or ejectment; but if the contract be merely for board and lodging as an inmate of the house, although the inmate is to have a separate room, such contract is not within sect. 4. *Wright v. Stwert*, 2 E. & E. 721; 29 L. J., Q. B. 161. Nor, it would seem, is a contract to take as lodger, and not as under-tenant, certain defined rooms within sect. 4. See *Allan v. Liverpool*, L. R., 9 Q. B. 191, 192, and cases cited, *post*, p. 905, *sub tit. Actions for Illegal Distress*. Nor is an agreement to build a house, though it implies a licence to go on the land. *Wright v. Stwert*, *supra*, per Crompton, J. See also *Wells v. Kingston-upon-Hull*, L. R., 10 C. P. 402. A grant of a right to shoot over land and take away part of the game killed is within sect. 4. *Webber v. Lee*, 9 Q. B. D. 315, C. A. So is a contract to retire from a partnership, part of the property of which consists of land. *Gray v. Smith*, 43 Ch. D. 208. So is a contract to retire from a milk-walk in favour of the defendant, and to give up the premises occupied by the plaintiffs and stock to him. *Smart v. Harding*, 15 C. B. 652; 24 L. J., C. P. 76. So, on an oral agreement to give up a brickyard and bricks on it to the plaintiff at a valuation, defendant undertaking to pay to the landlord the rent then due, though plaintiff has taken possession and paid for the bricks, he cannot sue defendant for not paying the landlord; the contract and consideration being entire. *Hodgson v. Johnson*, E. B. & E. 685; 28 L. J., Q. B. 88; *Sanderson v. Graves*, L. R., 10 Ex. 234. For although the plaintiff's part of the agreement be performed, it cannot be enforced against the defendant if not in writing. *Cocking v. Ward*, 1 C. B. 858. See, however, *Pulbrook v. Lawes*, 1 Q. B. D. 284. And an agreement as to land, if entirely performed on both sides, may be given in evidence, though not in writing, for a collateral purpose: thus, under an oral agreement that plaintiff should pay 37*l.* for defendant's interest in premises, defendant to return 10*l.* if plaintiff were refused a licence to use the premises as a slaughter-house, the plaintiff had possession of the premises and paid the defendant the 37*l.*; it was held that the plaintiff could recover the 10*l.* on the licence being refused. *Green v. Saddington*, 7 E. & B. 503.

A contract relating to the expenses of investigating the title to land is not within this section. *Jeakes v. White*, 6 Exch. 873. Nor is it clear that

an agreement relating to an easement on land is within it; such contract, however, if it professes to *grant* an easement, must be by deed. See Sugd. V. & P., 14th ed. 123, and *post, tit. Trespass to land—Defence of licence, post*, pp. 943, 944. A share in a mine actually in work was held to be within sect. 4. *Boyce v. Green*, Batty, 608, Ir. Q. B. But in *Watson v. Spratley*, 10 Exch. 222; 24 L. J., Ex. 53, an oral sale of shares in an unincorporated mine company in Cornwall, formed on the "cost-book" principle, was held good. *Accord. Powell v. Jessop*, 18 C. B. 336; 25 L. J., C. P. 199. These decisions are founded on the principle that a shareholder has an interest, not in the land, but in the adventure and profits thereof. If he be a co-tenant, in law or equity, of the land, the case would be different. The same principle applies to all joint stock companies possessing land, in which, even although unincorporated, the shareholders have no direct interest in the land necessarily occupied for carrying on the business, but only a right to the profits of the business itself, as has been frequently decided under the Mortmain Act; *Myers v. Perigal*, 2 D. M. & G. 599; 22 L. J., Ch. 431; *Edwards v. Hall*, 6 D. M. & G. 74; 25 L. J., Ch. 82; *Attree v. Howe*, 9 Ch. D. 337, C. A.; and in appeal cases from the revising barristers; *Bulmer v. Norris*, 9 C. B., N. S. 19; 30 L. J., C. P. 25; *Bennett v. Blain*, 15 C. B., N. S. 578; 33 L. J., C. P. 63; *Freeman v. Gainsford*, 18 C. B., N. S. 185; 34 L. J., C. P. 95; *Robinson v. Ainge*, L. R., 4 C. P. 429; *Watson v. Black*, 16 Q. B. D. 270. But debentures issued by a company owning leasehold property which charged its undertaking and property as a floating security, with liberty to the company to dispose of the property in the course of business, the principal money secured to become payable if the company created any specific charge on its freehold or leasehold property in priority to the debentures, and reserving power to the debenture holders on default of payment, or in the case of a winding-up to appoint a receiver who may sell the property, is within the section. *Driver v. Broad*, (1893) 1 Q. B. 539, 744, C. A. So are bonds issued by commissioners secured by a covering deed mortgaging lands under a statutory power. *Toppin v. Lomas*, 16 C. B. 145; 24 L. J., C. P. 144. A contract by the defendant to get for the plaintiff a lease of land, in which the defendant has no interest, is within the section. *Horsey v. Graham*, L. R., 5 C. P. 9. But a collateral agreement to do something not relating to land, in consideration that one of the parties shall sign a contract relating to land, is not within the section. *Morgan v. Griffith*, L. R., 6 Ex. 70; *Erskine v. Adeane*, L. R., 8 Ch. 756; *Mann v. Nunn*, 43 L. J., C. P. 241; *Angell v. Duke*, L. R., 10 Q. B. 174; *acc. Boston v. Boston*, (1904) 1 K. B. 124, C. A. So where in such case the agreement was a warranty as to an existing fact. *De Lassalle v. Guildford*, (1901) 2 K. B. 215, C. A.

*What is a sufficient note within Stat. of Frauds, s. 4.]* The note or memorandum must be a memorandum of an agreement complete when the memorandum is made. *Munday v. Asprey*, 13 Ch. D. 855. An affidavit of the defendant in prior proceedings, or a recital in his deed, may be sufficient. See *Barkworth v. Young*, and *In re Holland*, cited *post*, p. 317. The memorandum must specify the *terms*; for otherwise all the danger of perjury, which the statute intended to guard against, would be let in. Sugd. V. & P., 14th ed. 134. Thus, where an auctioneer's receipt for the deposit was set up as an agreement, it was rejected because it did not state the price to be paid for the estate; *Blagden v. Bradbear*, 12 Ves. 466; but had the receipt referred to the conditions of sale, so as to have entitled the court to look at them for the terms, it might have been enforced as an agreement. S. C. The agreement cannot be enforced, unless both the contracting parties are named in it. *Williams v. Jordan*, 6 Ch. D. 517;

*Williams v. Byrnes*, 1 Moo. P. C., N. S. 154; *Williams v. Lake*, 2 E. & E. 349; 29 L. J., Q. B. 1. Subject, terms, and names of the parties must appear. S. C. The signature of the defendant may supply his name. *Stokell v. Niven*, 61 L. T. 18, T. S. 1889, C. A. And it is sufficient if the names appear by certain description; thus, where the property was described "as belonging to the late A. B.," and the sale was stated to be by direction of the executors; *Hood v. Burrington, Ltd.*, L. R., 6 Eq. 218, or was stated to be sold "by direction of the proprietor;" *Sale v. Lambert*, L. R., 18 Eq. 1; *Rossiter v. Miller*, 3 Ap. Ca. 1124, D. P., or by a trustee selling under a trust for sale; *Cutling v. King*, 5 Ch. D. 660, or, it appear that the sale is by a company in possession; *Commins v. Scott*, L. R., 20 Eq. 11; the confirmation of the auctioneer or vendor's solicitor "as agent for the vendors," was held to satisfy this rule. See also *Carr v. Lynch*, (1900) 1 Ch. 613. And the name of an agent contracting for an undisclosed principal is sufficient. *Filby v. Hounsell*, (1896) 2 Ch. 737. This point was not taken in *Jarrett v. Hunter*, 34 Ch. D. 182. But the term "vendor" without further description is insufficient. *Potter v. Duffield*, L. R., 18 Eq. 4; *Thomas v. Brown*, 1 Q. B. D. 714.

A general description of the property sold is sufficient, the property being identified by extrinsic evidence. Thus "Mr. O.'s house," *Ogilvie v. Foljambe*, 3 Mer. 53; "the property in Cable Street," *Bleakley v. Smith*, 11 Sim. 150; "24 acres of land freehold at T. in the parish of D.," *Plant v. Bourne*, (1897) 2 Ch. 281, C. A. And a memorandum, "The property duly sold to A. S., and deposit paid at close of sale," coupled with a receipt, "Pinxton, Mar. 29, 1880. Received of A. S. the sum of 21l. as deposit on property purchased at 420l., at the Sun Inn, Pinxton, on the above date. C., owner," have been held sufficient. *Shardlow v. Cottrell*, 20 Ch. D. 90, C. A.

It is not necessary that the names or terms should appear in any single paper. The contract may be collected from several connected papers. *Kennedy v. Lee*, 3 Meriv. 441; *Warner v. Willington*, 3 Drew. 523; 25 L. J., Ch. 662; *Ridgway v. Wharton*, 6 H. L. C. 238; 27 L. J., Ch. 46; *New Valley Drainage Comrs. v. Dunkley*, 4 Ch. D. 1; *Baumann v. James*, L. R., 3 Ch. 508. So, if a letter, properly signed, does not contain the whole agreement, yet if it actually refer to a writing that does, it will be sufficient, though the latter writing is not signed; and oral evidence is admissible to identify the writing referred to. *Allen v. Bennet*, 3 Taunt. 169; *Oliver v. Hunting*, 44 Ch. D. 205; see *Climan v. Cooke*, 1 Sch. & Lef. 33. And a written contract stating "the land is sold subject to the conditions of the Halifax Incorporated Law Society," was held to be sufficient on proof of what those conditions were at the date of the contract. *Pirkles v. Sutcliffe*, (1902) W. N. 200, Mich. S., Farwell, J. Where a contract in writing exists which binds one party to the contract under the statute, any subsequent note, signed by the other, is sufficient to bind him, provided it either contains the terms, or refers to any other writing that contains them; *Dobell v. Hutchinson*, 3 Ad. & E. 355; *Rossiter v. Miller*, *supra*; even though the subsequent note is written to request a rescission of the contract. *Coupland v. Arrowsmith*, 18 L. T. 755, July, 1868, Giffard, V.-C. The connection ought to appear on the papers, and not by extrinsic oral evidence only. *Boydell v. Drummond*, 11 East, 152; *Taylor v. Smith*, (1893) 2 Q. B. 65, C. A.; 1 Smith's L. C., 11th ed. 308-9. But it need not be by express or specific description of one paper in the other. *Dart's V. & P.*, 7th ed. 246; *Long v. Millar*, 4 C. P. D. 450, C. A.; *Warner v. Willington*, *Oliver v. Hunting*, and other cases, cited *supra*. The name of one of the parties may be supplied by the indorsement on the envelope in which a letter which contained the other terms of the contract was proved to have been enclosed. *Pearce v. Gardner*, (1897) 1 Q. B. 688, C. A. Where

a contract is sought to be gathered from several letters, the whole of the correspondence must be considered, and although two early letters appear to constitute a complete contract, the later ones may be referred to to show that such contract was not within the contemplation of the parties. *Hussey v. Horne Payne*, 4 Ap. Ca. 311, D. P.; *May v. Thomson*, 20 Ch. D. 705, C. A.; *Bristol, &c., Bread Co. v. Maggs*, 44 Ch. D. 616. See hereon *Bellamy v. Debenham*, 45 Ch. D. 481; affirmed in the C. A. on other grounds, (1891) 1 Ch. 412. A letter, "I agree to let to A. the stables in G. for the same rent, and subject to the same conditions that I hold them myself," accepted by writing signed by A., is not sufficient, as it does not state the duration of the term. *Bagley v. Fitzmaurice*, 8 E. & B. 664; 27 L. J., Q. B. 143; 9 H. L. C. 78. So, the memorandum is insufficient if it do not appear therefrom when the term is to begin; *Marshall v. Berridge*, 19 Ch. D. 233, C. A.; there is no inference that the term begins on its date. S. C. Where it appears from the agreement that the lease is to begin at the date of possession being given, evidence of the date when possession was given is admissible. *In re Lander & Bagley's Contract*, (1892) 3 Ch. 41. Where the letter signed by the defendant, the lessor, contained terms, to some of which the plaintiff did not agree, it was held there was no agreement in writing between the parties; *Marshall v. Berridge, supra*. So, the acceptance of an offer, signed by the purchaser, must be unconditional in order to bind him; thus, where the vendors, in answer to an offer of purchase, wrote referring thereto "which offer we accept and now hand you two copies of conditions of sale," and enclosing agreement with special conditions, it was held that the acceptance was conditional only. *Crossley v. Maycock*, L. R., 18 Eq. 180; *Smith v. Webster*, 3 Ch. D. 49, C. A.; *Jones v. Daniel*, (1894) 2 Ch. 332. See *Bristol, &c., Bread Co. v. Maggs*, and *Bellamy v. Debenham, supra*. Where the terms are to be settled by a third person; *Stanley v. Dowdeswell*, L. R., 10 C. P. 102; or a formal contract is to be prepared and signed by the parties; *Chinnock v. Mchs. of Ely*, 4 D. J. & S. 638; *Winn v. Bull*, 7 Ch. D. 29; there is no agreement till that has been done; and such condition cannot be waived by one party alone. *Lloyd v. Nowell*, (1895) 2 Ch. 744. But, unless it clearly appear that the signature of a formal contract is a condition precedent to there being a binding bargain, the acceptance by letter will bind. *Bonnevell v. Jenkins*, 8 Ch. D. 70, C. A.; *Rossiter v. Miller*, 3 Ap. Ca. 1124, D. P.; *Lewis v. Brass*, 3 Q. B. D. 667, C. A.; *Gray v. Smith*, 43 Ch. D. 208, C. A. Whether there is such a condition precedent is a question of construction of the evidence. S. C. And the intention to execute a formal instrument may be waived by the conduct of the parties. *Metropolitan Ry. Co. v. Brogden*, 2 Ap. Ca. 666, D. P. It seems, notwithstanding the decisions in *Hudson v. Buck*, 7 Ch. D. 683, and *Hussey v. Horne Payne*, 8 Ch. D. 670, C. A., that a term in the contract that the title is to be approved by the vendee's solicitor is not a condition, but merely implies that the title is to be investigated. S. C., 4 Ap. Ca. 312, 322, *per* Ld. Cairns, C.; *Bolton Partners v. Lambert, ante*, p. 312. A letter written by the defendant to his own agent containing the terms of the agreement is sufficient to bind him. *Smith v. Watson*, Bunb. 55; *Gibson v. Holland*, L. R., 1 C. P. 1. The recital in a will of the agreement is sufficient to bind the testator's estate. *In re Hoyle*, (1893) 1 Ch. 84, C. A.

An agreement, good under the Stat. of Frauds, can, it seems, be wholly rescinded, but cannot be varied by a subsequent oral agreement; nor does such agreement to vary operate by way of rescission of the original agreement, *vide ante*, p. 28.

*Signature of Note.*] With regard to the *signing*, it has been held that a printed name is sufficient (*Saunderson v. Jackson*, 2 B. & P. 238 (decided on

sect. 17)), if recognized by, or brought home to, the party, as having been printed by his authority; *Schneider v. Norris*, 2 M. & S. 288; and it is immaterial in what part of the agreement the name is signed. S. C.; *Johnson v. Dodgson*, 2 M. & W. 653; *Knight v. Crockford*, 1 Esp. 190; Cox's note to 1 P. Wms. 771. Thus, "A. B. agrees with J. R. B. to take the property situate, &c., for 248l.," in J. R. B.'s writing, is sufficient signature by him as vendor. *Bleakley v. Smith*, 11 Sim. 150. So, "Messrs. E. bought of A. B." in the writing of Messrs. E.'s agent, binds them. *Durrell v. Evans*, 1 H. & C. 174: 31 L. J., Ex. 337, Ex. Ch. 1. So, a memorandum of agreement between the plaintiff and the defendant H. M. & Co., in the form of a letter from the plaintiff to the defendant headed "H. M. & Co.," written by the defendant's agent by their authority and presented to the plaintiff for signature, and signed by him, was held to bind the defendant. *Evans v. Hoare*, (1892) 1 Q. B. 593. *Leave to appeal refused*. See other cases, cited *post*, p. 533. But the mere drawing of an instrument with the name of the defendant put as one of the contracting parties by his agent, is not sufficient, if the instrument is evidently incomplete; as where it ends with "witness our hands," without any further signature following. *Hubert v. Treherne*, 3 M. & Gr. 743. And the signature must be introduced so as to govern every material and operative part of the instrument. *Caton v. Caton*, L. R., 2 H. L. 127. A minute of a contract entered in accordance with the Companies Act, 1862, s. 67, and signed by the chairman, is sufficient to bind the company. *Jones v. Victoria Graving Dock Co.*, 2 Q. B. D. 314. A signing as witness has been held sufficient, if the party signing be cognisant of the contents of the instrument. *Welford v. Beazeley*, 3 Atk. 503; *Harding v. Crethorn*, 1 Esp. 57; *Coles v. Trecothick*, 9 Ves. 234. But this doctrine was doubted in *Gosbell v. Archer*, 2 Ad. & E. 500, unless the person signing as a witness be a principal, or be expressly acting as agent of the principal. Nor is it clear that the signature of a solicitor approving of a draft agreement is sufficient to bind his client. *Thornbury v. Beville*, 1 Y. & C., C. C. 554. See *Smith v. Webster*, 3 Ch. D. 49, C. A. But the signature of a draft proposed contract by the principal, preceded by the word "approved," may amount to a sufficient signature. *Metropolitan Ry. Co. v. Brogden*, 2 Ap. Ca. 666, D. P. A letter from the purchaser's solicitor enclosing and referring to a draft conveyance which recites the agreement is insufficient. *Munday v. Asprey*, 13 Ch. D. 855. An affidavit containing a statement of an oral contract, signed and filed by the defendant in proceedings prior to the action on the contract, is sufficient. *Barkworth v. Young*, 4 Drew. 1; 26 L. J., Ch. 153. So a recital of such contract in a deed of the defendant. *In re Holland*, (1902) 2 Ch. 360, C. A.

Where a person cannot write, a signature by mark, if properly identified, is sufficient; and no inquiry can be made as to whether the person can write or not. *Baker v. Dening*, 8 Ad. & E. 94. Hence a signature by initials is sufficient. *In re Blewitt*, 5 P. D. 116. Sugden, V. & P., 14th ed. 144; 2 Smith's L. C., 11th ed. 335-6.

The statute requires the agreement to be signed by the *party to be charged therewith*, or some other person thereunto by him lawfully authorized. It is good as against him though only signed by the party to be charged, and not by the other party. *Seton v. Slade*, 7 Ves. 275; *Laythorp v. Bryant*, 2 N. C. 735; and the cases collected Sugd. V. & P., 14th ed. 129 (b). See also *Saunderson v. Jackson*, 2 B. & P. 238 (on sect. 17); and the important observations on this point in a note to *Sweet v. Lee*, 3 M. & Gr. 462. And it is good although the agreement purported to be *inter partes*, and the party suing on it had orally accepted but had never signed it; *Liverpool Banking Co. v. Eccles*, 4 H. & N. 139; 28 L. J. Ex. 122; *Smith v. Neale*, 2 C. B., N. S. 67; 26 L. J., C. P. 143; so, a proposal in writing signed by

the party to be charged and accepted orally is sufficient; *Reuss v. Picksley*, L. R., 1 Ex. 342, Ex. Ch.; even although it is one of two alternative proposals that has been accepted. *Lever v. Koffler*, (1901) 1 Ch. 543. Recognition of a previous signature is sufficient; thus, where a proposal signed by A. is made to B. and altered by B., if A. assent to the alteration he will be bound, and oral evidence is admissible as to the state of the document when he gave his assent, and thereby converted the proposal into an agreement. *Stewart v. Eddowes*, L. R., 9 C. P. 311 (on sect. 17).

With regard to the person authorized by the party to sign, it is settled that such person need not be authorized in writing. *Coles v. Trecothick*, 9 Ves. 250; *Emmerson v. Heelis*, 2 Taunt. 38; nor specially to sign a record of the contract. *John Griffiths Cycle Cor. v. Humber & Co.*, (1899) 2 Q. B. 414, reversed on facts, (1901) W. N. 110, D. P., no opinion being expressed on point decided in C. A. A subsequent recognition of the authority of the agent by the principal is sufficient. *Maclean v. Dunn*, 4 Bing. 722. A telegram sent by the defendant may be sufficient; the instructions for sending the telegram are a mandatory to the company or government officer to sign for the sender. *Godwin v. Francis*, L. R., 5 C. P. 295. The plaintiff's written offer to buy land was in this case accepted by a telegram: it was assumed that the original instructions for the telegram furnished by the defendant to the company, and the copy actually delivered by the company's servant to the plaintiff, were in evidence. S. C. See also *Coupland v. Arrowsmith*, 18 L. T. 755, *ante*, p. 315. The sender of a message is not liable for a mistake made by a telegraph clerk. *Henkel v. Pape*, L. R., 6 Ex. 7.

A sale by auction is within the Stat. of Frauds; *Blagden v. Bradbear*, 12 Ves. 466; and the auctioneer is for this purpose the agent for both vendor and vendee, and his writing down the name of the highest bidder in the auctioneer's book or catalogue is sufficient signature; *Emmerson v. Heelis*, *supra*; *White v. Proctor*, 4 Taunt. 209; but this is not a sufficient memorandum if the conditions of sale are not attached to the book. *Kenworthy v. Schofield*, 2 B. & C. 945. If the highest bidder be agent for another, the writing of the auctioneer of the agent's name as purchaser binds the principal; *Id.* 948, *per* Holroyd, J.; *White v. Proctor*, *supra*; in the latter case the principal was present though his agent bid. But the agency of the auctioneer ceases and does not apply to a memorandum signed by him several days after the auction; *Bell v. Balls*, (1897) 1 Ch. 663; nor to a sale by him *after* the auction; *Mews v. Carr*, 1 H. & N. 484; 26 L. J., Ex. 39. The agent must be a third person, and not one of the parties; *Wright v. Dannah*, 2 Camp. 203; therefore, if the action is brought against the purchaser by the auctioneer himself, the signing of the defendant's name by the auctioneer is insufficient to satisfy the statute. *Farebrother v. Simmons*, 5 B. & A. 333; *Sharman v. Brandt*, L. R., 6 Q. B. 720, Ex. Ch. (on sect. 17). But the signature by the auctioneer's clerk is sufficient in such action, where the clerk, as each lot was knocked down, named the purchaser aloud, and, on a sign of assent from him, made a note accordingly in a book. *Bird v. Boulter*, 4 B. & Ad. 443. So where the purchaser otherwise signified his assent. *Sims v. Landray*, (1894) 2 Ch. 318. Apart from some mark of assent, however, the clerk has no authority to sign for the purchaser. *Bell v. Balls*, *supra*. Where the auctioneer's clerk signed the contract, "Witness T. N.," without more, this was held not to be a signing by an agent of the vendor, though the deposit was paid over to the vendor's attorney, who wrote a letter to vendee's attorney advising the purchase to be relinquished; for such facts did not amount to a ratification of the agency of T. N. or of the contract, even supposing the signature as witness to be sufficient. *Gosbell v. Archer*, 2 Ad. & E. 500.

A bidding at an auction may be retracted before the hammer is down. *Payne v. Cave*, 3 T. R. 148; see *Routledge v. Grant*, 4 Bing. 653, 660. And it is very doubtful if the usual condition against retracting biddings could in the case of an ordinary sale by auction, be enforced. Sugden, V. & P., 14th ed. 14; *Jones v. Nanney*, 13 Price, 99. An auctioneer has an implied authority to sell without reserve; *Rainbow v. Hawkins*, (1904) 2 K. B. 322.

Instructions to a house and estate agent to procure a purchaser and to negotiate a sale of land do not authorize the agent to bind his principal by a contract to sell it. *Chadburn v. Moore*, 61 L. J., Ch. 674. It has, however, been held to be otherwise where the instructions are to sell, with an agreement to pay the agent a commission on the price accepted. *Rosenbaum v. Belson*, (1900) 2 Ch. 267.

[When an oral contract within Stat. of Frauds can be enforced.] The courts of equity were in the habit of granting specific performance of contracts falling within the provisions of the Stat. of Frauds, s. 4, where there had been a part performance of the contract, although there was no written note or memorandum of the agreement as required by the section; see *Maddison v. Alderson*, 8 Ap. Ca. 420, 475, 476, *per* Ld. Selborne, C.; and under Cairns' Act (21 & 22 V. c. 27) those courts were in such cases further empowered to award damages for the breach of the contract so partially performed. By the J. Act, 1873, s. 24, *ante*, pp. 306, 307, all the Divisions of the High Court, constituted by that Act, can exercise all the powers previously exercised by the Court of Chancery only. The jurisdiction to award damages is not affected by the repeal of Cairns' Act, *supra*, by 46 & 47 V. c. 49. *Sayers v. Collyer*, 28 Ch. D. 103, C. A. But damages can only be awarded in cases in which judgment for specific performance could be given. *Lavery v. Pursell*, 39 Ch. D. 508.

The general rule as to what amounts to such part performance is, that the parties must, by reason of the Act relied on, be in a position unequivocally different from that in which, according to their legal rights, they would have been if there were no contract. *Dale v. Hamilton*, 5 Hare, 381, *per* Wigram, V.-C. Thus, the fact of the purchaser being in possession of the vendor's land without liability to an action of trespass, shows unequivocally the existence of a contract between the parties. S. C. See *Dickinson v. Barrow*, (1904) 2 Ch. 339. Hence, acceptance of possession is sufficient part performance of the purchaser against his vendor; *Morphett v. Jones*, 1 Swans. 172; *Surcome v. Pinniger*, 3 D. M. & G. 571; *Ungley v. Ungley*, 5 Ch. D. 887, C. A.; and, similarly, delivery of possession by the vendor is sufficient as against his purchaser. *Buckmaster v. Harrop*, 13 Ves. 456. See also *Cotes v. Pilkington*, L. R., 19 Eq. 174. So, if a tenant in possession, in pursuance of the terms of an oral agreement for a lease, pay the increased rent to be reserved by the lease; *Nunn v. Fabian*, L. R., 1 Ch. 35; *Miller & Aldworth v. Sharp*, (1899) 1 Ch. 622; or lay out money which, in the event of there being no such agreement, he could not recover back from his landlord. *Mundy v. Jolliffe*, 5 Myl. & Cr. 167. See also *Williams v. Evans*, L. R., 19 Eq. 547. In these cases the court will endeavour to find out what was the oral contract between the parties, and then give it effect. *Mundy v. Jolliffe*, *supra*. So, where the parties have for a long time acted on the assumption of there being a contract. *Blachford v. Kirkpatrick*, 6 Beav. 232. See further the judgments in D. P. in *Maddison v. Alderson*, *post*, p. 320. An oral agreement for an easement over land is within this principle. *McManus v. Cooke*, 35 Ch. D. 681. See further *id.* 697, *post*, p. 526.

As has been often observed, however, the court will enforce, but cannot make contracts. Where, therefore, the contract is incomplete; *Thynne, Ly. v. Glengall, Et.*, 2 H. L. C. 131, 158; or, its terms are uncertain; *Reynolds v.*

*Waring*, You. 346; *Price v. Griffith*, 1 D. M. & G. 80; the court cannot decree specific performance. It must not only appear what the terms of the agreement are, but the acts of part performance must be referable to that agreement alone. *Price v. Salusbury*, 32 Beav. 446, 459; affirm. by L.J.J., see *Id.* 461, n. And an act which, though done in performance of a contract, admits of explanation without supposing a contract, will not in general take the case out of the statute, e.g., payment of the alleged purchase-money. *Dale v. Hamilton*, ante, p. 319. See also *Maddison v. Alderson*, 8 Ap. Ca. 467, D. P.; and *Humphreys v. Green*, 10 Q. B. D. 148, C. A. It may be observed that where marriage is the consideration for an oral contract, the entering into the marriage is not a part performance for the purpose of specific performance. *Caton v. Caton*, L. R., 1 Ch. 137.

The specific performance of a written agreement with a subsequent oral variation, stands on the same footing as that of an original independent oral agreement. See *Price v. Dyer*, 17 Ves. 356, and *Van v. Corpe*, 3 Myl. & K. 269, 277. But a plaintiff seeking to enforce a written contract, could not, in general, formerly, in equity, any more than he could at law (as to which *vide ante*, pp. 15 *et seq.*), on the ground of fraud, surprise, or mistake, vary its terms by oral evidence; *Price v. Dyer*, supra; *Townshend, Mqs. of, v. Stangroom*, 6 Ves. 328; *May v. Platt*, (1900) 1 Ch. 616; except, perhaps, where the fraud consists in a refusal to accede to a promised variation on the faith of which the plaintiff entered into a written agreement. *Pember v. Mathers*, 1 Bro. C. C. 52, 54; Sugd. V. & P., 14th ed. 174. It seems, however, that under the Judicature Act, 1873, s. 24 (7), ante, p. 307, the plaintiff may obtain both rectification of the contract on the ground of common mistake, and also specific performance of the rectified contract. See *Olley v. Fisher*, 34 Ch. D. 367.

On the ground that the statute is not to be made an instrument of fraud, the courts, following the old rules of equity, will enforce the contract where the absence of a written memorandum is caused by the fraud of the other party, or where the memorandum has been fraudulently drawn up so as not to express the real intention of the parties. See note to *Pym v. Blackburn*, 3 Ves. 38.

See further on this subject Sugden's V. & P., 14th ed., cap. iv., s. 7; and Dart's V. & P., 7th ed., cap. xvii.

An agent, A., who has been employed to buy land, cannot retain the land himself and rely on the Statute of Frauds, ss. 7, 8, on the ground of the absence of a written agreement between himself and his principal; *Heard v. Pilley*, L. R., 4 Ch. 548; *Rochefoucauld v. Boustead*, (1897) 1 Ch. 196, C. A.

*Performance of conditions precedent.*] When the defendant relies on the non-performance by the plaintiff of conditions precedent, he must plead the defence specially. Rules, 1883, O. xix. r. 15, ante, p. 309. The record, therefore, sufficiently indicates the proofs necessary at N. P. Certain conditions are, by the Vendor and Purchaser Act, 1874 (37 & 38 V. c. 78), ss. 1, 2, now incorporated in all contracts of sale of land, unless the contrary is stipulated; such of these provisions as are likely to be important at Nisi Prius will be found below.

*Proof of title.*] If the title of the plaintiff be put in issue, he must prove it. In the absence of stipulation to the contrary, the vendor was formerly obliged to deduce a good title commencing not later than 60 years back, but the Vendor and Purchaser Act, 1874, s. 1 (*vide supra*), has reduced this period to 40 years; in the cases, however, in which the period of 60 years was insufficient (as to which see Sugd. V. & P., 14th ed., pp. 366, 367), earlier title than 40 years may now be required. Where



abstracts of title are delivered, the refusal to complete the purchase is generally preceded by some communication between the parties in which a specific objection has been pointed out, and the title thereby admitted to be in other respects unexceptionable. See *Laythorp v. Bryant*, 1 N. C. 421, *per Tindal, C.J.* It is sufficient if the contract show a good equitable title in the vendor, with power to get in the legal estate under the Trustee Act, without showing where the outstanding legal estate may be. *Camberwell, &c., Building Society v. Holloway*, 13 Ch. D. 754. The defendant may insist upon any defect, whether legal or equitable, in the title deduced. *Maberley v. Robins*, 5 Taunt. 625; *Elliot v. Edwards*, 3 B. & P. 181; *Jeakes v. Wright*, 6 Exch. 873; 21 L. J., Ex. 265; *Stevens v. Austen*, 3 E. & E. 685; 30 L. J., Q. B. 212. Where the vendor has no power of sale, he cannot compel the purchaser to enter into a fresh contract with some one else who has the power. *In re Bryant & Barningham's Contract*, 44 Ch. D. 218. Where the contract expressly provides that a good title shall be deduced, evidence that the purchaser knew of the existence of covenants which rendered the title unmarketable is inadmissible. *Cato v. Thompson*, 9 Q. B. D. 616, C. A.; see also *May v. Platt*, (1900) 1 Ch. 616. It is, however, otherwise where there is no such express stipulation. See *In re Gloag and Miller's Contract*, 23 Ch. D. 320, 327, *per Fry, J.* A contract for "possession" means possession with a good title. *Tilley v. Thomas*, L. R., 3 Ch. 61. The vendor cannot require the vendee to make the title good by accepting it, and thereby avoiding a prior voluntary conveyance. *Clarke v. Willott*, L. R., 7 Ex. 313; *In re Briggs and Spicer*, (1891) 2 Ch. 127.

By the Vendor and Purchaser Act, 1874, s. 2, r. 2: "Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, acts of parliament, or statutory declarations 20 years old at the date of the contract shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions." By rule 3: "The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title, shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents." The recital in a deed 20 years old that the then vendor was seised in fee simple, was held by Malins, V.C., to be evidence thereof under rule 2, and unless disproved, to dispense with production of any earlier title. *Bolton v. L. School Board*, 7 Ch. D. 766. This decision has however been generally disapproved. See *In re Wallis & Groul's Contract*, (1906) 2 Ch. 206.

The plaintiff is held to strict proof of his derivative title. *Crosby v. Percy*, 1 Camp. 30. In the sale of leaseholds more than 60 years old, in the absence of a condition to the contrary, the lease itself must be produced. *Frend v. Buckley*, L. R., 5 Q. B. 213, Ex. Ch. A contract for the sale of leasehold property is not satisfied by an underlease, unless the contract gives the purchaser notice that the property is held under a derivative lease. *Camberwell, &c., Building Soc. v. Holloway*, 13 Ch. D. 754.

In the absence of a stipulation to the contrary, there was formerly, in every contract for the sale of a lease, an implied undertaking to make out the lessor's title to demise, as well as the title of the vendor to the lease; *Souter v. Drake*, 5 B. & Ad. 992; *Hall v. Betty*, 4 M. & Gr. 410; and see *Stranks v. St. John*, L. R., 2 C. P. 376. But, by the Vendor and Purchaser Act, 1874, s. 2, r. 1: "Under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold;" and now by the Conveyancing and Law of Property Act, 1881

(44 & 45 V. c. 41), ss. 3 (1), 13 (1), on a contract to sell and assign, or to grant a lease for a term of years to be derived out of a leasehold interest, the intended assignee or lessee has not the right to call for the title to the leasehold reversion, *i.e.* the reversion to the leasehold interest out of which the sub-lease has been or is to be created. *Gosling v. Woolf*, (1893) 1 Q. B. 39. The title to that leasehold interest must be proved. S. C. And if the intended assignee or vendee can show defects in the lessor's title, he may insist on those defects. *Jones v. Watts*, 43 Ch. D. 571, C. A. See also *Shepherd v. Keatley*, 1 C. M. & R. 117. See also *Sellick v. Trevor*, and *Phillips v. Cuddelough*, *post*, p. 322. But where the contract contained a similar clause, and the defendant agreed to sell to the plaintiff the lease "as he held the same," it was held that the plaintiff could not raise any objection to the lessor's title. *Spratt v. Jeffery*, 10 B. & C. 249. So, where the condition was that the "lessor's title will not be shown and shall not be inquired into," *Hume v. Bentley*, 5 De G. & S. 520; 21 L. J., Ch. 760. See also *Best v. Hamand*, 12 Ch. D. 1, C. A.; and *Scott v. Alvarez*, (1895) 2 Ch. 603, C. A. But where the title is bad specific performance will not be decreed unless, perhaps, when the condition is very definite. S. C. It has, however, been held that, notwithstanding such a condition, the purchaser may raise any objection to the title which the vendor himself discloses. *Smith v. Robinson*, 13 Ch. D. 148. And, where the contract provided that it should form no objection to the title that the indenture was an underlease, and no requisition or inquiry should be made respecting the title, the purchaser was held to be at liberty to show *alimunde* that the lessor was mortgagor only, and had no power to grant the lease. *Waddell v. Wolfe*, L. R., 9 Q. B. 515. See also *Harnett v. Baker*, L. R., 20 Eq. 50. There is no implied contract for title on the sale of an agreement for a lease; for this is only a sale of the vendor's interest such as it is. *Kintrea v. Preston*, 1 H. & N. 357; 25 L. J., Ex. 287. So, on a sale of a patent right, there is no implied warranty of valid letters patent. *Hall v. Conder*, 2 C. B., N. S. 22; 26 L. J., C. P. 138; *Smith v. Neale*, 2 C. B., N. S. 67; 26 L. J., C. P. 143. See, however, *Chanter v. Lese*, 5 M. & W. 698.

In a sale of leaseholds, where the licence of the lessor is, by the terms of the lease, required for an assignment, the vendor must obtain the required licence. *Winter v. Dumergue*, 14 W. R. 281, 282, M. T. 1866, C. P.; *Id.* 699, Ex. Ch. As to the time when such licence must be produced, see *Ellis v. Rogers*, 29 Ch. D. 661, C. A. Where land is taken by a railway company, under their parliamentary powers, the necessity for such licence is taken away by the operation of the Act. *Slipper v. Tottenham, &c., Ry. Co.*, L. R., 4 Eq. 112. See also *Bailey v. De Crespigny*, L. R., 4 Q. B. 180.

If the vendor stipulate that he shall not be bound to produce title prior to the last conveyance, if he produce an earlier title bad on the face of the abstract, the vendee may reject it. *Sellick v. Trevor*, 11 M. & W. 722. So, if the vendor agree to sell a "freehold" residence, under a similar condition, and the title deed produced show that the property is encumbered with a condition or covenant, the vendee may reject it, as he bargained for an unencumbered freehold. *Phillips v. Cuddelough*, L. R., 4 Q. B. 159.

Where the property consisted of several parcels sold by auction in distinct lots to one vendee, *Ld. Kenyon* is said to have held that the vendor, having made out a title to a single lot only, the whole contract might be rescinded, considering the purchase of the several lots as having been made with a view to a joint concern. *Chambers v. Griffiths*, 1 Esp. 150. But, where several lots are knocked down to a bidder at an auction, and his name is marked against them in the catalogue, a separate contract arises on each lot. *Roots v. Dormer, Ltd.*, 4 B. & Ad. 77. See the cases collected and discussed in *Cusamajor v. Strode*, 2 Myl. & K. 706, 724; and *Chambers v.*

*Griffiths, supra*, cannot be maintained as an authority, except where it can be shown that there was an agreement that the purchaser was not to take any of the lots unless he should obtain them all. In *Dykes v. Blake*, 4 N. C. 463, *post*, p. 328, the vendee was allowed to repudiate two lots, bought separately, because they were made the subject of one entire contract by a written agreement signed at the auction.

An alleged delivery of an "abstract" is not satisfied by proof of a delivery of the deeds themselves. *Horne v. Wingfield*, 3 M. & Gr. 33. But an alleged delivery of a "full and sufficient abstract of title" is satisfied by a delivery of a full abstract of all the vendor's title deeds, and of the facts deducing the title to himself or a trustee for him (known as a *perfect abstract*), though they may not constitute a good title; *Blackburn v. Smith*, 2 Exch. 783; and, if any condition refer to the delivery of the abstract, this, in any question as to time, means the delivery of a perfect abstract. S. C.; *Hobson v. Bell*, 2 Beav. 17; *Gray v. Fowler*, L. R., 8 Ex. 249, 279, Ex. Ch. It is the duty of the purchaser to apply for the abstract, as well as of the vendor to deliver it. *Guest v. Homfray*, 5 Ves. 818.

When an abstract is delivered by the vendor, he must be able to verify it by the title deeds in his possession; *Cornish v. Rowley*, 1 Selw. N. P., 13th ed. 219; *Berry v. Young*, 2 Esp. 610, n.; which deeds must be duly stamped. *Whiting to Loomes*, 17 Ch. D. 10, C. A. The vendee may rescind the contract where the vendor can neither convey nor enforce a conveyance from other proper parties. *Farrer v. Nash*, 35 Beav. 167; *Brewer v. Broadwood*, 22 Ch. D. 105; *Bellamy v. Debenham*, (1891) 1 Ch. 412, C. A. As to the time within which the vendor must make out his title *vide infra*. As to the vendor's right to rescind, on objection being taken to the title, *vide post*, p. 329.

Where the contract "is subject to the approval of the title by the vendee's solicitor," it cannot be enforced if he *bonâ fide* disapprove of the title. *Hudson v. Buck*, 7 Ch. D. 683. See also *Hussey v. Horne Payne*, 8 Ch. D. 670, C. A.; 4 Ap. Ca. 311, D. P.

Where, without a stipulation in the contract to that effect, the purchaser takes possession before completion with knowledge that there are defects in the title which the vendor cannot remove, the purchaser waives his right to have those defects removed or to repudiate the contract. *In re Glouay and Miller's Contract*, 23 Ch. D. 320. *Secus*, where the defects are removable by the vendor. See S. C.

[Time for completion, &c., when material.] When a day is fixed for completion, unless the vendor make out a good title by that day, the purchaser was, at law, entitled to rescind the contract; *Cornish v. Rowley*, and *Berry v. Young, supra*; *Noble v. Edwards*, 5 Ch. D. 378, C. A.; even though it appeared that the purchaser was not ready to pay the purchase money. *Clarke v. King*, Ry. & M. 394. If no time be mentioned for the vendor to make out a good title, he must be allowed a reasonable time; *Samson v. Rhodes*, 6 N. C. 261; but Ld. St. Leonards [V. & P., 14th ed. 259 (l)] adds *sed quare*.

But although, at law, the time of completion was of the essence of the contract, in equity this was in general otherwise, if there were nothing in the express stipulations between the parties, the nature of the property, or the surrounding circumstances which would make it inequitable to interfere with and modify the legal right. *Roberts v. Berry*, 3 D. M. & G. 284, 291, *per* Turner, L.J.; *Tilley v. Thomas*, L. R., 3 Ch. 61, 67, *per* Ld. Cairns, L.J. By the J. Act, 1873, s. 25 (7), *ante*, p. 308, the rule of equity now prevails. *Howe v. Smith*, 27 Ch. D. 89, 96, 103, C. A. See *Cornwall v. Henson*, (1900) 2 Ch. 298, C. A. A court of equity proceeded on the

principle that, having regard to the nature of the subject, time was immaterial to the value, and was urged only by way of pretence and evasion. *Doloret v. Rothschild*, 1 Sim. & St. 590. This principle, however, does not apply where the property fluctuates in value from day to day, as in the case of foreign stock: time is then of the essence of the contract. S. C. So, in the case of a life annuity; see *Withy v. Cottle*, Turn. & R. 78. Or, of a reversion; see *Newman v. Rogers*, 4 Bro. C. C. 391; *Spurrier v. Hancock*, 4 Ves. 667; *Patrick v. Milner*, *infra*. So, where property is bought for the purpose of residence; *Tilley v. Thomas*, *ante*, p. 323; or, of trade, as in the case of a grant of a mining lease; *Parker v. Frith*, 1 Sim. & St. 199, n.; or, of the sale of a public-house as a going concern; *Cowles v. Gale*, L. R., 7 Ch. 12. In this latter case the vendor is bound only to have a valid licence, and to indorse it, to enable the purchaser to apply at once for interim protection under 5 & 6 V. c. 44, s. 1. *Tadcaster Tower Brewery Co. v. Wilson*, (1897) 1 Ch. 705. Time is also of the essence of the contract in equity where the vendors are a fluctuating body, and beneficially interested, as in the case of an ecclesiastical corporation. *Carter v. Ely*, *Dean of*, 7 Sim. 211. In such cases, however, if the conditions of sale provide for the possibility of delay in completion, it seems that time is not of the essence of the contract. *Patrick v. Milner*, 2 C. P. D. 342.

If either party has been guilty of delay, then, although time was not originally of the essence of the contract in equity, the other party may make it so by giving notice to complete within a reasonable time limited by such notice. *Stewart v. Smith*, 6 Hare, 222, n.; *Benson v. Lamb*, 9 Beav. 502; *Green v. Sevin*, 13 Ch. D. 589, 599, 600, *per* Fry, J. What is a reasonable time depends on the circumstances of each case, the state of the title, &c., and it is impossible to lay down any definite rule as to what the length of the notice must be. See Sugd. V. & P., 14th ed. 268, 269; Dart. V. & P., 6th ed. 487, 488; *Green v. Sevin*, *supra*; *Compton v. Bayley*, (1892) 1 Ch. 313.

So, conversely, although time may have been originally of the essence of the contract, or made so by subsequent notice, this may be waived by the conduct of the other party. *Hudson v. Bartram*, 3 Madd. 440; *Cutts v. Thodey*, 13 Sim. 206. Thus, if the purchaser proceed with the purchase after the expiration of the time fixed. *King v. Wilson*, 6 Beav. 124; *Webb v. Hughes*, L. R., 10 Eq. 281. And the same principle applies to a vendor. See *Pegg v. Wisden*, 16 Beav. 239.

Where the contract fixes a day for completion, and provides for the payment of interest from that day till completion, time is not so much of the essence of the contract that the purchaser can at once repudiate the contract, if it be not completed on the day from a defect of conveyance, and not of title; the purchaser must first give the vendor notice to remove the defect within a reasonable time. *Hatten v. Russell*, 38 Ch. D. 334.

If the purchaser have not made an application for the title before the commencement of the action, and no time is fixed for completing the contract, it is said to be sufficient if the plaintiff can show a good title in himself at the time of trial. *Thompson v. Miles*, 1 Esp. 185. And where time is not of the essence of the contract, and the delay originates in the state of the title, it is sufficient if, on an action being brought by the vendor for specific performance, he make out a good title at the time of the judgment. Sugd. V. & P., 14th ed. 264.

*Readiness to convey.*] An averment of readiness to convey, if traversed, is negatived by proof of a defective title; for it negatives ability to convey. *De Medina v. Norman*, 9 M. & W. 820. See further on the evidence under a negative of readiness, *Action for not accepting goods*, *post*, p. 537. The plaintiff

is not bound to tender a conveyance where (as is usual) it is to be prepared by and at the cost of the vendee. *Wilmot v. Wilkinson*, 6 B. & C. 506. An averment of readiness at the steward's office, on a certain day, to complete the conveyance of copyhold by surrender, &c., is proved by the plaintiff's readiness to go to the office, though he omitted to do so, because the defendant had just before that day told him that *he* should not be ready. *Perry v. Smith*, Car. & M. 554, *per* Patteson, J. See further *Smith v. Butler*, (1900) 1 Q. B. 694, C. A. As to the right of the vendee to require separate conveyances of parcels, see *Egmont, El. of*, v. *Smith*, 6 Ch. D. 469.

By the Conveyancing and Law of Property Act, 1881 (44 & 45 V. c. 41), s. 8 (1), "On a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor, as such; but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor."

The purchaser might at common law have refused to take a conveyance executed under a power of attorney; for it multiplies his proofs, and there is the risk of express or implied revocations. *Anon.*, cited 1 Esp. 116; *Richards v. Burton*, *Id.* 269. Under the Conveyancing Act, 1882 (45 & 46 V. c. 39), ss. 8, 9 (*ante*, p. 138), a power of attorney may be made irrevocable, in favour of a purchaser, and the 44 & 45 V. c. 41, s. 48 (1, 4, 6), *ante*, p. 138, provides a means of proving it by an office copy. There is no provision under sect. 8, *supra*, that the purchaser may provide a witness to the execution of the power, and it is very doubtful if the above sections would oblige a purchaser to accept a conveyance executed under a power. If the vendee did not attend to complete, it was no objection that the vendor's solicitor had not a formal authority to receive the purchase money. See *Cox v. Watson*, 7 Ch. D. 196. As to authority to receive the purchase money, *vide Payment, post*, p. 695.

*Claim on an account stated.*] Where the contract is not in writing as required by the Stat. of Frauds, plaintiff may sometimes recover on a claim for an account stated by proving an acknowledgment of money due. *Cocking v. Ward*, 1 C. B. 858; *Laycock v. Pickles*, 4 B. & S. 497; 33 L. J., Q. B. 43, cited *Action on account stated, post*, p. 627.

*Damages.*] Where the action is brought before conveyance, the defendant having taken possession and dispensed with the execution of the conveyance, the plaintiff cannot recover the whole purchase money, but only damages; for the land continues to belong to him. *Laird v. Pim*, 7 M. & W. 474. This rule applies in the case of land compulsorily taken under the provisions of the Lands Clauses Consolidation Act, 1845. *E. London Union v. Metropolitan Ry. Co.*, L. R., 4 Ex. 309. The plaintiff may recover his bill of costs without proving that it has been paid. *Richardson v. Chasen*, 10 Q. B. 756.

The conditions of sale usually provide that if the purchase be not completed by the appointed day "from any cause whatever other than wilful default on the part of the vendor," the vendee is to pay interest from that day on the purchase money. As to what amounts to "wilful default" see the judgment in *Bennett v. Stone*, (1902) 1 Ch. 226, (1903) 1 Ch. 509, C. A., where the recent decisions thereon are summarized.

The conditions of sale usually also provide for the payment of a deposit by the purchaser, which is to be forfeited to the vendor, on default of the former in complying with the other conditions. Where the purchaser fails to make the agreed deposit, the vendor, on default made by the purchaser in completion, is entitled to recover the amount of the deposit. *Wallis v. Smith*, 21 Ch. D. 243, C. A. The forfeiture of the deposit does not, however,

prevent the vendor from recovering general damages on the purchaser's refusal to complete. *Iceley v. Grew*, 6 Nev. & M. 467; *Essex v. Daniell*, L. R., 10 C. P. 538. But, where the vendor resells the property under a usual condition of sale, and does so at a loss, he must, in suing the vendee for such loss and for the expenses, give him credit for the amount of the deposit paid. *Ockenden v. Henley*, E. B. & E. 485; 27 L. J., Q. B. 361. Where the contract contains a variety of stipulations of different importance, and one sum is stated to be payable on breach of performance of any one of them, then the general rule is that, although it be called by the name of liquidated damages, it is in reality a penalty, and the actual damage sustained is alone recoverable. *Magee v. Lavell*, L. R. 9 C. P. 107, 111, 115. So also, where the sum agreed to be paid is under the circumstances so large as to make absurd the idea that it was intended to be paid as liquidated damages. *Law v. Redditch, Local Board*, (1892) 1 Q. B. 127, 130, *per* Ld. Esher, M.R. The contract must however in each case be construed according to the intention of the parties, to be ascertained from all the circumstances. *Pye v. British Automobile Syndicate*, (1906) 1 K. B. 425. See further *Law v. Redditch Local Bd.*, C. A., *supra*; *In re Newman*, 4 Ch. D. 724; *Elphinstone, Ld. v. Monkland Iron and Coal Co.*, 11 Ap. Ca. 332, D. P.; *Willson v. Love*, (1896) 1 Q. B. 626, C. A.; *Strickland v. Williams*, (1899) 1 Q. B. 382, C. A.; *Clydebank Engineering Co. v. Don Jose, &c., y Castanda*, (1905) A. C., 6, D. P.; *Public Works Comrs. v. Hill*, (1906) A. C. 368, J. C.; *Diestel v. Stevenson*, (1906) 2 K. B. 345.

Accidental deterioration after the date of the contract is a loss which must fall on the vendee. *Robertson v. Skelton*, 12 Beav. 260; 19 L. J., Ch. 140. Hence, it seems that such loss may be claimed as part of the plaintiff's damages occasioned by the defendant's non-completion. Loss arising from the vendor's neglect of care in preserving the property falls on him, *vide post*, p. 330. Damages may be granted in lieu of specific performance notwithstanding the repeal of Cairns' Act (21 & 22 V. c. 27, s. 2) by 46 & 47 V. c. 49, s. 3. See *Chapman v. Auckland Union*, 23 Q. B. D. 294, C. A.; *Sayers v. Collyer*, 28 Ch. D. 103, C. A.; and *Hipgrave v. Case, Id.* 356, C. A.

#### *Defence.*

By Rules, 1883, O. xix. r. 15, *ante*, p. 309, the defendant must allege in his statement of defence all facts not previously stated on which he relies, and must raise all such grounds of defence as, if not pleaded, would be likely to take the plaintiff by surprise. Rule 17, *ante*, p. 310, provides that a plaintiff shall not deny generally the allegations in the statement of claim. See *Byrd v. Num*, 5 Ch. D. 781; 7 Ch. D. 284, C. A.

*Denial of Contract.*] By Rules, 1883, O. xix. r. 20, *ante*, p. 310, a bare denial of a contract alleged in any pleading shall be construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether in reference to the Stat. of Frauds or otherwise. This rule requires the defendant specifically to allege in his defence that he relies on the objection to the contract arising under the statute. *Clark v. Callow*, 46 L. J., Q. B. 53, C. A. As to when a written contract is dispensed with by part performance, *vide ante*, pp. 319 *et seq.*

*Fraud—Misdescription.*] Fraud must be specially pleaded. Rules, 1883, O. xix. r. 15, *ante*, p. 309. See further as to fraud, *Defences to actions on simple contracts—Fraud, post*, pp. 663 *et seq.*

It is a defence that a misdescription has been wilfully introduced into the conditions of sale to make the land appear more valuable. *Norfolk, Dk.*

of, v. *Worthy*, *infra*; and see *Vernon v. Keys*, 12 East, 637. The result of the decisions on this point is thus stated by Tindal, C.J., in *Flight v. Booth*, 1 N. C. 376:—"All the cases concur in this, that where the mis-statement is wilful or designed, it amounts to fraud, and such fraud, upon general principles of law, avoids the contract altogether. But with respect to mis-statements which stand clear of fraud, it is impossible to reconcile all the cases; some of them laying it down that no mis-statements which originate in carelessness, however gross, shall avoid the contract, but shall form the subject of compensation only; *Norfolk, Dk. of, v. Worthy*, 1 Camp. 340; *Wright v. Wilson*, *post*, p. 328, whilst other cases lay down the rule that a misdescription in a material point, although occasioned by negligence only, not by fraud, will vitiate the contract of sale. *Jones v. Edney*, 3 Camp. 284; *Waring v. Hoggart*, Ry. & M. 39; *Stewart v. Alliston*, 1 Mer. 26. In this state of discrepancy between the decided cases, we think it is at all events a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts the purchaser may be considered as not having purchased the thing which was really the subject of the sale, as in *Jones v. Edney*, *supra*, where the subject-matter of the sale was described to be a free public-house, while the lease contained a proviso that the lessee and his assigns should take all the beer from a particular brewery, in which case the misdescription was held to be fatal." *Accord. In re Fawcett and Holmes*, 42 Ch. D. 150, C. A.; *Jacobs v. Revell*, (1900) 2 Ch. 358, and *In re Puckett and Smith's Contract*, (1902) 2 Ch. 258 C. A. See also *Pulsford v. Richards*, 17 Beav. 96. So where the land is without the knowledge of the purchaser subject to restrictive covenants, *In re Nisbet and Poll's Contract*, (1906) 1 Ch. 386, C. A.; or to a party wall notice and award under the London Building Act, 1894 (57 & 58 V. c. ccxiii.) ss. 90, 91, *Carlsh v. Salt*, *Id.* 335. An innocent misrepresentation may be such as to preclude a judgment for specific performance, although it is not ground for rescinding the contract. See *Hope v. Walters*, (1900) 1 Ch. 257, C. A.

Where premises were *malâ fide* described as "a substantial brick building," which were not such, and a plot of land mentioned in the particulars did not exist at all, the sale was held voidable. *Robinson v. Musgrove*, 2 M. & Rob. 92. So, where they were described as an "eligible investment;" and they were, in fact, liable to be taken under a local public Act: held that the purchaser might rescind the contract, and that the Act, though public, was not notice *per se*. *Ballard v. Way*, 1 M. & W. 520. And, where the premises, including a yard, were said to be held under a term of 23 years, when, in truth, the yard, which was an essential part, was held under a yearly tenancy, the purchaser was allowed to rescind the sale, though a lease of the yard for the same term was afterwards procured by the seller, and though there was a clause in the conditions for compensation in the case of erroneous description, and a provision that the contract should not be annulled by it. *Dobell v. Hutchinson*, 3 Ad. & E. 355. Where an agreement for sale contains a clause similar to the one in the last case, the court will not decree specific performance where the acreage varies very largely from that represented. *Durham, El. of, v. Legard*, 34 Beav. 611; 34 L. J., Ch. 589, and cases there cited. Where an estate was represented to contain 1,530 acres, when in fact it contained only 1,100 acres, it was held that a condition that the estate as to extent of acreage should be taken to be conclusively shown by certain deeds, was a mere conveyancing condition as to identity, and that, coupled with the

representation as to the acreage, it did not estop the purchaser from rescinding on the ground of deficiency in acreage. *Aberaman Ironworks v. Wickens*, L. R., 4 Ch. 101. But, where it was provided by the conditions of sale, that "if any mistake should be made in the description of the premises, or if any other material error should appear in the particulars of sale, such mistake or error should not annul the sale, but a compensation should be made," the vendee was held not to be released from the contract by reason of a misdescription in the particulars of sale obvious on sale of the premises, unless such misdescription were wilful and designed. *Wright v. Wilson*, 1 M. & Rob. 207. So, a specific performance for the purchase of a meadow was decreed, where a visible footpath went across it, of which no notice was given. *Oldfield v. Round*, 5 Ves. 508; see Sugd. V. & P., 14th ed. 328. Where building ground was sold, as such, without notice of a right of way reserved across it by a lease of another portion of it, held that the contract was voidable; and the purchaser was permitted to avoid it as to two lots separately bought at an auction, though the defect applied only to one lot; the seller having afterwards united both in a single contract of sale at an entire sum. *Dykes v. Blake*, 4 N. C. 463; *Accord. Shackleton v. Sutcliffe*, 1 De G. & Sm. 609. See also *Heywood v. Mallalieu*, 25 Ch. D. 357; and *Nottingham Brick and Tile Co. v. Butler*, 15 Q. B. D. 261. As to the effect of a misleading conveying condition, see *In re Banister*, 12 Ch. D. 131, C. A.; *In re Marsh and Earl Granville*, 24 Ch. D. 11, C. A. A vendee of land described as copyhold is not compellable to accept freehold, notwithstanding a provision that errors in description should not vitiate the sale. *Ayles v. Cox*, 16 Beav. 23. See *Turquand v. Rhodes*, 37 L. J., Ch. 830. An agent employed to find a purchaser has authority to describe the property, and state any fact or circumstance relating to the value, so as to bind the vendor. *Mullens v. Miller*, 22 Ch. D. 194. See also *Brett v. Clowser*, 5 C. P. D. 376.

When more than one person is employed by the vendor to bid at a sale by auction this will be deemed a fraud. *Crowder v. Austin*, 3 Bing. 368; *Wheeler v. Collier*, M. & M. 126. And the employment of a single puffer when the sale is "without reserve," avoided it at law. *Thornett v. Haines*, 15 M. & W. 367. And where the sale is not advertised as "without reserve," the employment of a single puffer, unknown to the bidders, is evidence for the jury to sustain the defence of fraud. *Green v. Baverstock*, 14 C. B., N. S. 204; 32 L. J., C. P. 181. But a sale is not avoided by the fictitious bidding of a mere stranger. *Union Bank of London v. Munster*, 37 Ch. D. 51. By 30 & 31 V. c. 48, s. 4, the rule in equity is made the same as at law; see also sects. 5 and 6, *infra*. It seems that an auctioneer who advertises a sale "without reserve," and without disclosing his principal's name, is liable to an action, if he knock down the lot to the principal's bidding after that of the plaintiff. *Warlow v. Harrison*, 1 E. & E. 309; 29 L. J., Q. B. 14, Ex. Ch. But where a reference was made by name to the solicitor of the mortgagee by whose direction the sale was represented to be made, the auctioneer was held not to be liable. *Mainprice v. Westley*, 5 B. & S. 420; 34 L. J., Q. B. 229. See, however, *Woolfe v. Horne, & Rainbow v. Howkins*, cited, *post*, p. 544.

By 30 & 31 V. c. 48, s. 5, it is enacted, "that the particulars or conditions of sale by auction of any land shall state whether such land will be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved; if it is stated that such land will be sold without reserve, or to that effect, then it shall not be lawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly any bidding from any such person." By sect. 6, where the sale is declared "to be subject to a right for the seller to bid, it shall be lawful for the seller, or any one person on his behalf, to bid at such auction in such manner as he may think



proper." Where the conditions state that the sale is subject to a reserved bidding, this Act renders it illegal for the vendor to employ a person to bid up to the reserved price, unless the right to do so is expressly stipulated for. *Gilliat v. Gilliat*, L. R., 9 Eq. 60.

*Sale of leaseholds.*] The purchaser is not bound to complete a contract for the purchase of a lease, if subject to onerous covenants of an unusual character, unless, prior to the contract, he had an opportunity of ascertaining the terms of the covenants. *Molyneux v. Hawtrey*, (1903) 2 K. B. 487, C. A. So in the case of a contract to take an underlease. *Hyde v. Warden*, 3 Ex. D. 72, C. A.

#### VENDEE AGAINST VENDOR.

If the vendor refuse, or is unable to complete his contract, the purchaser may either sue for damages for such breach of contract; or in case he has made a deposit or paid part of the purchase money and has not taken possession, may sue to recover it back as money had and received. So, if a fraud have been practised on him by the vendor to induce him to buy, the vendee may rescind the contract, and sue for the deposit. *Thornet v. Haines*, ante, p. 328.

In a special action on the contract by the purchaser, he must prove the contract, if denied; and by other defences he may be put to prove the performance of conditions precedent, and all other matters traversed by the defendant. The vendee is entitled to have a good title; *vide ante*, p. 320; but this right is lost by failure to take objections to that disclosed on the abstract within the time limited by the contract. *Rosenberg v. Cook*, 8 Q. B. D. 162, C. A. In this case the vendee was held entitled to delivery of possession, only, of the land by the vendor. When the defendant's title, as stated in the abstract, is objected to, it will not be enough to prove that the title has been deemed by conveyancers to be insufficient; the defect must be pointed out; *Camfield v. Gilbert*, 4 Esp. 212; and the plaintiff cannot, at the trial, insist upon any objection to the title, as stated therein, which he neglected to take at the time of rescinding the contract, and which might have been remedied by the vendor if taken before. *Todd v. Hoggart*, M. & M. 128, cor. Ld. Tenterden, C.J. The vendor may compel delivery of particulars of every matter of fact relied upon as an objection; but not of matter of law. *Roberts v. Rowlands*, 3 M. & W. 543. If no particulars have been given, and the pleadings are general, the vendee will be at liberty to prove any infraction of the conditions of sale. *Squire v. Tod*, 1 Camp. 293.

Where the sale is subject to a condition that if the purchaser make any requisition which "the vendor should be unable or unwilling to remove or comply with," the right to rescind thereunder must be exercised reasonably. *In re Starr-Bowkett Building Society and Sibon's Contract*, 42 Ch. D. 375, C. A. It arises as soon as the requisition is made. S. C. The vendor is not bound to state his reasons for rescission. S. C. After rescission, the contract is at an end, and the subsequent withdrawal by the purchaser of his requisitions has no effect. *In re Dames and Wood*, 29 Ch. D. 626, C. A. See further, as to rescission under such a condition, *Gray v. Fowler*, L. R., 8 Ex. 219, Ex. Ch.; *Woolcott v. Peattie*, 15 Ap. Ca. 42, J. C.; *In re Arbib and Class's Contract*, (1891) 1 Ch. 601, C. A.

As to when the vendee is entitled to sue the vendor for not completing on the day fixed, *vide ante*, pp. 323 *et seq.*

As to action for deposit, *vide post*, p. 330. After the purchaser has recovered the deposit only, from the auctioneer, he may, in a special action against the vendor, recover interest and the expenses of investigating the

title. *Parquhar v. Farley*, 7 Taunt. 592. The expenses of investigating the title cannot be recovered under a claim for money paid. *Camfield v. Gilbert*, 4 Esp. 221.

As a general rule, the vendee is bound to tender a conveyance to the vendor for execution by him. *Poole v. Hill*, 6 M. & W. 835. Yet, even when he is bound by the express terms of the contract to tender one, if a bad title be produced, he may maintain an action for the recovery of his deposit without tendering it. *Seaward v. Willock*, 5 East, 198, 202, *per* Ld. Ellenborough; and in *Lowndes v. Bray*, Sugd. V & P., 14th ed. 364 (b). So, where the vendor has, by selling the estate, incapacitated himself from executing a conveyance to the purchaser, further trouble and expense on the plaintiff's part are unnecessary, and he may sustain an action without tendering a conveyance, or the purchase money. *Lovelock v. Franklyn*, 8 Q. B. 371. As to the vendee's right to rescind the contract on the ground of want of title in the vendor, *vide ante*, p. 323.

After the completion of the conveyance the purchaser may, if he were induced to enter into the agreement by fraud, maintain an action to set aside the agreement and recover his purchase money. *Roddy v. Williams*, 3 J. & L. 1; or for damages, *vide Action for Deceit and Misrepresentation*, *post*, pp. 843 *et seq.* Where he was induced to enter into it by an innocent material misstatement, he may maintain an action to set it aside, and to recover his purchase money; *vide post*, p. 844; but he cannot, in the absence of a special term in the agreement of purchase that he shall be allowed compensation, maintain an action for damages. *Clayton v. Leech*, 41 Ch. D. 103, C. A., approving *Besley v. Besley*, 9 Ch. D. 103; *Brett v. Clowser*, 5 C. P. D. 376; *Joliffe v. Baker*, 11 Q. B. D. 255. Where, however, there is such special term in the agreement, it is not, for this purpose, merged in the conveyance, and the purchaser may recover damages thereon. *Palmer v. Johnson*, 13 Q. B. D. 351, C. A., following *Bos v. Helsham*, L. R., 2 Ex. 72; *In re Turner and Skelton*, 13 Ch. D. 130. *Accord*, 2 Dart's V. & P., 7th ed. 812, 813. But the usual term as to compensation does not apply to defect in the vendor's title. *Debenham v. Sawbridge*, (1901) 2 Ch. 99. A representation made by the vendor at the time of completion may amount to a collateral warranty for breach of which the purchaser can sue him. See *De Lassalle v. Guildford*, (1901) 2 K. B. 215, C. A. cited, *ante*, p. 314.

Where the vendor keeps possession till completion he is a trustee for the purchaser, and is bound to take reasonable care to preserve the property; *R. Bristol Permanent Building Society v. Bomash*, 35 Ch. D. 390; *Clarke v. Ramuz*, (1891) 2 Q. B. 457, C. A.; and where damage of which neither the vendor nor the vendee knew at the time of completion has arisen from such want of care, the execution of the conveyance is no bar to its recovery. S. C.

An auctioneer is not liable at the suit of a disappointed bidder for withdrawing lots from an advertised sale. *Harris v. Nickerson*, L. R., 8 Q. B. 286. A vendor, B., is liable in damages to J., to whom the property was knocked down at the auction, if, although J. complies with the conditions of sale, B. refuses to allow him to sign a contract, and the Statute of Frauds is no defence. *Johnston v. Boycs*, (1899) 2 Ch. 73. The deposit must be paid in cash if the vendor so require. S. C.

[*Claim for deposit.*] To enable the purchaser to maintain an action for money had and received to recover the deposit, the contract must be disaffirmed *ab initio*. Some of the grounds upon which it may be rescinded are stated *ante*, pp. 322, 323. As to when the purchaser is entitled to rescind the contract on the ground of non-completion of the contract on the appointed day, *vide ante*, pp. 323, 324. If the purchaser have taken possession of the

premises under the contract, he has adopted the contract, and cannot disaffirm it afterwards by quitting the premises, as the parties cannot be put in the same situation in which they before stood. *Hunt v. Silk*, 5 East, 449. See also *In re Gloag and Miller's Contract*, 23 Ch. D. 320, cited *ante*, p. 323. His remedy is then on the contract itself. *Blackburn v. Smith*, 2 Exch. 783. If the purchaser repudiate the contract, *Ex pte. Barrell*, L. R., 10 Ch. 512; or fail to complete it within a reasonable time, *Howe v. Smith*, 27 Ch. D. 89, C. A.; he cannot recover the deposit, though there be no clause of forfeiture in the contract. See also *Smith v. Butler*, (1900) 1 Q. B. 694, C. A. And, even if the contract be oral only, the purchaser cannot, by repudiating it, after he has obtained the abstract and sent requisitions thereon, entitle himself to recover the deposit. *Thomas v. Brown*, 1 Q. B. D. 714. It seems that the purchaser cannot recover the deposit if he would get a good holding title, even although it is not one which the court would force on him. See *Nottingham Patent Brick and Tile Co. v. Butler*, 16 Q. B. D. 778, C. A. Where the vendee, A., has accepted the title, and the vendor, B., has forfeited the deposit under a clause in the contract for non-completion, A. cannot afterwards recover it on the ground that the title was bad. *Soper v. Arnold*, 37 Ch. D. 96, C. A.; 14 Ap. Ca. 429, D. P. See further as to right to recover deposit on the ground of want of title, *Went v. Stallibrass*, L. R., 8 Ex. 175.

When the plaintiff seeks to recover the deposit, he must prove payment of it to the defendant. A payment to the agent of the vendor is, in law, a payment to the principal; and in an action against the latter for the recovery of the money, it is immaterial whether it has actually been paid over to him or not. *Norfolk, Dk. of, v. Worthly*, 1 Camp. 337. And even where after an auction the deposit has been paid to the solicitor, J., of the vendor, G., as his agent, the action must be against G. and not against J. *Ellis v. Goulton*, (1893) 1 Q. B. 350, C. A. But if the deposit has been paid to the auctioneer, an action for it will lie against him *before* payment over to his principal, for he is in the nature of a stakeholder; *Burrough v. Skinner*, 5 Burr. 2639; or, if he has paid it over after notice of the defect in the title; *Edwards v. Hodding*, 5 Taunt. 815; and even, it should seem, *after* payment over to the principal without notice; for he ought to keep the deposit until the sale is complete, and it appears to whom it ought to be paid. *Gray v. Gutteridge*, 1 M. & Ry. 614. No notice to the auctioneer previous to the action being brought against him as stakeholder is necessary. *Duncan v. Cafe*, 2 M. & W. 244. Interest on the deposit cannot, in general, be recovered in such action. *Lee v. Munn*, 8 Taunt. 45; *Farquhar v. Farley*, 7 Taunt. 594. But it may be given by the jury under 3 & 4 W. 4, c. 42, s. 28, as damages, if a demand for the repayment of the money has been made with a notice that interest will be claimed; *vide Action for interest, post*, p. 625. Where an auctioneer does not disclose the name of principal, an action will lie against himself for damages for the breach of contract. *Hanson v. Roberdeau, Peake*, 120; *Simon v. Moticos*, 3 Burr. 1921.

*Damages.*] Where the contract is oral the vendee can recover the deposit only, for he cannot sue upon the special contract. *Walker v. Constable*, 1 B. & P. 306. In other cases the purchaser may recover, in a special action against the vendor, the deposit with interest, and the expenses of investigating the title, searching for judgments, &c. *Hodges v. Lichfield*, *El. of*, 1 N. C. 492; *Turner v. Beaurain*, *Sugl. V. & P.*, 14th ed. 362; *Farquhar v. Farley*, 7 Taunt. 592. And such expenses as a solicitor's bill may be recovered under an averment that plaintiff "had been put to great expenses, to wit, &c., in and about investigating the title," &c., although not actually paid. *Richardson v. Chasen*, 10 Q. B. 756. If the purchase money has been

lying ready without any interest being made of it, and it was reasonable to keep it so lying, interest may be recovered as damages. *Sherry v. Oke*, 3 Dowl. 349. But a person who has agreed to advance a sum on a mortgage, cannot recover interest on it where the negotiation fails for want of title, unless there be a special contract to pay it. *Sweetland v. Smith*, 1 Cr. & M. 585.

The purchaser cannot recover expenses incurred previously to entering into the contract; nor the expenses of a survey of the estate made before he knows the title; nor the expense of a conveyance drawn in anticipation; nor the extra costs of a suit for specific performance brought by the vendor; nor losses on the re-sale of stock prepared for the farm. *Hodges v. Lichfield*, *El. of, ante*, p. 331. So where the vendee filed a bill for specific performance, which was dismissed in consequence of the defective title, he was not permitted to recover these costs in an action against the vendor for breach of contract. *Mulden v. Eyson*, 11 Q. B. 292. Nor can the vendee recover any expenses incurred in preparing a conveyance after the defect in title was discovered; *Pounsett v. Fuller*, 17 C. B. 660; 25 L. J., C. P. 145; or in further fruitless negotiations. *Sikes v. Wild*, 1 B. & S. 587; 30 L. J., Q. B. 325; 4 B. & S. 421; 32 L. J., Q. B. 375, Ex. Ch. And where a lessee, with power to alter and improve, had an option to purchase, and, after laying out money in improvements, elected to purchase, and the title proved bad, he was held entitled only to damages for the breach of contract, but not for expense of improvements. *Worthington v. Warrington*, 8 C. B. 134. Where the defendant agreed to demise lands to the plaintiff, and to deduce a good title thereto, and the plaintiff had formed a company to establish certain works on it, and the title proved to be a bad one, it was held that the plaintiff might recover the expenses of the agreement, of investigating the title and endeavouring to procure a good one and to obtain the lease; but not the expense of raising the purchase money with interest, or of forming, establishing, and registering the company, nor the profits that would have accrued either to the company from the lease, or to the plaintiff as their solicitor, in carrying their project into effect; the latter heads of expense being either premature or speculative. *Hanslip v. Padwick*, 5 Exch. 615.

The purchaser is not in general entitled to recover compensation for the fancied goodness of his bargain, where the vendor is, without fraud, incapable of making a title. *Flureau v. Thornhill*, 2 W. Bl. 1078; *Bain v. Fothergill* L. R., 7 H. L. 158. This rule is of general application, and the exception engrafted thereon by *Hopkins v. Grazebrook*, 6 B. & C. 31; *Robinson v. Harman*, 1 Exch. 850, is no longer law. S. C. In such case the purchaser can only by an action for deceit recover any damages beyond the expenses he has incurred. S. C., *per* Ld. Chelmsford, L. R., 7 H. L. 207. So a purchaser who has obtained judgment for specific performance cannot in general recover damages for delay in completion. *Rowe v. London School Board*, 36 Ch. D. 619. A contract to grant an easement is for this purpose equivalent to a contract to sell land. S. C. Where, however, on the sale of a lease, the vendor did not do his best to obtain the consent of the lessor, as required by the lease, and the sale went off because the consent was refused, the vendee was held entitled to recover damages for the loss of his bargain. *Day v. Singleton*, (1899) 2 Ch. 320, C. A. And where the sale does not go off for want of title, but by reason of the refusal of the vendor to take the necessary steps to give possession to the vendee, the plaintiff can recover, as such damages, the difference between the contract price and the value at the time of the breach. *Engel v. Fitch*, L. R., 4 Q. B. 659, Ex. Ch. The price at which the estate was afterwards sold is *prima facie* evidence of its then value. S. C.; and see *Godwin v. Francis*, L. R., 5 C. P. 295, cited *post*,

p. 493. Where A. agreed to let premises to B., knowing his intention to carry on a trade thereon, B. was held entitled to recover from A., for the breach of this agreement, damages for the loss of anticipated business during the time he necessarily occupied in getting other premises. *Jaques v. Millar*, 6 Ch. D. 153. So loss of rent may be recovered as damages. *R. Bristol Permanent Building Soc. v. Bomash*, 35 Ch. 390. See also *Jones v. Gardiner*, (1902) 1 Ch. 191. As to the effect of a provision in the contract for the payment of a penalty or liquidated damages, *vide ante*, p. 326. As to what damages are recoverable under a claim for the deposit, *vide ante*, p. 331.

### ACTION FOR USE AND OCCUPATION.

This action is grounded on stat. 11 G. 2, c. 19, s. 14, by which it is enacted that it shall be lawful for landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, or hereditaments held or occupied by the defendants, in an action on *the case* for the use and occupation of what was so held or enjoyed; and if, on the trial of such action, any parol demise or any agreement (not being by deed) whereon a certain rent was reserved shall appear, the plaintiff shall not therefore be nonsuited, but may make use thereof as evidence of the quantum of damages to be recovered. But, the action of *debt* for rent on a contract for use and occupation lies at common law and not upon this statute. *Egler v. Marsden*, 5 Taunt. 25; *Gibson v. Kirk*, 1 Q. B. 850; and *per* Bramwell, B., in *Churchward v. Ford*, cited *infra*. It may be observed that since the abolition of real actions by stat. 3 & 4 W. 4, c. 42, debt for a rentcharge in fee will lie against the freehold tenant in possession of the land; *Thomas v. Sylvester*, L. R., 8 Q. B. 368; *Searle v. Cooke*, 43 Ch. D. 519, C. A.; even although the rentcharge may be also recoverable under 44 & 45 V. c. 41, s. 44. S. C.; and it exceeds the profits of the land. *Pertwee v. Townsend*, (1896) 2 Q. B. 129. It will not, however, lie against a tenant for years in occupation of the land; *Charity Coms. v. Green*, (1896) 2 Ch. 811; nor against the official liquidator of a company in whom the land out of which the rentcharge issues has been vested by order of the court under the Companies Act, 1862, s. 203. *Graham v. Edge*, 20 Q. B. D. 683, C. A. By 54 & 55 V. c. 19, s. 5 (2), where any yearly or other periodical payment has been made in respect of any land to or for the benefit of any charity or charitable purposes for 12 consecutive years, such payment shall be deemed *primâ facie* evidence of the perpetual liability of such land to such payment, without proof of the origin thereof.

*Plaintiff's title.*] If the defendant have come in under the plaintiff, or have acknowledged his title by the payment of rent to him or otherwise, he will not be permitted to impeach it at the trial; *Sullivan v. Stradling*, 2 Wils. 208; *Cooke v. Loxley*, 5 T. R. 4; *Phipps v. Sculthorpe*, 1 B. & A. 50; and it is not material in such case that the plaintiff should have the legal estate. *Hull v. Vaughan*, 6 Price, 157. Thus, if *cestui que trust* demise, he is the person to sue for the rent, and not the trustee, though the latter may have given notice to defendant to pay to him. *Churchward v. Ford*, 2 H. & N. 446; 26 L. J., Ex. 354. But, unless the defendant came in under the plaintiff, or had recognized his title, the plaintiff could only recover rent from the time that the legal estate vested in him. *Cobb v. Carpenter*, 2 Camp. 13, n. It seems, however, that since the J. Acts it is sufficient if the plaintiff has a right in equity to receive the rents as such. Tenants in common may join in this action on a parol yearly tenancy, if the tenant has always paid the rent to a joint agent of the plaintiff's; for

this is evidence of a joint letting. *Lust v. Dinn*, 28 L. J., Ex. 94. Where a person, after letting defendant into possession on an agreement for a future lease, mortgaged the premises to the plaintiff, who gave notice to the defendant of the mortgage, it was held that the plaintiff might recover in this form of action rent accruing due for a half-year subsequent to the mortgage, and during the currency of which the notice was given. *Rawson v. Eicke*, 7 Ad. & E. 451. A defendant, whose tenancy began under A., and who has since paid rent to the *cestui que trust* under A.'s will, cannot set up the want of the legal estate to an action for use and occupation by *cestui que trust*, though the fact is disclosed by the plaintiff's evidence. *Dolby v. Hles*, 11 Ad. & E. 335. The assignee of the landlord of A., who holds under a parol lease, may sue A. in this action, although there has been no recognition of tenancy or promise as between him and the assignee; at least where the grant by the assignor was "for himself and assigns." *Standen v. Christmas*, 10 Q. B. 135. There is a distinction between the case where a person has actually received possession from one who has no title, and the case where he has merely attorned by mistake to one who has title; in the former case the tenant cannot, except under very special circumstances, dispute the title; in the latter he may. *Per Bayley, J.*, in *Cornish v. Searell*, 8 B. & C. 475; *Rogers v. Pitcher*, 6 Taunt. 202; *Gravenor v. Woodhouse*, 1 Bing. 38; and see the cases cited, *sub tit. Replevin—Tenancy of Plaintiff*, *post*, pp. 1082 *et seq.* Thus, where a tenant took "premises from A. and B., for and on behalf of the trustees of the joint estate of C. and D.," and it appeared at the trial, on the evidence of the plaintiffs (who described themselves in the declaration as joint trustees), that they were trustees of C. only; it was held that the tenant was estopped from taking advantage of this variance. *Fleming v. Gooding*, 10 Bing. 549. So, where A. hired apartments by the year from B., and B. afterwards let the entire house to C., who sued A. for use and occupation, it was held that A. could not impeach C.'s title. *Rennie v. Robinson*, 1 Bing. 147. But a payment on a mistaken supposition that the claimant was personal representative of the tenant's deceased landlord will not estop the tenant. *Knight v. Cox*, 18 C. B. 645. And where land, belonging to a parish, was occupied by A., and he paid rent to the churchwardens, who executed a lease of the same land for a term of years to B., and gave A. notice of the lease; in an action for use and occupation by B. against A., it was held that A. was not precluded from disputing B.'s title, for that B. could not derive a valid title from the churchwardens. *Phillips v. Pearce*, 5 B. & C. 433.

An estoppel must be mutual; therefore if the landlord is not estopped, neither is the tenant. *Bac. Abr. Leases (O.)*; *Breton v. Evans*, *Cro. Eliz.* 700. Thus, where a husband and wife joined in leasing, by deed, land to the defendant, of which the husband alone was seised, it was held that, in an action of debt for rent, brought by the wife after her husband's death, the defendant was not estopped from showing that the plaintiff had no interest in the land, because the wife could not be estopped by the lease. *S.C.* So, where husband and wife demised land, the legal estate of which was in trustees for the wife, it was held that the husband could not, after his wife's death, distrain for the subsequent rent, as there was no estoppel. *Howe v. Scarrot*, 4 H. & N. 723; 28 L. J., Ex. 325.

In general, the title of the plaintiff is established by the production of a writing or agreement, which is proved in the usual manner, &c.; but if there be no actual lease or agreement, the plaintiff's title may be established by evidence of the defendant having paid rent to him, or submitted to a distress by him. *Panton v. Jones*, 3 Camp. 372. Notice to produce the receipts for rent, or the notice of distress, if any, should in such cases be given by the plaintiff. Where the defendant occupied the plaintiff's land

under the powers of a local Act, and, upon a dispute respecting the right of the plaintiff to demand rent, a decree for payment was made in an amicable suit in Chancery, in which the defendant acquiesced for several years, it was held that he could not afterwards dispute his liability to rent in an action for use and occupation. *Allason v. Stark*, 9 Ad. & E. 255. Payment of an annual sum by defendant and his predecessors, occupiers, to the overseers of the parish for a century, as for "rent of common lands," is evidence of a rent-service, and not a rent-charge, especially if the defendant have his title deeds in court and decline to produce them. *Hardon v. Hesketh*, 4 H. & N. 175; 28 L. J., Ex. 137. See, however, *Doe d. Whittick v. Johnson*, Gow, 173, in which Holroyd, J., held that such payment is evidence only of a right to the rents, and not to the laud, and that the presumption is that they were quit rents; this case was not cited in *Hardon v. Hesketh*, *supra*. If it appear from the plaintiff's witnesses that the defendant holds under a written agreement not produced, or which, when produced, cannot be read for want of a stamp, the plaintiff will not be allowed to give oral evidence of the holding. *Brewer v. Palmer*, 3 Esp. 213; *Ramsbottom v. Mortley*, 2 M. & S. 445. But, if the plaintiff have made out a *prima facie* case, and the defendant seek to show that he holds under a written agreement, he must produce the instrument duly stamped, or his objection is untenable. *Fielder v. Ray*, 6 Bing. 332; *R. v. Padstow*, 4 B. & Ad. 208. A parol demise for all the residue of the lessor's term, it being the intention of the parties to create the relation of landlord and tenant, will operate as a lease, so as to enable the lessor to maintain an action for use and occupation, or debt for rent. *Poultney v. Holmes*, 1 Str. 405; *Baker v. Gostling*, 1 N. C. 19; *Pollock v. Stacy*, 9 Q. B. 1033. Such demise, however, operates as an assignment. *Beardman v. Wilson*, L. R., 4 C. P. 57. Where A. lets land to B. as tenant from year to year, and B. by deed assigns his interest in the land to C., and A. assigns his reversion to D., who does not accept C. as his tenant, D. cannot sue B. for the rent, there being no privity of estate or contract between them. *Alcock v. Moorhouse*, 9 Q. B. D. 366, C. A. One joint tenant, or tenant in common, can demise his interest at a rent, to another joint tenant, or tenant in common. *Cowper v. Fletcher*, 6 B. & S. 464; 34 L. J., Q. B. 187; *Leigh v. Dickeson*, 12 Q. B. D. 194; 15 Q. B. D. 60, C. A. A reversionary lease creates an *interesse termini* only, until entry thereunder at the time fixed therein, and does not enlarge the term of the original lease. *Lewis v. Baker*, (1905) 1 Ch. 46.

A married woman may, under the Married Women's Property Act, 1882 (45 & 46 V. c. 75), s. 1 (2), sue alone, for the use and occupation of land to the rents of which she is, under sects. 1 (1), 2, 5 of that Act, separately entitled. See *sub tit.*, *Actions by married women*, *post*, pp. 1176 *et seq.*

Where the estate of the lessor ceased before, or on the rent day, the tenant was not, at common law, liable to pay any rent for his occupation from the last rent day to the day of such cesser. This was remedied in certain cases by stats. 11 G. 2, c. 19, s. 15, and 4 & 5 W. 4, c. 22, s. 1. And now by the Apportionment Act, 1870 (33 & 34 V. c. 35, s. 2), all "rents" . . . "shall, like interest on money lent, be considered as accruing from day to day, and be apportionable in respect of time accordingly;" but (sect. 3) the apportioned part shall not be payable until the entire rent shall or would have become payable. By sect. 4, all persons, their heirs and executors, &c., are to have the same remedies for recovering the apportioned part, as for the entire portions if entitled thereto; but in the case of rents received and continuing, the entire rent shall be received by the person who would have been entitled if there had been no apportionment, and the apportioned part shall be recoverable from him. By sect. 5 "rents" includes rent service, rent charge, rent

seek, and also tithes and payments in lieu thereof. See hereon, *Swansea Bank v. Thomas*, 4 Ex. D. 394; *Ex pte. Mandleberg*, (1895) 1 Q. B. 844; *Rochester, Bp. of, v. Le Fanu*, (1906) 2 Ch. 513; *Ellis v. Rowbotham*, (1900) 1 Q. B. 740, C. A. The Act does not apply to forehand rent. S. C.

By stat. 14 & 15 V. c. 25, s. 1, where a tenancy of lands held by a tenant T. at rack rent determines by the cesser of the estate of the landlord L., entitled for his life, &c., instead of claims to emblements, T. shall hold the lands under the succeeding owner O., on the same terms as he would have held the same of L., till the end of the current year of tenancy, and shall then quit without notice; O. may recover a proportional part of the rent reserved for the time between the cesser of L.'s estate and T.'s quitting. The section applies to those tenancies only in which the right to emblements would arise. *Haines v. Welch*, L. R., 4 C. P. 91. It applies to the tenancy of a labourer's cottage with more than an acre of land, partly cultivated as a garden and partly sown with corn and planted with potatoes. S. C.

*Defendant's occupation.*] There must be an occupation or holding actual or constructive; therefore a tenant who has agreed to take premises, but has not entered, is not liable to an action for use and occupation. *Edge v. Stafford*, 1 C. & J. 391; *Lowe v. Ross*, 5 Exch. 553; *Towne v. D'Heinrich*, 13 C. B. 892; 22 L. J., C. P. 219.

But it is *prima facie* sufficient for the plaintiff to prove that the defendant did occupy the premises; and the continuance of the occupation will be presumed till the contrary appears. *Harland v. Bromley*, 1 Stark. 455; *Ward v. Mason*, 9 Price, 291. Where there has been an actual demise, a constructive occupation of the premises by the defendant during the time granted is sufficient; an occupation which he might have had, if he had not voluntarily abstained from it. *Per Gibbs, C.J., Whitehead v. Clifford*, 5 Taunt. 519; *Pinero v. Judson*, 6 Bing. 206; *Atkins v. Humphrey*, 2 C. B. 654, 659, *per* Cresswell, J. See *Smallwood v. Sheppards*, (1895) 2 Q. B. 627. But there does not appear to be any authority for the proposition that use and occupation can, in the absence of an actual demise, be maintained on a constructive occupation after the tenant has in fact ceased to occupy, and has offered to surrender the premises to the landlord. As to what creates an actual demise, see *Replevin—Tenancy of Plaintiff*, *post*, pp. 1082 *et seq.* Where there has been an actual demise to the defendant, to which he has assented, he is liable in debt for rent, even before entry. See Co. Litt. 270 a; Bac. Abr. Leases (M.).

Where the defendant entered a house under an agreement to take it and pay a half-year's rent in advance, Lush, J., held that that sum was recoverable only on a special count on the agreement. *Angell v. Randall*, 16 L. T. 498. The assignee of the reversion cannot, as it seems, maintain this action for rent in part incurred before the assignment; for there was then no occupation of the plaintiff's property by his permission, but debt for rent would lie. *Mortimer v. Preedy*, 3 M. & W. 602. An adverse occupation by the defendant will not entitle the owner to sue in this form of action. *Tew v. Jones*, 13 M. & W. 12. Indeed, the stat. 11 G. 2, c. 19, contemplates the relation of landlord and tenant. Hence, where a trespasser entered on land after a mortgage of it to the plaintiff, who had never taken possession nor got a judgment in ejectment, it was held that the latter could not recover rent in this form of action. *Turner v. Cameron's Coal Co.*, 5 Exch. 932. But a tenancy at sufferance is enough to support this action; as where a lessee under a lease from the plaintiff continues to hold adversely to him, after the expiration of it, as tenant to a stranger whose title is not shown. *Bayley v. Bradley*, 5 C. B. 396; *Hellier v. Silcox*, 19 L. J., Q. B. 295. If A. agrees to let lands to B., who permits C. to occupy them, B. may be sued



by A. for use and occupation. *Bull v. Sibbs*, 8 T. R. 327; *Conolly v. Baxter*, 2 Stark. 525. So, if B. assigns all his interest in the premises to D., A. may maintain an action for use and occupation against B., provided A. has never recognized D. as his tenant. *Shine v. Dillon*, 1 R., 1 C. L. 277, Ex. After an agreement between the plaintiff and defendant for a lease, the receipt by the defendant of the rents and profits, or an attornment from an under-tenant, is proof of use and occupation by the defendant. *Neal v. Swind*, 2 C. & J. 377. If the premises are in possession of an under-tenant, the landlord may refuse to accept the possession, and hold the original lessee liable during such time as the under-tenant retains possession, for the lessor is entitled to receive the absolute possession at the end of the term. *Harding v. Crethorn*, 1 Esp. 57; *Ibbs v. Richardson*, 9 Ad. & E. 849; see *Levy v. Lewis*, 6 C. B., N. S. 766; 28 L. J., C. P. 301; 9 C. B., N. S. 872; 30 L. J., C. P. 141, Ex. Ch.; *Henderson v. Squire*, L. R., 4 Q. B. 170. But it may be proved that the lessor had accepted the under-tenant as his tenant, as by his having accepted the key from the original lessee, while the under-tenant was in possession: by his acceptance of rent from him, or by some act tantamount to it. *Harding v. Crethorn*; *supra*, per Ld. Kenyon.

A tenant who has quitted in pursuance of an oral surrender to his landlord, without having given or received a notice to quit, remains liable; *Mollett v. Brayne*, 2 Camp. 104; *Matthews v. Sawell*, 8 Taunt. 270; or, after an insufficient notice to quit, although first acquiesced in by the landlord; *Johnstone v. Huddestone*, 4 B. & C. 922; *Bessell v. Landsberg*, 7 Q. B. 638; even though the landlord, on the tenant's quitting, puts up a bill in the window for the purpose of getting another tenant for the premises. *Redpath v. Roberts*, 3 Esp. 225; *Johnstone v. Huddestone*, *supra*. But, not so, if the landlord have, with the assent of the tenant, accepted another person as tenant, and he have entered, for this operates as a surrender in law of the first tenant's term. *Thomas v. Cook*, 2 B. & A. 119; *Nickells v. Atherstone*, 10 Q. B. 944. And the operation of such acceptance as a surrender applies even where there was a lease under seal; *Davison v. Gent*, 1 H. & N. 744; 26 L. J., Ex. 122; and possession of the premises by the new tenant, and the fact of a new lease having been granted and the old one delivered up and cancelled, is evidence of the assent of the first tenant. S. C.; *Walker v. Richardson*, 2 M. & W. 882. The old tenant must give up possession to the new tenant at or about the time of the grant of the new lease to which he assents. *Wallis v. Hands*, (1893) 2 Ch. 75, 82. If the landlord have accepted the key of the premises, this in itself is a surrender, and the acceptance of another tenant is immaterial; *Dohd v. Acklom*, 6 M. & Gr. 672; so, if after refusal of the key which the tenant leaves behind, the landlord make use of it and enter the premises and puts up a board "to let." *Phené v. Popplewell*, 12 C. B., N. S. 334; 31 L. J., C. P. 235; see *Lyon v. Reed*, 13 M. & W. 285, and the notes to *Ds. of Kingston's case*, 2 Smith's L. C., 11th ed. 837 *et seq.* Anything which amounts to an agreement on the part of the tenant to abandon, and on the part of the landlord to resume, possession of the premises, if followed by such resumption of possession, amounts to a surrender by operation of law. *Phené v. Popplewell*, per Erle, C.J., 12 C. B., N. S. 340; 31 L. J., C. P. 236. But, unless the landlord intend to resume possession, the fact that the key has been left with him, and he has tried to let the premises, does not constitute a surrender, and after he has let them there is no relation back beyond the time of letting. *Oastler v. Henderson*, 2 Q. B. D. 575. A., the tenant of a house, three cottages, and a stable and yard at an entire rent for a term of seven years, before the expiration of the term assigned all the premises to B. for the remainder of the term, the house and cottages being in the possession of under-tenants. The landlord accepted a sum of money as rent up to the day

of the assignment, which was in the middle of a quarter. B. took possession of the stable and yard only. The occupiers of the cottages having left them after the assignment, and before the expiration of the term, the landlord relet them. A. paid no rent after the assignment, but the landlord received rent from the under-tenants. Before the expiration of the term the landlord advertised the whole of the premises to be let or sold. It was held that this was a surrender by operation of law of all the premises. *Reeve v. Bird*, 1 C. M. & R. 31; S. C., 4 Tyrw. 612. Where a tenant from year to year, at a rent payable half-yearly, quitted without giving notice to quit, and the landlord, before the expiration of the next half year, let the premises to another tenant, it was held that the landlord was not entitled to recover rent from the first tenant from the expiration of the current year when he quitted the premises to the time when the landlord relet the same to the second tenant. *Hall v. Burgess*, 5 B. & C. 332; and see *Walls v. Atcheson*, 3 Bing. 462. So, where rent was payable quarterly, if the tenant quitted by consent in the middle of a quarter, the landlord could not recover the rent, *pro rata*, either for the subsequent portion of the quarter or for that part of it during which the tenant occupied. *Whitehead v. Clifford*, 5 Taunt. 518; *Grinnan v. Legge*, 8 B. & C. 324. But now see the Apportionment Act, 1870, *ante*, p. 335. Where a tenant, whose lease expired on Lady Day, paid a quarter's rent, after deducting a sum for repairs, on Midsummer Day, and was not afterwards seen on the premises, and a third person afterwards came into possession, and paid rent at irregular periods, a jury may presume that the landlord has accepted the latter as his tenant. *Woodcock v. Nuth*, 8 Bing. 170.

Where a tenant from year to year of a Lady Day holding, agreed with the landlord in December to surrender at Midsummer, a new tenancy is created, which operates as a surrender of the former one. *Fenner v. Blake*, (1900) 1 Q. B. 426. Although the premises are burnt down and remain unoccupied, the tenant still continues liable in this action for the rent subsequently accruing; for the premises continue to be "held" by the defendant; *Baker v. Holtzaffell*, 4 Taunt. 45; *Izon v. Gorton*, 5 N. C. 501; unless it be agreed that the liability shall cease after the fire; in which case the lessee will be liable in use and occupation, for a portion of the rent during the time of actual occupation. *Packer v. Gibbins*, 1 Q. B. 421. And the fact of the premises having been insured, and the landlord having received the insurance money and not applied it to reinstating the premises, affords no equitable defence to the action. *Lofft v. Dennis*, 1 E. & E. 474; 28 L. J., Q. B. 168.

Where a tenant from year to year assigned all his personal property to the defendant for the benefit of his creditors, and the defendant executed the deed and acted under it, it was held that he was liable for the rent unless he repudiated the tenancy. *White v. Hunt*, L. R., 6 Ex. 32.

Use and occupation did not, at common law, lie against a husband for a half-year's rent due in respect of premises occupied for part of that time by his wife before marriage, and which continued to be occupied by her for a short time after her marriage; debt for rent was the proper remedy. *Richardson v. Hall*, 1 B. & B. 50. Where one of two executors of a deceased tenant for years enters into the premises, such entry does not enure as the entry of both so as to make them both liable in an action for use and occupation. *Nation v. Tozer*, 1 C. M. & R. 172. And, when one only of two joint lessees holds over the other cannot be charged for rent. *Draper v. Crofts*, 15 M. & W. 166. But, where two persons sign an agreement to become tenants, and one enters under it, it may be presumed that he entered for both; and use and occupation against both will lie. *Glen v. Dungey*, 4 Exch. 61. Where premises were held by parol under two trustees, one of whom died, and the lessee continues to hold, the surviving trustee may sue

in his own right, and not as survivor. *Wheatley v. Boyd*, 7 Exch. 20; 21 L. J., Ex. 39.

If, after the determination of a lease, the tenant holds over and pays rent, such payment is conclusive evidence of a tenancy; and he will be liable in an action for use and occupation for the time he occupies the premises. *Bishop v. Howard*, 2 B. & C. 100; and see *Bayley v. Bradley*, 5 C. B. 326, *ante*, p. 336. So, an executor of a tenant from year to year, holding on and paying rent, will hold on the terms of the former demise, and be personally liable. *Buckworth v. Simpson*, 1 C. M. & R. 834. And where there has been a lease for a year, and by consent of both parties the tenant continues in possession afterwards, then, in the absence of anything showing a contrary intention, a tenancy from year to year on the terms of the lease, so far as they are applicable to such a tenancy is to be applied; *Dougal v. McCarthy*, (1893) 1 Q. B. 736, C. A., following *Right d. Flower v. Darby*, 1 T. R. 159, 162, 163. See further, cases cited *post*, p. 347. But where a tenant from year to year, after the expiration of his landlord's title, continued in possession for one quarter, and paid rent for that quarter to the party entitled in reversion, but quitted at the end of it, the payment is not evidence of a tenancy for more than the quarter, and the reversioner cannot sue the tenant for use and occupation beyond the quarter. *Freeman v. Jury*, M. & M. 19; *Jenner v. Clegg*, 1 M. & Rob. 213.

As to the power of a corporation to sue, and its liability to be sued for use and occupation, *vide post*, p. 1093.

We have seen that it is not necessary that there should be an *express* contract creating the relation of landlord and tenant between the parties: the relation may be implied. Thus where the defendant has entered under a contract for sale which ultimately goes off, and his occupation has been a beneficial one, it seems that he may be liable in this action; *Hearn v. Tomlin*, Peake, 191; but, only for the period since the putting an end to the contract; *Howard v. Shaw*, 8 M. & W. 118; see *Crouch v. Treginning*, L. R., 7 Ex. 88; and he is not liable for rent at all, if the sale goes off for want of title, and there is no agreement about paying for such occupation. *Winterbottom v. Ingham*, 7 Q. B. 611. And it has been held that the defendant may rebut an implied agreement to pay for use and occupation by showing that he entered as vendee under a parol agreement, and that a payment he then made was for purchase-money and not rent. *Corringan v. Woods*, 15 W. R. 318, H. T. 1868, Ir. Ex. But, in a case where the defendant, vendor, was under contract to sell the premises, but subsequently gained possession of them from a sub-vendee by falsely representing that the original contract was at an end, he was held liable to the sub-vendee during such possession for use and occupation, though at that time the defendant had the legal estate. *Hull v. Vaughan*, 6 Price, 157. So, where defendant took possession under an agreement that plaintiff, the landlord, should put the premises in repair, and that rent should not be payable till the completion of the repairs, and he quitted after six months in consequence of non-repair; yet this was held evidence from which a jury might infer an agreement to pay *ad interim*, on the footing of a *quantum valchaut*. *Smith v. Eldridge*, 15 C. B. 236. Where, under an agreement of purchase, the plaintiffs were to receive the rents and profits of the premises from a given day, and to pay the defendants interest on the purchase-money from that day, the plaintiffs were entitled to recover the occupation value of the premises although there was no tenancy between the parties. *Metropolitan Ry. Co. v. Defries*, 2 Q. B. D. 189, 387, C. A.

This action does not lie where the defendant enters under an agreement for a lease which the plaintiff cannot grant for want of title. *Rumball v. Wright*, 1 C. & P. 589. B. entered into a building agreement with A.,

which settled the rent to be reserved by the leases of future houses to be built under A., and provided that certain annual rents or sums should be payable to A., in the interim. B. assigned the *agreement* to C., and C. to D.; held, that C. could not be sued for the reserved annual sums after his assignment to D.; for that neither B. nor C. became yearly tenants by the payments of the above sums, no estate having passed under the agreement; and the annual sums being only collateral sums, independent of any tenancy, for which B. alone was liable on the contract. *Camden, Mqs. of, v. Batterbury*, 5 C. B., N. S. 808; 28 L. J., C. P. 187, Ex. Ch.; 7 C. B., N. S. 864; 28 L. J., C. P. 335. But B. is liable to pay such sums though the leases to be granted exceed three years, and the agreement is not under seal. *Adams v. Hagger*, 4 Q. B. D. 480, C. A. If the plaintiff be a co-director with the defendant of a company which occupies the plaintiff's premises, he cannot sue defendant on an *implied* contract. *Chadwick v. Clarke*, 1 C. B. 700. One co-tenant, who occupies a house alone, but without excluding his co-tenants, is not therefore liable to pay rent to them; *McMahon v. Burchell*, 2 Phill. 127; and one tenant of a farm, who takes all the profits, is not impliedly liable to his co-tenants for use and occupation. *Henderson v. Easin*, *Id.* 308, and 12 Q. B. 986.

Where A. agreed by letter with B. to take a lease of B.'s iron ore for forty years at a certain rent, engaging to work the veins in a certain manner, it was held that this was not a mere licence, but a right constituting a hereditament within 11 G. 2, c. 19, s. 14, in respect of which use and occupation would lie against A., who had worked under it. *Jones v. Reynolds*, 4 Ad. & E. 805. So this action lies against one who, under a written agreement or licence, had used a fishery; *Holford v. Pritchard*, 3 Exch. 793; or who has exercised a right of sporting. See *Thomas v. Fredericks*, 10 Q. B. 775, and *Adams v. Clutterbuck*, 10 Q. B. D. 403, cited *post*, p. 345.

Where premises were hired with regard to a special event, which was the foundation of the contract, and had become impossible by reason of an unforeseen accident, both parties are discharged from the further performance of the contract, and rent not due till a subsequent time is not recoverable. *Krell v. Henry*, (1903) 2 K. B. 740, C. A.; *secus* as to rent due previously; *Chandler v. Webster*, (1904) 1 K. B. 493 C. A.; and rent paid in advance cannot be recovered back. See *Civil Service Co-operative Soc. v. Gen. Steam Nav. Co.*, cited *post*, p. 606; and *Elliott v. Crutchley*, (1904) 1 K. B. 565 C. A.; (1906) A. C. 7, where the contract contained a special provision against the occurrence of the accident. See further, cases cited *post*, p. 589.

*Damages.*] Where a rent is mentioned in the lease or agreement, such rent will be the measure of damages, though the lease be void by the Statute of Frauds. *De Medina v. Polson*, Holt, N. P. 47. But where there is no express agreement as to rent, or where the terms of the agreement have been so far departed from that the stipulated rent is no just criterion of value, the value of the premises must be proved; *Tomlinson v. Day*, 2 B. & B. 680; and though a tenant, who holds over after the end of his term, is presumed to hold at the old rent, yet where a new tenant is substituted by consent under an agreement afterwards abandoned, no such inference arises, and the jury must find the real annual value. *Thetford, Mayor of, v. Tyler*, 8 Q. B. 95.

*Plaintiff's title expired.*] Although the defendant cannot impeach the title of the plaintiff under whom he holds (*ante*, p. 333), yet he may show that it has expired. *Holmes v. Pontin*, Peake, 99; *Gravenor v. Woodhouse*, 1 Bing. 43. So he may show ouster of the plaintiff's title by sequestration. *Powell v. Hibbert*, 15 Q. B. 129. Where the defendant had come in under

the plaintiff, it was held not competent for him to show that the plaintiff's interest had been forfeited to the lord of the manor, to whom the defendant had since paid rent upon notice and demand made, unless he has expressly renounced the plaintiff's title, and commenced a fresh holding under the new landlord. *Balls v. Westwood*, 2 Camp. 11. But it is not necessary for the tenant to surrender or suffer eviction before he refuses to pay rent. It will be enough if he have paid it to a *bonâ fide* claimant really entitled to the premises, under whom he has made a new arrangement, and commenced a fresh tenancy. *Mountnoy v. Collier*, 1 E. & B. 630; 22 L. J., Q. B. 124. See *post*, *Replevin*,—*Evidence on denial of tenancy*. But a mere claim of rent is no defence at all, unless the defendant has actually given up possession, or has paid the rent to the owner of the legal estate under compulsion, so as to be able to show an eviction. *Emery v. Barnett*, 4 C. B., N. S. 473; 27 L. J., C. P. 216; *Hickman v. Machin*, 4 H. & N. 716; 28 L. L., Ex. 310; *Wilton v. Dunn*, 17 Q. B. 294; 21 L. J., Q. B. 60. As to what amounts to an eviction, *vide infra*.

*Defendant's occupation determined.*] As to notice to quit possession of land, see *post*, *Action for recovery of possession of land by landlord*. As to the notice necessary in the case of a right to shoot, see *Lowe v. Adams*, (1901) 2 Ch. 598. An agreement that on the tenant's quitting the rent shall cease, and an acceptance of the key by the landlord, or a letting of the premises by him to a third person, is (as already stated, *ante*, p. 337) a sufficient defence. *Whitehead v. Clifford*, 5 Taunt. 518; *Hall v. Burgess*, 5 B. & C. 332; *Grimman v. Legge*, 8 B. & C. 324; *Walls v. Atcheson*, 3 Bing. 462. But delivery of the keys by an agent of the defendant to a servant at the plaintiff's house, is not alone sufficient to prove an acceptance by the plaintiff. *Harland v. Bromley*, 1 Stark. 455. *Accord. Cannan v. Hartley*, 9 C. B. 634; 19 L. J., C. P. 323.

A tenancy from year to year is assignable by deed, and the privity of estate between the landlord and tenant is thereby severed. *Allcock v. Moorhouse*, 9 Q. B. D. 366, C. A., cited *ante*, p. 335.

*Eviction.*] An eviction by the landlord is a defence, as it determines the occupation. *Prentice v. Elliott*, 5 M. & W. 606. And where the premises are let at an entire rent, an eviction from part, if the tenant quits the residue, is a complete defence. *Smith v. Raleigh*, 3 Camp. 513. It has been said that, if the tenant continue in possession of the residue, he is liable *pro tanto* on a *quantum meruit*. *Stokes v. Cooper*, *Id.* 514, n. But it is now settled that eviction from any part *by the lessor*, is a suspension of the whole rent while the eviction lasts. Co. Litt. 148 b; 2 Wms. Saund. 204 (2); *Walker's case*, 3 Rep. 22 b; *Reeve v. Bird*, 1 C. M. & R. 31, 36, *per* Parke, B.; *Neale v. Mackenzie*, 1 M. & W. 747, Ex. Ch.; *Morrison v. Chadwick*, 7 C. B. 266; *Upton v. Townend*, 17 C. B. 30; 25 L. J., C. P. 44. Eviction from part of the demised premises by a stranger, by title paramount, does not suspend the whole rent, but is merely a ground for its being apportioned. *Walker's case, supra*; 1 Wms. Saund. 204 a (f). See also *Stevenson v. Lambard*, 2 East, 575.

A mere trespass is not an eviction; *Hodgskin v. Queenborough*, Willes, 130, n. (b); B. N. P. 177; *Newby v. Sharpe*, 8 Ch. D. 39, C. A.; nor is a demand of rent by an elegit creditor who had no right to eject the defendant. *Poole, Mayor, &c. of, v. Whitt*, 15 M. & W. 571. But a threat of expulsion by a person entitled to possession, and a consequent attornment to him, are equivalent to expulsion. *Semb.*, S. C. So a demand by a person lawfully entitled, and a giving up possession to him, may amount to eviction. *Semb.*, *Carpenter v. Parker*, 3 C. B., N. S. 206; 27 L. J., C. P. 78. An eviction of the under-tenant is an eviction of the tenant. *Burn v. Phelps*, 1 Stark. 94.

But a forcible expulsion of a man put into the plaintiff's house to keep possession for the defendant (tenant), and who was an unfit person, was held no eviction; the jury finding that the plaintiff did not intend to dispossess the defendant. *Henderson v. Mears*, 28 L. J., Q. B. 305. Where a lease of mines provided that the lessee should, jointly with the lessor, have the use of a railroad upon the demised premises, it was held that an expulsion from this railroad did not amount to an eviction, as the rent issued out of the land demised, and not out of the easement to use the railway. *Williams v. Hayward*, 1 E. & E. 1040; 28 L. J., Q. B. 374. See further, as to what amounts to an eviction, *Dunn v. Di Nuovo*, 3 M. & Gr. 105; *Upton v. Townend*, *supra*; *Wheeler v. Stevenson*, 6 H. & N. 155; 30 L. J., Ex. 46; *Pellatt v. Boosey*, 31 L. J., C. P. 281.

*Defendant treated by plaintiff as a trespasser.*] If the landlord have treated the tenant as a trespasser, he cannot afterwards recover against him in this action. Thus, if he had *recovered* against him in ejectment, he could not sue in this action for the rent accruing *after* the date of the writ; for, by suing for the tort, he precluded himself from suing *ex contractu*. *Birch v. Wright*, 1 T. R. 378; *Bridges v. Smyth*, 5 Bing. 410. And the mere *bringing* of an ejectment for a forfeiture will prevent the plaintiff from suing for rent subsequently due; for this determines the lease. *Jones v. Carter*, 15 M. & W. 718; *Grimwood v. Moss*, L. R., 7 C. P. 360; and see *Toleman v. Portbury*, L. R., 7 Q. B. 344, Ex. Ch.; and *Dendy v. Nicholl*, 4 C. B., N. S. 376; 27 L. J., C. P. 220. So the issue and service by a superior landlord of a writ to recover possession for a forfeiture which has been incurred, bars a claim for rent by the mesne landlord. *Serjeant v. Nash*, (1903) 2 K. B. 304, C. A.

*No beneficial occupation.*] In the case of a ready-furnished house there is an implied condition that it shall be reasonably fit for occupation when the tenancy is to begin; and if the house be then uninhabitable by reason of its being infested with vermin; *Smith v. Murrable*, 11 M. & W. 5; *Campbell v. Wenlock, Ltd.*, 4 F. & F. 716; or of defective drainage; *Wilson v. Finch Hatton*, 2 Ex. D. 336; the tenant may give up occupation, and then ceases to be liable to pay rent. There is, however, no condition that it shall remain fit for occupation during the term. *Parson v. Roberts*, (1895) 2 Q. B. 395, C. A. And in the case of an unfurnished house, there is in general no condition that it shall be fit for occupation. *Hart v. Windsor*, 12 M. & W. 68, 86; *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. D. 507. But now by the Housing of the Working Classes Act, 1890 (53 & 54 V. c. 70), s. 75, in any contract "for letting for habitation a house, or part of a house," at a rent not exceeding that stated below, "there shall be implied a condition that the house is, at the commencement of the holding, in all respects reasonably fit for human habitation;" the limit of annual rent is, in the metropolis 20*l.*, in Liverpool 13*l.*, in Manchester and Birmingham 10*l.*, and elsewhere 8*l.* By 3 E. 7. c. 39, s. 12, this condition applies to any such contract made after Aug. 14th, 1903, notwithstanding any agreement to the contrary. A tenant may sue his landlord for damages sustained by a breach of this condition. *Walker v. Hobbs*, 23 Q. B. D. 458 (decided under 48 & 49 V. c. 72, s. 12, which was identically the same). A tenant is, notwithstanding the destruction of the house demised, liable to pay the rent reserved. *Manchester Bonded Warehouse Co. v. Carr*, *supra*; *Baker v. Holtzaffell*, 4 Taunt. 45. Non-compliance of the landlord with a covenant to do repairs, whereby the premises have become unfit for profitable occupation, and that the defendant has quitted them on that account, is no defence. *Surplice v. Furnsworth*, 7 M. & Gr. 576; *Sutton v. Temple*, 12 M. & W. 52; and some reported N. P. cases *contra* are not law.

*Payment.*] By 4 A. c. 16, s. 10, payment of rent by the defendant to his lessor, before he had notice of an assignment of the premises by him to the plaintiff is a good defence. *Cook v. Moylan*, 1 Exch. 67—51. But payment in advance to the lessor before the rent day affords no defence at law, as against the assignee, if the defendant had notice of the assignment before the rent day. *De Nicholls v. Saunders*, L. R. 5 C. P. 589. See *Clun's case*, 10 Rep. 127; *Cromwell, Ld. v. Andrews*, Cro. Eliz. 15. If he had not notice before the rent day, the advance then becomes payment. *Cook v. Guerra*, L. R., 7 C. P. 132. As to what amounts to notice, *vide* S. C. Payment of property tax by the tenant, which the landlord is bound to allow him under 5 & 6 V. c. 35, Sched. A., No. IV., Rule 9; 16 & 17 V. c. 34, s. 40; 27 & 28 V. c. 18, s. 15; and 6 E. 7. c. 8, s. 6, is, in effect, payment by the tenant of so much of the next rent due by him. See *Denby v. Moore*, 1 B. & A. 123, 129, 130. It would, however, now seem necessary to plead the defence specially, as it would otherwise be likely to take the plaintiff by surprise. Rules, 1883, O. xix. r. 15, *ante*, p. 309. The tax must be deducted from the next payment of rent thereafter to be made by the tenant, and if the tenant do not so deduct the tax he cannot afterwards sue the landlord for it as money paid. *Denby v. Moore, supra*; *Cumming v. Bedborough*, 15 M. & W. 438. Nor can he deduct it from rent subsequently payable, *vide* S. CC. Nor can he in the case of land tax. *Andrew v. Hancock*, 1 B. & B. 47. Nor could he have done so in the case of tithe rent charge. *Daves v. Thomas*, (1892) 1 Q. B. 414. But the tenant can enforce an agreement by the landlord to repay him the property tax, if he pay the rent in full. *Lamb v. Brewster*, 4 Q. B. D. 220, 607, C. A. These statutes do not allow the tenant to deduct the tax payable on the full improved value of the premises, but only that on the rent reserved. *Watson v. Horne*, 7 B. & C. 286; *Smith v. Humble*, 15 C. B., N. S. 321. This amount may be deducted although a deduction from the rent has been made by the tenant under the Licensing Act, 1904 (4 E. 7. c. 23), s. 3. *Hancock v. Gillard*, (1907) 1 K. B. D. 47. The tax cannot be deducted unless it has been paid by the tenant. See *Pocock v. Eustace*, 2 Camp. 181; explained in *Baker v. Davis*, 3 Camp. 474; *Ryan v. Thompson*, L. R., 3 C. P. 144, cited *post*, p. 909, *Action for illegal distress—Defence*. The tenant may also, by way of payment, show payment of rates, which he may deduct from his rent under a statute allowing such deduction to be made, provided that the statute specifically enacts that such payment shall be a discharge *pro tanto* of the rent, *e.g.* the Poor Rate Assessment, &c., Act, 1869 (32 & 33 V. c. 41), s. 1, see *Hammond v. Farrow*, (1901) 2 K. B. 332, the Rating Act, 1874 (37 & 38 V. c. 54), ss. 5, 6, 8, 9, see *Chaloner v. Bolckow*, 3 Ap. Ca. 933, D. P. Where however the statute does not so enact, as in cases of the Public Health Act, 1875 (38 & 39 V. c. 55), ss. 216, 226, and the Metropolis Management Amendment Act, 1862 (25 & 26 V. c. 102), s. 96, the defence is one of set-off. *Skinner v. Hunt*, (1904) 2 K. B. 452, 457, *per* Vaughan Williams, L.J. With regard to payment of an amount equivalent to the rent to the superior landlord, under compulsion or threat of distress, or payment of any other charge on the land, see *Replevin—Denial of rent being in arrear, post*, p. 1086.

*Statute of Limitations.*] The Statute of Limitations is a good defence in an action against a person who has been tenant from year to year, but who has not, within the last six years, occupied the premises, paid rent, or done any act from which a tenancy can be inferred; though no notice to quit has been given. *Leigh v. Thornton*, 1 B. & A. 625.

*Illegality.*] It is a good defence that the premises have been knowingly let by the plaintiff to the defendant for an immoral purpose; *Crisp v. Churchill*, cited 1 B. & P. 340; or, for the delivery of blasphemous lectures;

see *Cowan v. Milbourn*, L. R. 2 Ex. 230; or, the occupation knowingly allowed to continue for such purposes. *Jennings v. Throgmorton*, Ry. & M. 251. Where a lessee assigned the lease, knowing the house was to be continued to be used as a brothel, it was held he could not enforce the covenant of indemnity against the assignee. *Smith v. White*, L. R. 1 Eq. 626. But it is no defence that plaintiff knowingly let the land to defendant for the use of a company not licensed to hold land of which defendant was a promoter. *Job v. Lamb*, 11 Exch. 539; 25 L. J., Ex. 87.

*Distress.*] It seems to be no defence that the landlord has distrained goods to the full value of the rent, if he have sold them for a less sum. If he have sold them at too low a rate, the tenant's remedy is by action on the case. *Ejford v. Burgess*, 1 M. & Rob. 23, per Parke, B. But so long as the landlord retains the distress, though insufficient in amount, he cannot maintain the action. *Lehain v. Philpott*, L. R., 10 Ex. 242. It is no defence that the tenant quitted, without giving notice, in fear of a distress by the superior landlord. *Rickett v. Tullick*, 6 C. & P. 66.

### ACTION FOR WASTE, BAD HUSBANDRY, ETC.

This action lies on a contract not under seal, express or implied, and is in some cases founded on wrong independent of contract, arising out of the relation of landlord and tenant. It may in some cases be maintained by a married woman alone, *vide ante*, p. 335.

Claims under the Agricultural Holdings (England) Act, 1883 (46 & 47 V. c. 61), are in case of difference settled by a reference: see 63 & 64 V. c. 50, s. 2 (replacing sect. 8). So in the case of claims under stat. 50 & 51 V. c. 26 (allotments and cottage gardens), 53 & 54 V. c. 57 (land under mortgage), and 58 & 59 V. c. 27 (market gardens), as to which see Agricultural Holdings Act, 1906, 6 E. 7, c. 56, s. 5. All claims under any of these acts are, after Dec. 31st, 1908, to be settled by a single arbitrator. *Id.* ss. 1 (2, 3), 9.

*The Demise—Statute of Frauds.*] By the Stat. of Frauds (29 C. 2, c. 3), s. 1, all leases and terms, whether freehold or for years, not in writing and signed by the party making them, or their agents authorized by writing, shall have the effect of leases at will only, except (sect. 2) leases not exceeding three years from the making thereof, whereon the reserved rent is equal to two-thirds of the improved value. These sections apply only to leases whereby a rent is reserved. *Crosby v. Wadsworth*, 6 East, 602.

Sect. 4 of the same statute is stated *ante*, p. 312, and applies to contracts for creating a tenancy as well as to sales; but although sect. 2 excepts leases for three years at rack rent out of sect. 4, as well as out of sect. 1; *Bolton, Ltd. v. Tomlin*, 5 Ad. & E. 856; yet agreements for such leases are not so excepted; *Edge v. Stratford*, 1 Cr. & J. 391; and though the leases are valid, and any remedy on them in their character of leases may be resorted to, yet they do not confer the right to sue the lessee for damages for not taking possession. S. C. It seems, however, that the lessee might have been sued in debt for the rent reserved, for, where there has been an actual demise, debt lies before entry; *vide ante*, p. 336. An oral lease valid under sects. 1, 2, may be as special in its terms as a written one. *Bolton, Ltd. v. Tomlin*, *supra*.

The three years must be from the *making*, and not from the *commencement* only. *Baker v. Reynolds*, Hill MSS., 2 Selw. N. P., 13th ed. 759. An oral lease for two years, with an option to the lessee to continue the holding beyond three years from the making of the lease, is severable, and is good as to the two years. *Haid v. Hall*, 2 Ex. D. 355, C. A., reversing S. C.,



*Id.* 318. Special terms, not necessarily implied in a tenancy, may yet be incorporated with an oral demise by implication. Thus, where an oral lease is bad for want of proper formalities required by sect. 1, yet if the lessee enter and pay rent, he becomes tenant from year to year on such of the terms of the invalid lease as are not inconsistent with such a tenancy; *Doe d. Rigge v. Bell*, 5 T. R. 471; *Richardson v. Gifford*, 1 Ad. & E. 52; and see *Martin v. Smith*, *post*, p. 347; but, upon entry under an oral lease for more than three years, the lessee is strict tenant at will, and only becomes a yearly tenant on payment of any rent. *Berrey v. Lindley*, 3 M. & Gr. 512; 2 Smith's L. C., notes to *Doe d. Rigge v. Bell*, and *Clayton v. Blakey*. The Act 8 & 9 V. c. 106, s. 3, now requires a deed wherever the Statute of Frauds required a writing, otherwise the lease is void at law. It is, however, good as an agreement. See on this statute, *post*, pp. 1013, 1014. In order to show an implied promise to hold on the terms of a former lease, the old lease must be produced (unless admitted) duly stamped. *Wallis v. Broadbent*, 4 Ad. & E. 877; *ante*, p. 222. By Rules, 1883, O. xix. r. 20 (*ante*, p. 310), any objection on the ground of insufficiency in law of the contract must be specially pleaded.

Where lands are held of a corporation under a parol demise, a yearly tenancy is created upon payment of rent. *Wood v. Tate*, 2 N. R. 247; *Ecclesiastical Commissioners v. Merral*, L. R., 4 Ex. 162.

[ Where the defendant has enjoyed an incorporeal hereditament under an agreement, void as a grant because not under seal, for the whole period named therein, he is bound by the terms of the agreement; *Thomas v. Fredricks*, 10 Q. B. 775; *Adams v. Clutterbuck*, 10 Q. B. D. 403; but not if he have entered only. *Bird v. Higginson*, 6 Ad. & E. 824, Ex. Ch.

*Waste.*] By the common law, an action for waste lay only against the tenant by the curtesy, tenant in dower, or guardian, for these estates were created by law. The tenants for life or years, having obtained their estates by grant, were not punishable for waste until the Stat. of Marlbridge (52 H. 3, c. 23 or 24), which gave an action for damages against the lessee for life or years or *pur autre vie*. 2 Inst. 144 *et seq.* Subsequently the Stat. of Gloucester (6 E. 1, c. 5) gave the additional remedy against them of the writ of waste, to recover the land wasted, as well as damages for the waste. 2 Inst. 300, 301. The ordinary remedy for waste has for a long while been by an action on the case in the nature of waste; and now, by 3 & 4 W. 4, c. 27, s. 36, the writ of waste is itself abolished, and consequently that action is now the only remedy. 2 Wms. Saund. 252 *et seq.* (7). By the J. Act, 1873, s. 25 (3), a tenant for life without impeachment of waste may not commit equitable waste unless an intention to allow him to do so shall expressly appear by the instrument creating the estate.

The general rule as to waste at common law is that, in order to constitute it, there must be a diminution of value of the estate by it; or an increased burden upon it; or an impairing of the evidence of title. *Per Pattenon, J.*, in *Huntley v. Russell*, 13 Q. B. 572. It is not waste for a tenant to dig gravel from pits, or work mines already open on the land when leased, if they are not excepted; Co. Lit. 54 b; Bac. Abr. Waste (C. 3); nor to work quarries which have been worked by the owners of the inheritance for the purpose of making a profit. *Elias v. Snowdon Slate Quarries Co.*, 4 Ap. Ca. 454, D. P. Working for use is sufficient. *Id.* p. 465, *per* Ld. Selborne. But where gravel pits are opened by surveyors of highways under the Highway Acts, the tenant cannot continue to work and sell gravel for his own profit. *Huntley v. Russell*, *supra* (case of rector for dilapidations by predecessor). If anything be done to destroy the evidence of title, an action is maintainable by the landlord *against his*

*tenant*. Thus, if the tenant open a new door, the landlord may recover against him in this action pending the lease, though the house itself may not be the worse for it, provided the jury find that his reversionary interest is injured; for the mere alteration of the property may tend to the injury of the owner. *Young v. Spencer*, 10 B. & C. 145, 152. It is observable that an act of the nature here referred to seems to be actionable without regard to its effect on the evidence of title; for the alteration cannot be made without destroying at least some part of the freehold, which no tenant has a right to do, even although compensating improvement may in other respects result from it. In this latter case, however, the waste was known in equity as "meliorating waste," and an injunction will not be granted to restrain it. *Doherty v. Allman*, 3 Ap. Ca. 709, D. P. The erection of buildings on the land demised is not waste unless the building is an injury to the inheritance. *Jones v. Chappell*, L. R., 20 Eq. 539. The accumulation of large quantities of rubbish on the land may be waste. *W. Ham, &c. Central Charity Board v. E. L. Waterworks Co.*, (1900) 1 Ch. 624. The tenant is bound during the term to keep distinctly marked the boundaries between the demised land and his own land adjoining. *Spike v. Harding*, 7 Ch. D. 871. See *Scarle v. Cooke*, 43 Ch. D. 518, C. A.

A tenant at will is not liable for permissive waste; *Harnett v. Mailland*, 16 M. & W. 257; in the absence of an express or implied contract to repair. *Blackmore v. White*, (1899) 1 Q. B. 293, 300, *per* Ld. Russell, C.J. But tenants for years are liable for permissive, as well as for voluntary waste. See *Harnett v. Mailland*, *supra*, and *Yellowly v. Gower*, 11 Exch. 274, 293, 294; 24 L. J., Ex. 289, 298; in which cases some earlier decisions are explained or overruled. *Accord. Davies v. Davies*, 38 Ch. D. 499. See also Litt. s. 67; Co. Litt. 53 a; 2 Inst. 229; and 1 Wms. Saund. 323 c (7), 2 *Id.* 252 (7), and *Woodhouse v. Walker*, 5 Q. B. D. 401. In *In re Cartwright*, 41 Ch. D. 532, and *In re Parry & Hopkin*, (1900) 1 Ch. 160, tenants for life were held not liable for permissive waste; these decisions seem, however, to be inconsistent with the opinions expressed by the courts (not mere *dicta* of Parke, B., and Lush, J.) in *Yellowly v. Gower*, and *Woodhouse v. Walker*, *supra*, that tenants for life and for years are under the same liability. As to the liability of a tenant from year to year, *vide post*, p. 347. The lord may recover damages against a tenant for life of copyholds for not repairing according to the special custom of the manor. *Blackmore v. White*, *supra*. *Secus* for non-repair in the absence of such special custom. *Galbraith v. Poynton*, (1905) 2 K. B. 258.

An action for waste will lie by the lessor although the waste amounts also to a breach of covenant in the lease for which he might sue; *Kintyside v. Thornton*, 2 Wm. Bl. 1112; *Marker v. Kenrick*, 13 C. B. 188; 22 L. J., C. P. 129; but the acts for which the action is brought must be waste *per se* and not mere breach of covenant. *Jones v. Hill*, 7 Taunt. 392. And the covenants may restrict the liability for acts that would otherwise be waste. *Doe d. Dalton v. Jones*, 4 B. & Ad. 126; *Yellowly v. Gower*, 11 Exch. 274; 24 L. J., Ex. 289. Where the destruction of a building demised is caused by its user in an apparently reasonable and proper manner, having regard to its character and the purposes for which it was intended to be used, this is not waste. *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. D. 507.

The right of a remainderman to sue tenant for life for waste arises when the waste is committed, and the Statute of Limitations then begins to run. *Higginbotham v. Hawkins*, L. R., 7 Ch. 676. As to right to trees as between tenant for life and remainderman, see *Honywood v. Honeywood*, L. R., 18 Eq. 306; *Dashwood v. Magniac*, (1891) 3 Ch. 306, C. A.

In an action of waste the defendant is entitled to the verdict unless the

damages are substantial. *Doherty v. Allman*, 3 Ap. Ca. 709, 733, per Ld. Blackburn, citing *Harrow School Governors v. Alderton*, 2 B. & P. 86, per Ld. Eldon; *Meux v. Cobby*, (1892) 2 Ch. 253. The measure of damages is the diminution of the value of the reversion, less a discount for immediate payment. *Whitham v. Kershaw*, 16 Q. B. D. 613, C. A.

By 14 & 15 V. c. 25, s. 3, the tenant of a farm who shall erect any buildings on the farm for agricultural or trade purposes by written consent of his landlord, will be at liberty to remove them if the lessor shall not buy them within a month after notice of removal, at a valuation fixed by referees. See further the Agricultural Holdings (England) Act, 1883 (46 & 47 V. c. 61), ss. 34, 54, 55, amended by the Agricultural Holdings Act, 1900 (63 & 64 V. c. 50), ss. 1, 4, 12, and Scheds. I. & III: and *Id.* 1906 (6 E. 7. c. 56), ss. 1, 6, and the Market Gardeners' Compensation Act, 1895 (58 & 59 V. c. 27), ss. 1, 3, amended by 63 & 64 V. c. 50, ss. 1, 12, and Scheds. I. and III.

Where a lease provides that at the expiration of the tenancy all damages done by the tenant should "be made good or paid for by the tenant, the amount of such payment, if in dispute, to be referred to and settled by two valuers," the settlement of the amount of the payment is a condition precedent to an action in respect of dilapidations. *Babbage v. Coulburn*, 9 Q. B. D. 235. It is otherwise where there is also an independent contract to pay fair compensation. *Dawson v. Fitzgerald*, 1 Ex. D. 257, C. A.

[*Non-repairs.*] The obligation to repair implied in a tenancy for years, in the absence of express stipulation, is not well defined. A tenant from year to year is only bound to keep the premises wind and water-tight, and to use them in a "tenantlike" or "husbandlike" manner, and not to commit waste. *Ferguson v. —*, 2 Esp. 590; *Horsefall v. Mather*, Holt, N. P. 7; *Anworth v. Johnson*, 5 C. & P. 239; *Leach v. Thomas*, 7 C. & P. 327. He is not liable for the mere wear and tear of the premises. *Torriano v. Young*, 6 C. & P. 8. As to the tenant's liability when the non-repair amounts to waste, *vide ante*, pp. 345, 346.

If the tenant hold over after a lease with a repairing covenant, he presumably continues liable for the same repairs, so far as they are consistent with a yearly tenancy; *Digby v. Atkinson*, 4 Camp. 275; *Beale v. Sanders*, 3 N. C. 850; *Arden v. Sullivan*, 14 Q. B. 832; *Ecclesiastical Commrs. v. Merril*, L. R., 4 Ex. 162; *Harris v. Hickman*, (1904) 1 K. B. 13; see also *Dougal v. McCarthy*, *ante*, p. 339; unless altered circumstances rebut the presumption. *Johnson v. St. Peter, Hereford*, 4 Ad. & E. 520. Where a tenant enters under a lease for seven years, not under seal, and thereby agrees to do certain repairs in the 7th year of the term, and he occupies and pays rent during the whole term, he is bound to do the repairs. *Martin v. Smith*, L. R., 9 Ex. 50.

An express contract to repair supersedes implied obligations of the like nature. *Standen v. Christmas*, 10 Q. B. 135. The law with regard to the obligation to repair under such a covenant, is stated under tit. *Action on covenant to repair*, *post*, pp. 737 *et seq.*

There is no implied obligation of the landlord to do substantial repairs though the premises be in a dangerous state. *Gott v. Gandy*, 2 E. & B. 845; 23 L. J., Q. B. 1. Nor, to inform a proposed tenant of their state. *Keates v. Cadogan, El. of*, 10 C. B. 591; 20 L. J., C. P. 76. As to how far it might be an answer to an action on the lessee's covenant to repair, see *Colebeck v. Girdlers' Co.*, 1 Q. B. 234. The tenant in common of a house is under no liability to contribute to expense of repairs done by his co-tenant. See *Leigh v. Dickeson*, 15 Q. B. D. 60, C. A.

[*Good husbandry—Custom.*] The obligation to good husbandry arises

either by contract, or the mere relation of tenant, or from local custom, or other circumstances. The custom is not necessarily excluded by proof of express agreement, if the two be consistent. *Hutton v. Warren*, 1 M. & W. 466. But a custom that an outgoing tenant should leave the manure, being paid for it, is excluded by an express stipulation that he should leave it without any mention of payment. *Roberts v. Barker*, 1 Cr. & M. 808. A tenant who holds over after a lease has expired, or enters under an agreement for a lease, holds subject to the terms of the lease, as to the course of husbandry. S. C.; *Doe d. Thomson v. Aney*, 12 Ad. & E. 476. See also the cases cited *ante*, p. 347. But if, after holding over and paying rent, he by deed assign his interest to a third person, the assignee does not, until his tenancy has been recognized by the lessor, hold on the terms of the original lease. *Elliott v. Johnson*, L. R., 2 Q. B. 120. In this case there was a clause in the lease against assignment, but the majority of the court rested their judgment on the ground that the doctrine of conditions running with the land is confined to covenants annexed to the land by indenture of demise, and a mere assignment of a parol tenancy does not pass to the assignees the right to enforce collateral stipulations. *Id.* 124, 127.

Though it is generally treated as a custom for the incoming tenant to pay the value of fallows, &c., to the outgoing tenant, yet when there is no incoming tenant, the contract implied by the custom is that the landlord shall pay the value. *Faviell v. Gaskoin*, 7 Exch. 273; 21 L. J., Ex. 85. In such case the person in receipt of the rents is liable, although only tenant for life. *Mansel v. Norton*, 22 Ch. D. 769, C. A. *Prima facie*, the outgoing tenant's remedy for tillages or tenant right is against the landlord, for there is, under ordinary circumstances, no privity between the outgoing and incoming tenants. The mere fact of the incoming tenant entering upon the land does not render him liable for such tillages, but it is a question of fact whether the contract between the outgoing tenant and the landlord subsists, or a new contract has been entered into with the incoming tenant, the landlord being discharged. *Codd v. Brown*, 15 L. T. 536, H. T. 1867, C. P.; *Sucksmith v. Wilson*, 4 F. & F. 1083, Martin, B.; and see *Faviell v. Gaskoin*, *supra*, and *Bradburn v. Foley*, 3 C. P. D. 128. And a usage that the outgoing tenant should look to the incoming tenant for payment for such tillages, to the exclusion of the landlord's liability, is unreasonable and bad. S. C. Whatever the arrangement between the outgoing and incoming tenant, the landlord is entitled to a payment of arrears of rent due from the former out of the valuation. *Stafford v. Gardner*, L. R., 7 C. P. 242. The amount is recoverable by the tenant from the landlord on a *quantum meruit*, and the ascertainment of the amount by valuation is not a condition precedent to his right to sue when it is not made such by the terms of the lease. *Sucksmith v. Wilson*, *supra*. Where a tenant holds on the general terms of cultivating according to good husbandry, drainage may be part of it, and a custom for the outgoing tenant to charge his landlord with part of the expense of such drainage, though done without his knowledge, is reasonable and consistent with the terms. *Mousley v. Lullam*, 21 L. J., Q. B. 64. As to the allowance of interest on the valuation, see *Marsh v. Jones*, 40 Ch. D. 563. A stipulation that the tenant shall not sell any straw or manure produced on the farm without licence, disables him from selling it even after the tenancy has expired. *Massey v. Goodall*, 17 Q. B. 310; 20 L. J., Q. B. 526. The tenant is exonerated from his agreement to use as fodder on the farm, all the hay, &c., produced thereon, if the hay, &c., has been destroyed by fire before being so used. *In re Hall & Ly. Meux's Arbitration*, (1905) 1 K. B. 588, C. A. By the Agricultural Holdings (England) Act, 1900 (63 & 64 V. c. 50), s. 1, which gives an outgoing

agricultural tenant a right to compensation for certain improvements effected by him, by sub-sect. 5, provides that "nothing in this section shall prejudice the right of a tenant to claim any compensation to which he may be entitled under custom agreement or otherwise in lieu of any compensation provided by this section." By the Agricultural Holdings Act, 1906, 6 E. 7. c. 56, ss. 3, 9, after Dec. 31st, 1908, certain freedom of cropping and disposal of the produce is allowed the tenant, notwithstanding any custom or contract. By sects. 2, 4, the tenant is entitled to compensation for damage done to his crops by game and for unreasonable disturbance.

A valuation made in the usual way cannot be reopened, although the valuers have included therein things which by the custom of the country should not have been valued or which did not exist. *Per Kelly, C.B., Martin and Pigott, BB., Freeman v. Jefferies, L. R., 4 Ex. 189.*

*Action by and against assignee of lessor.*] The stat. 32 H. 8. c. 34, giving the right of action by the assignor of the lessor against the lessee (sect. 1), and by the lessee against the assignee of the lessor (sect. 2.), does not extend to parol contracts; *Standen v. Christmas, 10 Q. B. 135*; but where the assignee can determine the tenancy, the continued holding of the tenant under him is evidence of an agreement with the assignee to hold on the old terms. *Buckworth v. Simpson, 1 C. M. & R. 834, 844*; *Arden v. Sullivan, 14 Q. B. 832*; *Cornish v. Stubbs, L. R., 5 C. P. 334*; *Smith v. Eggington, L. R., 9 C. P. 145*. In other cases, the action must have been in the name of the original lessor. *Bickford v. Parson, 5 C. B. 923*. See *Elliott v. Johnson, ante, p. 348*; *Allcock v. Moorhouse, ante, p. 335*. Now, however, under the Conveyancing and Law of Property Act, 1881, s. 10 (1), *post, p. 724*, the person entitled to the income of the land may enforce any provision contained in a lease, made after Dec. 31st, 1881, having reference to the subject-matter thereof, and this section seems to apply to a parol lease, where a deed is not required by statute. But not to an agreement for a lease unless it could be enforced by specific performance. See *Manchester Brewery Co. v. Coombs, (1901) 2 Ch. 608, 619, per Farwell, J.*

Where a demise is determined by the expiration of the landlord's estate, and the tenant continues to hold under the remainderman, paying the same rent, the question whether a term contained in the former tenancy is adopted into the new contract of demise is a question of fact. If such a tenant continue to hold under the remainderman, and nothing pass between them except the payment and receipt of rent, the new landlord is not bound by a stipulation, contained in a former tenancy, which is not known to him in fact, nor is according to the custom of the country. *Oakley v. Monck, L. R., 1 Ex. 159, Ex. Ch.*

*Breach.*] As to proof of breach of contract to repair or to use good husbandry, see *Action on covenants, post, pp. 735 et seq.* Where the customary course of husbandry, as alleged, is negatived by the jury, the plaintiff cannot recover for not cultivating according to the real custom. *Angerstein v. Handson, 1 C. M. & R. 789*. But the judge may amend when the breach is non-repair.

#### ACTION ON BILLS OF EXCHANGE, CHEQUES, AND PROMISSORY NOTES.

The law as to bills of exchange, cheques, and promissory notes has been codified by the Bills of Exchange Act, 1882\* (45 & 46 V. c. 61). The

\* Cited for brevity as B. of Ex. Act, 1882.

several sections of this Act therefore now replace a large number of the decisions on these instruments, which were collected in editions of this work prior to 1884. "The proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law," but if "a provision be of doubtful import resort to the previous state of the law" would be perfectly legitimate. *Bank of England v. Vagliano*, (1891) A. C. 107, 144, 145, *per* Lord Herschell. The Act, in Part II., enacts in detail the law, so far as relates to bills of exchange, and in Parts III. and IV. respectively enacts that relating to cheques and promissory notes: this is done, to a great extent, by reference to Part II., and this scheme is accordingly adopted in the following pages.

The following sections are general in their application:—

Sect. 2. "In this act, unless the context otherwise requires,—

"*Acceptance* means an acceptance completed by delivery or notification." See sect. 21, *post*, p. 353. Acceptance is defined by sect. 17, *post*, p. 362, and its requisites are there stated.

"*Action* includes counter-claim and set-off.

"*Banker* includes a body of persons, whether incorporated or not, who carry on the business of banking.

"*Bankrupt* includes any person whose estate is vested in a trustee or assignee under the law for the time being in force relating to bankruptcy.

"*Bearer* means the person in possession of a bill or note which is payable to bearer.

"*Bill* means bill of exchange, and *note* means promissory note." These instruments respectively are defined by sect. 3, *post*, p. 351, and sect. 83, *post*, p. 412.

"*Delivery* means transfer of possession, actual or constructive, from one person to another." As to delivery, see sect. 21, *post*, p. 353.

"*Holder* means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof." A holder in due course is defined by sect. 29, *post*, p. 354. The rights of holders are defined by sect. 38, *post*, p. 355.

"*Indorsement* means an indorsement completed by delivery." See sect. 21, *post*, p. 353. The requisites of an indorsement are stated in sect. 32, *post*, p. 370.

"*Issue* means the first delivery" (*vide supra*) "of a bill or note, complete in form to a person who takes it as a holder.

"*Person* includes a body of persons, whether incorporated or not.

"*Value* means valuable consideration." See sect. 27, *post*, p. 354.

"*Written* includes printed, and *writing* includes print."

By sect. 90, "A thing is deemed to be done in good faith, within the meaning of this act, where it is in fact done honestly, whether it is done negligently or not."

By sect. 91, "(1.) Where, by this act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority.

"(2.) In the case of a corporation, where, by this act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing be sealed with the corporate seal.

"But nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal."

Sect. 96 repeals numerous statutory enactments relating to bills of exchange, cheques, and notes.

By sect. 97, "(1.) The rules in bankruptcy relating to bills of exchange,

promissory notes, and cheques, shall continue to apply thereto, notwithstanding anything in this act contained.

“(2.) The rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this act, shall continue to apply to bills of exchange, promissory notes, and cheques.

“(3.) Nothing in this act or in any repeal affected thereby shall affect—

“(a.) The provisions of the Stamp Act, 1870, or acts amending it, or any law or enactment for the time being in force relating to the revenue:” (*vide ante*, pp. 237 *et seq.*)

“(b.) The provisions of the Companies Act, 1862, or acts amending it, or any act relating to joint stock banks or companies:” (*vide post*, pp. 413, 414, and Part III., *Actions by and against companies*, *post*, pp. 1016, 1115.)

“(c.) The provisions of any act relating to or confirming the privileges of the Bank of England or the Bank of Ireland respectively:

“(d.) The validity of any usage relating to dividend warrants, or the indorsements thereof.”

When a dividend warrant is payable to the order of two or more persons, it is the usage to pay to the order of one of them: this provision saves this exception from the general rule laid down by sect. 32 (3), *post*, p. 370.

By sect. 99, “Where any act or document refers to any enactment repealed by this act, the act or document shall be construed, and shall operate, as if it referred to the corresponding provisions of this act.”

As to who is the holder of a bill, see *Latter v. White*, L. R., 5. H. L. 578, *post*, p. 413.

As to the application of sect. 97 (2), to the recovery of damages for re-exchange, see *Ex pte. Gillespie*, 18 Q. B. D. 286, C. A., cited *post*, p. 394.

#### ACTION ON BILLS OF EXCHANGE.

*Statute.*] The general sections of the B. of Ex. Acts, 1882, relating to bills of exchange are as follows:—

Sect. 3. “(1.) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer.

“(2.) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.

“(3.) An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with (a) an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount, or (b) a statement of the transaction which gives rise to the bill, is unconditional.” See *In re Boyse*, 33 Ch. D. 612.

“(4.) A bill is not invalid by reason—

“(a.) That it is not dated;

“(b.) That it does not specify the value given, or that any value has been given therefor;

“(c.) That it does not specify the place where it is drawn, or the place where it is payable.”

See sect. 12, *post*, p. 352, as to the insertion of the date in an undated bill.

Sect. 4. “(1.) An inland bill is a bill which is or on the face of it

purports to be (a) both drawn and payable within the British Islands, or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill.

“For the purposes of this act ‘British Islands’ mean any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of her Majesty.

“(2.) *Unless the contrary appear on the face of the bill the holder may treat it as an inland bill.*” This sub-section is new.

By sect. 97 (3, a.), *ante*, p. 351, nothing in this act affects the Stamp Acts.

Sect. 5. “(1.) A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of the drawee.” See *Chamberlain v. Young*, (1893) 2 Q. B. 206, C. A., *post*, p. 360.

Sect. 6. “(1.) The drawee must be named or otherwise indicated in a bill with reasonable certainty.

“(2.) A bill may be addressed to two or more drawees whether they are partners or not, but an order addressed to two drawees in the alternative or to two or more drawees in succession is not a bill of exchange.”

Sect. 7. “(1.) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty.” See *Chamberlain v. Young, supra*.

“(2.) A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees. A bill may also be made payable to the holder of an office for the time being.” The provision in italics is new; *vide post*, p. 414.

Sect. 9. “(1.) The sum payable by a bill is a sum certain within the meaning of this act, although it is required to be paid—

“(a.) With interest.

“(b.) By stated instalments.

“(c.) By stated instalments, with a provision that upon default in payment of any instalment the whole shall become due.

“(d.) According to an indicated rate of exchange or according to a rate of exchange to be ascertained as directed by the bill.”

“(3.) Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated from the issue thereof.”

As to damages on the dishonour of a bill, see sect. 57, *post*, p. 393.

Sect. 10. “(1.) A bill is payable on demand—

“(a.) Which is expressed to be payable on demand, or at sight, or on presentation;” replacing 34 & 35 V. c. 74; “or

“(b.) In which no time for payment is expressed.

“(2.) Where a bill is accepted or indorsed when it is overdue, it shall as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand.”

Sect. 11. “A bill is payable at a determinable future time within the meaning of this act which is expressed to be payable—

“(1.) At a fixed period after date or sight.”

As to fixing the due date, see sect. 14 (2), (3), *post*, p. 361, and sect. 65 (5), *post*, p. 390.

“(2.) On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain.

“An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect.”

Sect. 12. “Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed



period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly.

“Provided that (1) where the holder in good faith and by mistake inserts a wrong date, and (2) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date.”

As to the insertion of other material particulars omitted, *vide s. 20, infra*.

Sect. 13. “(1.) Where a bill or an acceptance or any indorsement on a bill is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be.

“(2.) A bill is not invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday.”

Sect. 20. “(1.) Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a *primâ facie* authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *primâ facie* authority to fill up the omission in any way he thinks fit.

“(2.) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact.

“Provided that if any such instrument after completion is negotiated to a holder in due course” (*vide sect. 29, post, p. 354*) “it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.”

Sect. 21. “(1.) Every contract on a bill, whether it be the drawer’s, the acceptor’s or an indorser’s, is incomplete and revocable, until delivery” (*vide sect. 2, ante, p. 350*) “of the instrument in order to give effect thereto.

“Provided that where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable.

“(2.) As between immediate parties, and as regards a remote party other than a holder in due course” (*vide sect. 29, post, p. 354*), “the delivery—

“(a.) in order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing, as the case may be:

“(b.) may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill,

“But if the bill be in the hands of a holder in due course” (*vide sect. 29, infra*), “a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed.

“(3.) Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved.”

Sect. 22. “(1.) Capacity to incur liability as a party to a bill is co-extensive with capacity to contract.

“Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations.”

By sect. 91 (2), *ante*, p. 350, the seal of a corporation on a bill is equivalent to signature.

“(2.) Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto.”

By sect. 27, “(1.) Valuable consideration for a bill may be constituted by—

“(a.) Any consideration sufficient to support a simple contract :

“(b.) An antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

“(2.) Where value has at any time been given for a bill, the holder” (*vide* sect. 2, *ante*, p. 350) “is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time.

“(3.) Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien.”

Sect. 29. “(1.) A holder in due course is a holder” (see sect. 2, *ante*, p. 350) “who has taken a bill, complete and regular on the face of it, under the following conditions ; namely :

“(a.) That he became the holder of it before it was overdue” (*vide* sect. 14, *post*, p. 361) “and without notice that it had been previously dishonoured, if such was the fact :

“(b.) That he took the bill in good faith” (*vide* sect. 90, *ante*, p. 350), “and for value” (*vide* sect. 27, *supra*), “and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

“(2.) In particular the title of a person who negotiates a bill is defective within the meaning of this act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

“(3.) A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.”

It will be seen that this section substitutes the term “holder in due course,” for “*bonâ fide* holder for value without notice.” The rights of a holder in due course are defined by sect. 38, *post*, p. 355. “Defect in the title” is used in this act as equivalent to “equity attaching to the bill.” “Force and fear” is the equivalent, in Scottish law, for “duress.” The effect of taking a bill overdue or dishonoured is defined by sect. 36 (2, 5), *post*, pp. 394, 395.

By sect. 30, “(1.) Every party whose signature appears on a bill is *primâ facie* deemed to have become a party thereto for value.

“(2.) Every holder of a bill is *primâ facie* deemed to be a holder in due course” (*vide*, sect. 29, *supra*) ; “but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.”

Sect. 37. “Where a bill is negotiated back to the drawer, or to a prior indorser or to the acceptor, such party may, subject to the provisions of this act” (*vide* sect. 59 (3) *post*, p. 401, and sect. 61, *post*, p. 404),

“re-issue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable.”

Sect. 38. “The rights and powers of the holder” (*vide* sect. 2, *ante*, p. 350) of a bill are as follows:—

“(1.) He may sue on the bill in his own name;

“(2.) Where he is a holder in due course” (*vide* sect. 29, *ante*, p. 354), “he holds the bill free from any defect of title” (*vide ante*, p. 354) “of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill:

“(3.) Where his title is defective—

“(a.) If he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill; and

“(b.) if he obtains payment of the bill the person who pays him in due course” (*vide* sect. 59 (1), *post*, p. 401) “gets a valid discharge for the bill.”

Sect. 53. “(1.) A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this act is not liable on the instrument.”

Sect. 58. “(1.) Where the holder” (*vide* sect. 2, *ante*, p. 350) “of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a ‘transferor by delivery.’

“(2.) A transferor by delivery is not liable on the instrument.

“(3.) A transferor by delivery who negotiates a bill thereby warrants to his immediate transferee being a holder for value that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless.”

Sect. 71. “(1.) Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill.”

“(3.) Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed the true owner of the bill; but nothing in this sub-section shall affect the rights of a person who in due course accepts or pays” (*vide* sect. 59 (1), *post*, p. 401), “the part first presented to him.” As to stamp on bills in sets, *vide ante*, p. 241.

Sect. 72. “Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:

“(1.) The validity of a bill as regards requisites in form is determined by the law of the place of issue” (*vide* sect. 2, *ante*, p. 350), and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement” (*vide Id.*), “or acceptance *supra* protest, is determined by the law of the place where such contract was made.

“Provided that—

“(a.) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue:

“(b.) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

- “(2.) Subject to the provisions of this act” (*vide infra*), “the interpretation of the drawing, indorsement, acceptance, or acceptance *supra* protest of a bill, is determined by the law of the place where such contract is made.
- “Provided that where an inland bill is indorsed in a foreign country the indorsement shall, as regards the payer, be interpreted according to the law of the United Kingdom.
- “(3.) The duties of the holder with respect to presentment for acceptance or payment, and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.
- “(4.) Where a bill is drawn out of but payable in the United Kingdom and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.” The value for stamp duty is ascertained at the date of the instrument, *vide ante*, p. 227.
- “(5.) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.”

In sub-sect. 2 “interpretation” means legal effect. *Alcock v. Smith*, (1892) 1 Ch. 238, 256; and “the payer” means the acceptor. *Id.* 262.

See further on this section, S. C. and *Embericos v. Anglo-Austrian Bank*, (1905) 1 K. B. 677, C. A., *post*, p. 966.

*Amount of bill.*] There is now no restriction as to the amount of a bill, for the stat. 48 G. 3, c. 88, s. 2, is repealed by the B. of Ex. Act, 1882, s. 96.

*Production of the bill.*] It is generally necessary for the plaintiff to produce the bill or note on which he claims, whenever the form of pleading puts it in issue; and even when not in issue, interest is not recoverable without production. *Hutton v. Ward*, 85 Q. B. 26; 19 L. J., Q. B. 293. But, where it appears that it has been destroyed, as where the defendant tore his own note of hand, a copy is admissible; *Anon.*, 1 Ld. Raym. 731; or, other secondary evidence may be given where the defence is not raised that the instrument is lost or destroyed. *Blackie v. Pidding*, *Charnley v. Grundy*, *infra*. Thus, under a defence denying acceptance, it is not competent for defendant to avail himself of the defence that plaintiff, an indorsee, has lost the bill and cannot produce it. *Blackie v. Pidding*, 6 C. B. 196. So, in an action on a note against maker, the defence of the loss of it must be pleaded specially. *Charnley v. Grundy*, 14 C. B. 608; 23 L. J., C. P. 121. The principle of this defence is that the holder of a negotiable security is only entitled to payment on production of it for re-delivery to the person liable to pay. If the defendant refuse to pay on that ground only, as where it is destroyed or is lost, there must be a defence to that effect. In *Poole v. Smith*, Holt, N. P. 144, Gibbs, C.J., seems to have held that where the bill is lost after plea pleaded, the defence might be raised without a special plea; *sed quere*.

By sect. 69, “Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again.

“If the drawer on request as aforesaid refuses to give such duplicate bill, he may be compelled to do so.”

Sect. 70. "In any action or proceeding upon a bill, the court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question." See sect. 51 (8), *post*, p. 386, as to protest on lost bill.

Unless the plaintiff avail himself of relief afforded by these sections he cannot, where the defence is properly pleaded, recover on a lost bill indorsed by the payee without proving that it had been destroyed; though he had offered an indemnity to the defendant; *Pierson v. Hutchinson*, 2 Camp. 211; *Hansard v. Robinson*, 7 B. & C. 90; and, though the bill was lost after it became due; S. C.; or, was payable to the plaintiff's order and not indorsed when lost; *Ramuz v. Crowe*, 1 Exch. 167. See further *Conflans Stone Quarry Co. v. Parker*, L. R., 3 C. P. 1. And, the loss of a bill in a negotiable state, is fatal to a recovery, on the debt for which the bill was given, as well as on the bill. *Crowe v. Clay*, 9 Exch. 604; 23 L. J., Ex. 150, Ex. Ch. Even an express promise by the defendant to pay the bill will not entitle the plaintiff to recover on it. *Davis v. Dodd*, 4 Taunt. 602. But the payee of a note, not negotiable, may require payment without producing it. *Wain v. Bailey*, 10 Ad. & E. 616; and see *per Jervis, C.J.*, in *Charnley v. Grundy*, 14 C. B. 614; 23 L. J., C. P. 122. If the acceptor improperly detain the bill in his hands, the drawer or other party may sue him upon it, without giving him notice to produce it; *Smith v. McClure*, 5 East, 477; and, where the defendant had admitted that he owed the money due upon a bill which was in his own possession, *Abbott, C.J.*, held that such admission might be given in evidence under the common counts without a notice to produce the bill. *Fryer v. Brown*, Ry. & M. 145. An admission of the handwriting of the defendant to the acceptance is *primâ facie* evidence of the regularity of such acceptance, and it dispenses with production, unless there be a "saving of just exceptions;" *Chaplin v. Levy*, 9 Exch. 531; 23 L. J., Ex. 117, cited *ante*, p. 74; and see *Sharples v. Rickard*, 2 H. & N. 57; 26 L. J., Ex. 302, where, in an action by indorsee against drawer, the court doubted whether on traverses only of presentment for acceptance and notices of dishonour, it was necessary to produce the bill. And where notice to produce must be given, see *ante*, pp. 7 *et seq.*

The bill or note produced must appear to be the same upon which the plaintiff claims, and if any material variance exist, it will be fatal, unless amended by leave of the judge at N. P. Where a bill appears to be altered it lies upon the party producing it to show that the alteration was made under such circumstances as not to vitiate the instrument; *Henman v. Dickinson*, 5 Bing. 183; and it cannot be left to the jury on the mere inspection of the bill, without other proof, to decide whether it was altered at the time of making or at a subsequent period. *Knight v. Clements*, 8 Ad. & E. 218. Where a note payable in two months was dated by mistake January, 1854, instead of 1855, but crossed by the maker before delivery, "due 4th March, 1855," it was held that this operated as a correction, and that the note was rightly described as of 1855. *Fitch v. Jones*, 5 E. & B. 238; 24 L. J., Q. B. 293. See further as to alterations in a bill, *ante*, pp. 244, 245, and *Defence, post*, pp. 395, 396.

*Variance in parties—Liability on the bill—Statute.*] A nominal partner who is named in the bill must join in suing. *Guidon v. Robson*, 2 Camp. 302.

By sect. 23, "No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such: Provided that—

"(1.) Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name:

“(2.) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm.” As to this liability, *vide post*, pp. 555 *et seq.*

As to signature by agent, *vide* sect. 91, *ante*, p. 350.

By sect. 53, “(1) The drawee of a bill who does not accept as required by this act,” (*vide* sect. 17 (2), *post*, p. 362) “is not liable on the instrument.”

Sect. 24. “Subject to the provisions of this act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor, or to enforce payment thereof, against any party thereto, can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.

“Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery.”

See sect. 21 (1), *ante*, p. 353, as to the effect of notification by the drawee that bill is accepted; sect. 54 (1), *post*, p. 363, as to that of acceptance; sect. 55 (1) (a) *post*, p. 375, of drawing; sect. 55 (2) (b) (c), *post*, p. 391, of indorsing. See also sect. 60, *post*, p. 406, and sect. 82, *post*, p. 410, for the special protection of bankers.

Sect. 25. “A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority.”

By sect. 26, “(1) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.

“(2.) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted.”

As to amendment in case of variance of parties, see *ante*, pp. 89 *et seq.* As to signatures on behalf of companies, *vide post*, pp. 413, 414.

By sect. 58, “(2) A transferrer by delivery is not liable on the instrument.”

A person is not liable *as acceptor* who accepts by procuration for the drawee, but without his authority. *Polhill v. Walter*, 3 B. & Ad. 122; *Eastwood v. Bain*, 3 H. & N. 738; 28 L. J., Ex. 44. He is, however, liable for breach of warranty of authority; *vide Action on warranty of authority, post*, p. 493. And, if one of several partners accept a bill in his own name on behalf of the partnership, having no authority to bind the firm, he will be personally liable as acceptor. *Owen v. Van Uster*, 10 C. B. 318; 20 L. J., C. P. 61; *Nicholls v. Diamond*, 9 Exch. 154; 23 L. J., Ex. 1. But where a bill drawn on a firm of B. & Co. was accepted by W. A. M. B., a partner having authority to accept bills, thus, “B. & Co., W. A. M. B.,” it was held that W. A. M. B. was liable thereon jointly with his co-partners only. *In re Barnard*, 32 Ch. D. 447, C. A. The master of a ship who drew a bill of exchange on the owners in favour of the suppliers of coal to the ship, concluding with the words “value received . . . on . . . coal . . . supplied to my vessel to enable her to complete her voyage . . . for which I hold my vessel owners and freight responsible,” is personally liable thereon. *The Elmville*, (1904) P. 319.

Sect. 24 (*ante*, p. 358) does not apply to indorsements made abroad. *Embricos v. Anglo-Austrian Bank*, (1905) 1 K. B. 677, C. A.

*Variance in names, &c.*] Although variances are now in most cases amendable, it has been thought as well to retain the cases as bearing upon other important points. Where initials or some contraction for a Christian name are used in the bill itself, the same initials or contraction may be used in the writ or statement of claim by 3 & 4 W. 4, c. 42, s. 12; but it may become necessary to identify the parties so designated, and if the name is spelt wrongly, oral evidence is admissible to show who was intended. *Willis v. Barrett*, 2 Stark. 29. Where a bill is drawn with the payee's name in blank, and in the statement of claim it is stated that A. B. (a *bonâ fide* holder who has inserted his own name) was payee, it is no variance. *Attwood v. Griffin*, Ry. & M. 425. In an action against several joint makers of a note, it is no objection on the ground of variance, that one of them, who has let judgment go by default, has been sued by a wrong Christian name; the identity of the party and service of the writ on him being shown. *Dickinson v. Bowes*, 16 East, 110. The name of a party to the bill may be stated as on the bill, though it be not the real name. *Forman v. Jacob*, 1 Stark. 47.

*Variance in the place of payment.*] If a bill be drawn payable at a particular place, this, as against the drawer, is part of the contract, and it is a variance to state it without that qualification: Bayley on Bills, 6th ed., 393; but as against the acceptor, this is now, by reason of sect. 19 (*post*, p. 362), no variance, unless the bill be accepted payable at a particular place, and not "otherwise or elsewhere." So, where a bill was directed to "A. B., payable in London," payment in London was held part of the contract. *Hodge v. Fillis*, 3 Camp. 463. As to promissory notes see sect. 87, *post*, pp. 414, 416. Where a note contains in the body of it a promise to pay at a particular place, it is a variance to omit the place. *Spindler v. Grellett*, 1 Exch. 384; *Vanderdonck v. Thellusson*, 8 C. B. 812; *Sanderson v. Bowes*, 14 East, 500. But when the place of payment is only mentioned in the memorandum at the foot of a note, it is no variance to omit it; *Price v. Mitchell*, 4 Camp. 200; *Williams v. Waring*, 10 B. & C. 2; *Masters v. Baretto*, 8 C. B. 433. And, the reason is not because a writing in the corner may not be part of a contract, but because by the usage of merchants it is a mere memorandum there written for the convenience of parties. *Per cur. Warrington v. Early*, 2 E. & B. 766; 23 L. J., Q. B. 47. But where a note was alleged to be payable at a certain place, and it was only made so payable by a memorandum at the bottom, *Abbott, C.J.*, held it no variance; *Hardy v. Woodroffe*, 2 Stark. 319; *Sproule v. Legg*, 3 Stark. 157; and, the reason seems to be that, if payable generally, it is payable at the place named. *Blake v. Beaumont*, 4 M. & Gr. 7.

*Variance in consideration.*] The words "value received," in a bill payable to the drawer's order, mean value received by the drawee; and if stated to be value received by the drawer, it is a variance. *Higmore v. Primrose*, 5 M. & S. 65; *Priddy v. Henbrey*, 1 B. & C. 671. But where the bill is drawn payable to the order of a third person, "for value received," it is no variance to state that it was for value received "of the drawer." *Grant v. Da Costa*, 3 M. & S. 351. "Value received," in a note, imports value received from the payee. *Clayton v. Gosling*, 5 B. & C. 360.

*Variance in the sum.*] The money mentioned in the statement of claim on a bill means English money; if the bill is really for foreign money it is a variance. *Kearney v. King*, 2 B. & A. 301; *Sproule v. Legge*, 1 B. & C. 16.

By sect. 9, "(2) Where the sum payable," by a bill, "is expressed in words, and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable."

*Ambiguous and irregular instruments.*] Sect. 3 (1), *ante*, p. 351, defines a bill of exchange, and (2) enacts that an instrument not complying with the conditions therein stated is not a bill. See also sects. 6 (2), 7 (2), *ante*, p. 352.

By sect. 5, "(2) Where in a bill drawer and drawee are the same person" (*vide* sect. 2, *ante*, p. 350), "or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note."

By sect. 7, "(3) Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer.

An instrument drawn thus, "pay to — order," the blank not having been filled up, is payable to the order of the drawer. *Chamberlain v. Young*, (1893) 2 Q. B. 206, C. A. The following instrument, "I promise to pay to J. B. or order," &c., signed "J. B." with J. G.'s name and address in the corner, and J. G.'s name written across it as an acceptance, and indorsed by J. B., may be treated by the holder as against J. B., as a note by him; *Edis v. Bury*, 6 B. & C. 433; and *semble*, at the holder's election as a bill of exchange. *Id.* "Pay without acceptance to the order of J. C. F." signed by the manager on behalf of a joint-stock banking company at one place and addressed to the company at another, is as against a partner in the company, a promissory note. *Miller v. Thomson*, 3 M. & Gr. 576.

The manager of an incorporated company wrote to the cashier thus: "53 days after date credit P., or order, with the sum of 500*l.*, claimed *per* 'Cleopatra,' in cash on account of this corporation," signed by the manager. This was held to be a bill of exchange. *Ellison v. Collingridge*, 9 C. B. 570; 19 L. J., C. P. 268.

"I promise to pay T. L. or order," signed H. O.: the name of the defendant was on the left corner, and his acceptance across it. Held, that T. L. might sue defendant on it as a bill of exchange. *Lloyd v. Oliver*, 18 Q. B. 471; 21 L. J., Q. B. 307; and *semb.*, it might have been treated as either a bill or a note as against H. O. *Id.* An instrument payable to order, with a direction "at Messrs. A. B.," instead of *to* Messrs. A. B., may also be treated as a bill or note, in an action against the drawer. *Shuttleworth v. Stephens*, 1 Camp. 407; *Allan v. Mawson*, 4 Camp. 115.

Without the drawer's signature, a bill though accepted is of no force (see sect. 3, *ante*, p. 351), and cannot be treated as a promissory note; *Stoessiger v. S. E. Ry. Co.*, 3 E. & B. 549; 23 L. J., Q. B. 293; *Goldsmid v. Hampton*, 5 C. B., N. S. 94; 27 L. J., C. P. 286; *McCall v. Taylor*, 19 C. B., N. S. 301; 34 L. J., C. P. 365. So, a bill not directed to any drawee is void as a bill, and an acceptance by some one, to whom it is not directed, is no acceptance; *Peto v. Reynolds*, 9 Exch. 410; *Davis v. Clarke*, 6 Q. B. 16; unless he be an acceptor for honour; *Polhill v. Walter*, 3 B. & Ad. 122.

An acceptance where there is no drawee named may make the person accepting liable as on a promissory note by himself. *Peto v. Reynolds*, *supra*. In *Fielder v. Marshall*, 9 C. B., N. S. 506; 30 L. J., C. P. 158, S. M. was sued on the following instrument:—"Pay to Mrs. E. F., or order," (*Signed*) "A. L.;" directed "To Mrs. E. F., Nelson Lodge, Chelsea," and across was written, "Accepted, S. M.;"—the whole document, except "A. L.," was written by the defendant, and was given by him to E. F. to secure a debt from A. L. to her; and it was held that the address, "To Mrs. E. F.," might be treated as a repetition of the payee's name, and not as a drawee, and the document as a promissory note made by S. M.



A payee, P., is fictitious within sect. 7 (3), *ante*, p. 360, where although P. is a real person he was never intended by the drawer to have any right on the bill, and even although the document which was concocted by G. is not really a bill, the signatures of the named drawer and that of P. having been forged by G., who fraudulently obtained the signature of the plaintiff V., as acceptor, V. and P. being both ignorant of the circumstances; such a document may therefore be treated as payable to bearer. *Bank of England v. Vagliano*, (1891) A. C. 107, D. P. Sect. 7 (3) applies although the acceptor believed that P. was a real person. S. C.; *Clutton v. Attenborough*, (1897) A. C. 90, D. P. *Seeus*, where the drawer is induced by fraud to draw a cheque to the order of a real person K., as a payment to him. *Macbeth v. N. & S. Wales Bank*, (1906) 2 K. B. 718, following *Vinden v. Hughes*, (1905) 1 K. B. 795.

*Payee against Acceptor.*

The proofs in this action entirely depend upon the pleadings. If the acceptance be intended to be put in issue, it must be traversed by the statement of defence. See *post*, *Defence*, p. 394.

*Bill when payable—Statute.*] Sects. 10, 11, *ante*, p. 352, respectively define what bills are payable on demand, and what bills are payable at a determinable future time.

By sect. 14, "Where a bill, is not payable on demand" (*vide* sect. 10, *ante*, p. 352) "the day on which it falls due is determined as follows:

"(1.) Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace: Provided that—

"(a.) When the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by Royal proclamation as a public fast or thanksgiving day, the bill is, except in the case hereinafter provided for, due and payable on the preceding business day" (*vide* sect. 92, *post*, p. 383);

"(b.) When the last day of grace is a bank holiday (other than Christmas Day or Good Friday) under the Bank Holidays Act, 1871, and Acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a bank holiday, the bill is due and payable on the succeeding business day" (*vide* sect. 92, *post*, p. 383).

"(2.) Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment.

"(3.) Where a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance, or for non-delivery.

"(4.) The term 'month' in a bill means calendar month."

By sect. 65, "(5) Where a bill payable after sight is accepted for honour, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour." The provision in italics is new. The Bank Holidays Act, 1871 (34 & 35 V. c. 17), s. 1, appoints as bank holidays, Easter Monday, Whitsun Monday, the first Monday in August, and December 26th, if a week day. If it be a Sunday, then the holiday is December 27th; 38 & 39 V. c. 13, s. 2. By 31 & 35 V. c. 17,

s. 5, these days may in any year be altered by Order in Council; and her Majesty may by proclamation appoint other days to be kept as bank holidays (sect. 4).

*Bill when payable.*] Where a bill is drawn at so many months after date, calendar months are intended, sect. 14 (4), *ante*, p. 361; and the day on which it falls due is always regulated by the day of the date, irrespective of the length of the months, and in ordinary cases will be the day with the same number in the last month of the currency; thus a bill drawn at two months on the 10th of January, will be due on the 10th of March. But, if the date be one of the last days of a month having more days than the month in which the bill becomes due, then the bill will be due on the last day of that month: thus, bills drawn, at one month, on the 28th 29th, 30th, or 31st of January, will, it would seem, in ordinary years, be all due on the 28th of February, and with the days of grace payable on the 3rd of March; Byles on Bills, 11th ed. p. 204; Story on Bills, 2nd ed. s. 300, pp. 74, 75; Marius, 4th ed. p. 18; and the dicta of the judges in *Freeman v. Read*, 4 B. & S. 174; 32 L. J., M. C. 239, and in *Webb v. Fairmaner*, 3 M. & W. 473.

It follows from sect. 14 (1), *ante*, p. 361, that where a fast or thanksgiving day alone is proclaimed, the bills due that day are payable the day before, but if the proclamation further appoint the day to be kept as a bank holiday, they are payable the day after the fast or thanksgiving day.

An action on the bill commenced before the expiration of the last day of grace is premature. *Kennedy v. Thomas*, (1894) 2 Q. B., 759, C. A.

*Acceptance—statute.*] By sect. 2, "Acceptance means an acceptance completed by delivery or notification," as to which *vide*, sect. 21, *ante*, p. 353.

Sect. 17. "(1) The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer.

"(2) An acceptance is invalid unless it complies with the following conditions, namely:

"(a.) It must be written on the bill and be signed by the drawee" (19 & 20 V. c. 97, s. 6). "The mere signature of the drawee without additional words is sufficient" (41 & 42 V. c. 13).

"(b.) It must not express that the drawee will perform his promise by any other means than the payment of money."

As to acceptance of a bill drawn in a set, *vide* sect. 71 (4), *post*, p. 363. As to signature by agent, *vide* sect. 91 (1), *ante*, p. 350.

Sect. 18. "A bill may be accepted,

"(1) Before it has been signed by the drawer, or while otherwise incomplete:

"(2) When it is overdue, or after it has been dishonoured by a previous refusal to accept, or by non-payment:

"(3.) When a bill payable after sight is dishonoured by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance."

Sect. 19. "(1) An acceptance is either (a) general or (b) qualified.

"(2) A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

"In particular an acceptance is qualified which is—

"(a.) conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated:

"(b.) partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn:

“(c.) local, that is to say, an acceptance to pay only at a particular specified place:

An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere” (1 & 2 G. 4, c. 78, s. 1):

“(d.) qualified as to time:

“(e.) the acceptance of some one or more of the drawees, but not of all.”

By sect. 21 (1), *ante*, p. 353, the acceptor's contract is incomplete and revocable until delivery of the bill has been made, or notification of acceptance given as described in that section.

By sect. 44 (1), *post*, p. 376, “the holder of a bill may refuse to take a qualified acceptance.” As to the effect of taking such an acceptance, *vide* sect. 44 (2), *post*, p. 376.

Sect. 52. “(1.) When a bill is accepted generally, presentment for payment is not necessary in order to render the acceptor liable.

“(2.) When by the terms of a qualified acceptance” (*vide* sect. 19, *ante*, p. 362) “presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures.

“(3.) In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonour should be given to him.”

Sect. 54. “The acceptor of a bill by accepting it—

“(1.) Engages that he will pay it according to the tenor of his acceptance” (*vide* sect. 19, *ante*, p. 362):

“(2.) Is precluded from denying to a holder in due course” (*vide* sect. 29, *ante*, p. 354):

“(a.) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill;

“(b.) In the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement;

“(c.) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement.”

By sect. 71 (4), where a bill is drawn in a set, “The acceptance may be written on any part, and it must be written on one part only.

“If the drawee accepts more than one part, and such accepted part get into the hands of different holders in due course” *vide* sect. 29, *ante*, p. 354), “he is liable on every such part as if it were a separate bill.”

*Acceptance, general or qualified.*] A conditional acceptance will not support the allegation of a general one, though the condition has been performed. *Lungston v. Corney*, 4 Camp. 177; *Ralli v. Sarell*, D. & Ry. N. P. C. 33; *Swan v. Cox*, 1 Marsh. 176. But where the drawee has accepted on condition of an extension of time for payment, the indorsee may sue as on a bill accepted payable at the postponed date. *Russell v. Phillips*, 14 Q. B. 891. Drawee of a bill, dated 8th September, at four months, accepted generally, adding the words “due 11th December.” Held, a memorandum for his own convenience perhaps accidentally mis-dated, and not a qualified acceptance. *Funsharve v. Peet*, 2 H. & N. 1; 26 L. J., Ex. 314. “Accepted, payable on giving up a bill of lading for goods, &c., *per* Amazon,” is a conditional acceptance, binding the holder to give up the bill of lading on presentment for payment, but, not imposing on him a further condition to the acceptor's liability, that the bill of lading should be given up on the very day the bill falls due. *Smith v. Vertue*, 9 C. B., N. S. 214; 80 L. J., C. P. 56. A bill of exchange was drawn by F. payable “to order F.,” the

drawees accepted the bill, as follows—across its face they stamped the words “Accepted payable at the A. Bank”; above “accepted” they wrote the words “In favour of P. only—No. 28,” the word “order” had been struck out, but it did not appear by whom; it was held, in an action by indorsees for value, that there was a general acceptance of a negotiable bill. *Decroix v. Meyer*, (1891) A. C. 520, D. P. Whether an acceptance be general or qualified is a question of law for the judge. *Sproat v. Matthews*, 1 T. R. 182.

An acceptance, expressed to be payable at a banker's or other place, was formerly held to be a special or qualified, and not a general acceptance. *Rowe v. Young*, 2 B. & B. 165. But by sect. 19 (2), *ante*, p. 362, replacing Onslow's Act (1 & 2 G. 4, c. 78), s. 1, such acceptance is general unless it expressly states that the bill is to be paid there *only, and not elsewhere*. A bill which is *drawn* payable at a particular place is within this section; there being no distinction between the case where the bill is so rendered payable by the language of the drawer, or of the acceptor; and unless the acceptance be special within the statute, it is unnecessary, *as against the acceptor*, to aver or prove any presentment. *Selby v. Eden*, 3 Bing. 611; *Fayle v. Bird*, 6 B. & C. 531. The use of the word “only” is not essential to qualify the acceptance, if the words “and not elsewhere” are inserted. *Higgins v. Nichols*, 7 Dowl. 551. By sect. 52 (1), *ante*, p. 363, when a bill is accepted generally, presentment for payment is not necessary in order to render the acceptor liable; and if the holder neglect to present, and the bankers, at whose house it is made payable generally, fail, with money of the acceptor in their hands, the acceptor is not thereby discharged. *Turner v. Hayden*, 4 B. & C. 1. But, by sect. 54 (1), *ante*, p. 363, if the acceptance is local, the plaintiff must prove presentment at the place named, in order to charge the acceptor; and this was the rule at common law. *Rowe v. Young*, *supra*. An acceptance payable at the acceptor's bankers is equivalent to an order on the banker to pay the bill to any holder who can by law give a valid discharge for it, and to debit his customer with the amount. *Robarts v. Tucker*, 16 Q. B. 560; 20 L. J., Q. B. 270, Ex. Ch.

A bill of exchange drawn generally may now be accepted in three ways; either generally, or payable at a particular banker's, or at a particular banker's and not elsewhere. If the drawee accept generally, he undertakes to pay the bill at maturity when presented to him. If he accept payable at a banker's, he undertakes to pay the bill at maturity, when presented, either to himself or at the banker's. If he accept payable at a banker's and not elsewhere, he contracts to pay the bill at maturity, provided it is presented at the banker's, but not otherwise. *Halstead v. Skelton*, 5 Q. B. 93.

*Acceptance, how proved.*] The acceptance, when traversed, is proved by evidence of the acceptor's handwriting, and the production of the bill, with such proof, is *prima facie* evidence of acceptance before action brought, as the presumption is that it was accepted within a reasonable time after date, according to the regular course of business, and before maturity. *Roberts v. Bethell*, 12 C. B. 778; 22 L. J., C. P. 69. What is such reasonable time depends on the places of residence of the parties, &c. *Per cur.*, S.C. If several, not partners, are acceptors, the handwriting of all must be proved. *Gray v. Palmers*, 1 Bsq. 135.

*Acceptance by partners.*] By sect. 23 (2), *ante*, p. 358, “the signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm.” If one of several partners accept a bill drawn on the firm, it is sufficient to prove the partnership, and his handwriting, in an action against all; *Mason v. Rumsey*, 1

Camp. 384; and, where a bill was directed to "E. M. and others, trustees of" &c., and was "accepted, E. M.," it was held that, on proving that E. M. accepted by authority of the other trustees, plaintiff could recover on the bill against the others, as well as against E. M., though E. M. alone signed, and did not expressly sign on behalf of the rest. *Jenkins v. Morris*, 16 M. & W. 877. But the name of the firm must appear on the face of the instrument, and an action cannot be maintained thereon against the firm, when one partner signed his own name only, although the proceeds were in reality applied to partnership purposes; *Siffkin v. Walker*, 2 Camp. 308; *Emly v. Lye*, 15 East, 7; *Nicholson v. Ricketts*, 2 E. & E. 497; 29 L. J., Q. B. 55; for no person whose name, or the name of whose firm, does not appear on the bill can be liable on it; *Emly v. Lye*, *supra*; *Beckham v. Drake*, 9 M. & W. 79, 92, 96; *Miles' Claim*, L. R., 9 Ch. 635; and see sect. 23, *ante*, p. 357. It was, indeed, held in *Mason v. Lumsey*, *ante*, p. 364, that where a bill was directed to a firm, an acceptance by one partner in his own name was sufficient; but this decision is not in accordance with the later decisions cited above, and the reason given by Ld. Ellenborough that "it would have been enough if the word 'accepted' had been written on the bill," is now removed by sect. 17 (2)(a), *ante*, p. 362. Where a bill is accepted by a partner in a firm in a name common to himself and the firm, and he carries on no business separate from the firm, there is a presumption that the bill is accepted for and binds the firm. *Yorkshire Banking Co. v. Beatson*, 5 C. P. D. 109, 121, C. A. This presumption may, however, be rebutted by evidence that the bill was accepted as that of the partner for his own private purposes, and not as those of the firm. S. C. The Partnership Act, 1890, 53 & 54 V. c. 39, s. 6, *post*, p. 556, does not affect any general rule of law relating to the execution of negotiable instruments.

It is a good defence that the plaintiff had notice that the firm would not be bound by such an acceptance; *Gallway Ld. v. Mathew*, 10 East, 264; *Jones v. Corbett*, 2 Q. B. 828; *Grout v. Enthoven*, 1 Exch. 838; 53 & 54 V. c. 39, s. 8, *post*, p. 559; or, that the bill was not accepted for partnership purposes, and that there was connivance between the partner who accepted and the plaintiff. *Shirreff v. Wilks*, 1 East, 48. Although it was formerly held that, in the absence of fraud or collusion, a party who had received a bill given by one or several partners in the name of the firm for his separate debt, might sue the partnership on such bill; *Swan v. Steele*, 7 East, 210; *Ridley v. Taylor*, 13 East, 175; *Lloyd v. Ashby*, 2 B. & Ad. 23; it is now established that the unexplained fact that a partnership security has been received from one of the partners in discharge of a separate claim against himself is a badge of fraud, or of such palpable negligence as amounts to fraud, which it is incumbent on the party who takes the security to remove, by showing either that the party from whom he received it acted with the authority of the rest of his partners, or that he himself had good reason to believe so. *Leverson v. Lane*, 13 C. B., N. S. 278; 32 L. J., C. P. 10; *Ex pte. Darlington Joint Stock Banking Co.*, 34 L. J., Bky. 10; *Arden v. Sharp*, 2 Esp. 524; *Green v. Deakin*, 2 Stark. 347; and now see 53 & 54 V. c. 39, s. 7, *post*, p. 559; see also *Heilbut v. Nevill*, L. R., 4 C. P. 354; Ex. Ch., L. R., 5 C. P. 478. This defence was formerly raised by a traverse of the acceptance. *Hogg v. Skeen*, 18 C. B., N. S. 426; 34 L. J., C. P. 153, explaining *Musgrave v. Drake*, 5 Q. B. 185. But under Rules, 1883, O. xix. r. 15, *ante*, p. 309, it would seem it ought to be specially pleaded.

Where one partner has subscribed in a style slightly differing from the real name of the firm, it is a question for the jury whether he had authority from the firm to do so; or whether he must be taken to have issued the bill on his own account. *Faith v. Richmond*, 11 Ad. & E. 339. And, it seems,

that no partner has any implied authority to bind in any but the true style of the firm. *Kirk v. Blurton*, 9 M. & W. 284. Where a bill was accepted by one of two partners, "J. B. & Co.," the true style being "J. B.," the firm was held, as matter of law, not bound. S. C. The correctness of the application of the law in this case has, however, been doubted, on the ground that it was a question for the jury whether "J. B." and "J. B. & Co." did not mean the same thing. *Stephens v. Reynolds*, 5 H. & N. 513; 29 L. J., Ex. 278, *per* Martin, B. See also *Maclue v. Sutherland*, 3 E. & B. 36; 23 L. J., Q. B. 242, *per cur.* And one of two partners may perhaps, under the general authority conferred by the partnership, bind the other by signing the true names of both, instead of the fictitious name of the firm. *Norton v. Seymour*, 3 C. B. 792, 794, *per* Maule, J. As to the liability of partner on an acceptance in blank by his co-partner, see *Hogarth v. Latham*, 3 Q. B. D. 643, C. A., and cases there cited.

The implied power of one partner to bind the others by his acceptance, &c., of bills does not extend to partnerships other than for trading purposes, such as solicitors; *Hedley v. Bainbridge*, 3 Q. B. 316; see *Forster v. Mackreth*, L. R., 2 Ex. 163, cited *post*, p. 407; or, brokers; *Yates v. Dalton*, 28 L. J., Ex. 69; or auctioneers; *Wheatley v. Smithers*, (1906) 2 K. B. 321. So, there is no implied authority in a director of a joint-stock company, not being a trading partnership, to accept bills on the part of the directors of the company. *Bramah v. Roberts*, 3 N. C. 963. Nor is there any implied authority to the directors of a mining company to bind the shareholders by making notes or accepting bills. *Dickinson v. Valpy*, 10 B. & C. 128. But if it be shown to be necessary from the very nature of the company, or usual in similar companies, to draw and accept bills, it would be reasonable that the directors should have such powers, and the law would imply it. *Per* Bosanquet, J., *Id.*

After a partnership is proved, the admission of one partner that he accepted the bill in the name of the firm will be proof of the acceptance as against all. *Hodenyyl v. Vingerhoed*, *per* Abbott, C.J., MSS.; Chitty on Bills, 11th ed. 415; see 53 & 54 V. c. 39, s. 15; and further, *ante*, p. 70.

A railway company incorporated in the usual manner, cannot draw, accept or indorse bills. *Bateman v. Mid Wales Ry. Co.*, L. R., 1 C. P. 499. Nor, has a company incorporated under the Companies Act, 1862, this power, unless it is, at any rate impliedly, given by the memorandum and articles of association. *Peruvian Ry. Co. v. Thames and Mersey Marine Insurance Co.*, L. R., 2 Ch. 617. But where a company has the power, and represent that they have exercised it, they cannot afterwards set up an informality in the execution of the power. *Ex pte. Overend, Gurney, & Co.*, L. R., 4 Ch. 460. As to the liability of directors, who accept a bill for a company, which cannot accept bills, *vide post*, p. 494.

The power of registered companies to make or accept notes and bills is regulated by statute. See *Actions by and against companies*, *post*, pp. 1110, 1115.

*Acceptance by agent.*] By sect. 26, *ante*, p. 358, an agent will be personally liable to third persons by drawing, indorsing, or accepting in his own name, unless he unequivocally show on the face of the writing that he signs only in a ministerial capacity. Thus, a bill was drawn, "Pay to J. S. or order 200*l.*, value received, and place same to account of Y. B. Co., as per advice from C. M. to H. B." (the defendant), "cashier of the Y. B. Co.," and the defendant wrote, "Accepted per H. B.;" it was held that defendant was personally liable, although he accepted by direction of the company. *Thomas v. Bishop*, 2 Str. 855. So, where an agent to a country branch of a London bank, to whom the plaintiff sent a sum of money in order to procure a bill upon London, drew in his own name a bill

for the amount upon the firm in London, he was held liable, although the plaintiff knew he was agent only. *Leadbitter v. Farrow*, 5 M. & S. 345. See also the cases cited, *Promissory notes, post*, pp. 413, 414. Where a bill was directed "to the A. C. Mining Co.," and was accepted in his own name, "for the A. C. Mining Co.," by one of the managing partners who had no authority to sign for the rest, it was held that on proof of his being partner in the adventure he was liable on the acceptance. *Owen v. Van Uster*, 10 C. B. 318; 20 L. J., C. P. 61. So, where a bill was directed to "J. D., purser of W. D. Mining Co.," being an unincorporated company, and the acceptance was "J. D., *per pro.* W. D. Mining Co.," held that J. D. was personally liable, being himself a shareholder, and not authorized to bind the rest; and this, although at the time of acceptance he notified to the plaintiffs, the drawers, his intention not to be personally bound. *Nicholls v. Diamond*, 9 Exch. 154; 23 L. J., Ex. 1. And where a bill directed to a person who was only purser and not an adventurer, purported to be in payment for goods supplied to the company, and the drawee accepted it "for the company, W. C., purser," he was held liable; for the bill was not directed to the company, and therefore could not be accepted by, or by procuration for them, and the acceptance "for the company" was not inconsistent with an intention on the part of the defendant to bind himself; and, being at utmost only ambiguous, must be taken to be operative against him. *Mare v. Charles*, 5 E. & B. 978; 25 L. J., Q. B. 119. *Semble*, if the acceptance had been "*per procuration*," it would have been inoperative. S. C.

If the acceptance be by an agent, his authority and handwriting must be proved. If it be within his authority, his abuse of the power will not affect a *bonâ fide* holder for value. *Bryant, &c., Ltd., v. Quebec Bank*, (1893) A. C. 170, J. C.; see also *Hambro v. Burnand, ante*, p. 312. An admission by defendant of his liability on another bill, accepted by the same agent, is confirmatory evidence, after other proof, of a general authority. *Llewellyn v. Winckworth*, 13 M. & W. 598. But *semb.*, it would not be evidence *per se.* S. C. As to signature by procuration, see sect. 25, *ante*, p. 358, and *Reid v. Rigby*, (1894) 2 Q. B. 40, decided thereon. If an agent, as apparent principal, carry on a business for another, to which business the drawing or accepting bills is incidental, the principal cannot, by secret instructions to his agent, divest the latter of the power of drawing and accepting bills. *Edmunds v. Bushell*, L. R., 1 Q. B. 97. Proof that the defendant's wife conducted his business and had applied the proceeds of the bill in payment of debts incurred in the business, and absence of any proof by whom the defendant's name was written as acceptor, is no evidence that the defendant had sanctioned the acceptance. *Goldstone v. Tovey*, 6 N. C. 98. Proof of an acceptance by the wife, in her own name, of a bill drawn on her husband, and that he, after looking at it, promised to pay, saying he knew all about it, is evidence that he authorized this mode of acceptance, and he is bound by it. *Lindus v. Bradwell*, 5 C. B. 583. The manager of a co-partnership has not, as such manager, authority to sign the name of the firm. *Beveridge v. Beveridge*, L. R., 2 H. L. Sc. 183. See also *post*, pp. 371 *et seq.*, *sub tit.*, *Indorsement, how proved.*

[*Proof of acceptance by admission.*] By sect. 21 (1), *ante*, p. 353, where an acceptance is written on a bill, notice by the drawee to the person entitled thereto, that he has accepted it, makes the acceptance complete and irrevocable. By sect. 24, *ante*, p. 358, subject to the provisions of the act, a forged or unauthorized signature is wholly inoperative unless the party against whom it is sought to enforce payment of the bill is precluded (see sect. 54 (2), *ante*, p. 363) from setting up the forgery or want of authority.

But this is not to "affect the ratification of an unauthorized signature not amounting to a forgery." It seems, therefore, that a forged acceptance cannot be ratified, except, perhaps, in a case falling within sect. 21 (1). See *Brook v. Hook*, L. R., 6 Ex. 89. The defendant paid a bill of exchange (of which the plaintiff was holder) on which his acceptance had been forged. In an action against him on another bill similarly accepted, the jury found that the signature was not made by the defendant's authority, nor had he adopted it; that the defendant did not know that the plaintiff was the holder of the former bill, nor did he lead the plaintiff to believe that the acceptance was his. It was held that the payment by him of the former bill did not estop the defendant from denying the authority to accept. *Morris v. Bethell*, L. R., 5 C. P. 47. See also *M'Kenzie v. British Linen Co.*, 6 Ap. Ca. 82, D. P.

Where in an action against the acceptor of a bill, his attorney gave a notice to produce all papers relating to the bill, describing it, and adding, "and which said bill was accepted by the said defendant," the notice was held to be *prima facie* evidence of the acceptance. *Holt v. Squire*, Ry. & M. 282.

*Proof of identity of acceptor.*] *Vide ante*, pp. 125, 135.

*Acceptance before drawing.*] As to acceptance of a bill before it is filled in, see sect. 20, *ante*, p. 353. The Statute of Limitations is no defence to an action by a holder in due course; *vide* sect. 29, *ante*, p. 354; though the drawer issued the bill improperly after a lapse of twelve years. *Montague v. Perkins*, 22 L. J., C. P. 187. And even although a smaller sum is expressed in figures on the margin of the bill, yet if these be altered and the blank filled in to the full amount covered by the stamp, the acceptor is liable to that amount to a holder in due course. *Garrard v. Lewis*, 10 Q. B. D. 30.

Where an acceptance has been given for valuable consideration with the drawer's name alone in blank, the latter can be added after the death of the acceptor. *Carter v. White*, 20 Ch. D. 225; 25 Ch. D. 666, C. A.

And it is immaterial that the names of the drawer and indorsee are forgeries or fictitious. *L. & S. W. Bank v. Wentworth*, 5 Ex. D. 96.

But where A. merely writes a blank acceptance, he will not be liable thereon even at the suit of a *bonâ fide* holder for value, unless A. issued the acceptance, intending it to be filled up so as to become a complete bill. *Bavendale v. Bennett*, 3 Q. B. D. 525, C. A.

It is a material alteration, which avoids the bill, at any rate as between the immediate parties, to insert words before the acceptance making the bill payable at a particular place. *Hanbury v. Lovett*, 28 L. T., 366, E. T. 1868, Ex. And it seems that where the holder of a bill, accepted in blank, has taken it from the drawer with knowledge of it having been so accepted, he will have no better title than the drawer had. *Hatch v. Searles*, 2 Sm. & Giff. 147; *aff. by L.J.J.*, 24 L. J., Ch. 22. See further as to acceptance in blank, *Hogarth v. Latham*, 3 Q. B. D. 613, C. A.

The proviso in sect. 20 (2), *ante*, p. 353, applies to an instrument negotiated to a holder in due course, but not to one issued only, *vide* sect. 2, *ante*, p. 350, to such holder. *Herdman v. Wheeler*, (1902) 1 K. B. 361. But apart from that section the apparent acceptor may be estopped from denying the acceptance. *Lloyd's Bank v. Cooke*, (1907) 1 K. B. 794, C. A.

*Presentment for payment.*] Proof of presentment is necessary against the acceptor on a qualified acceptance, but not on a general acceptance, see *ante*, p. 363, even where the bill is payable on demand. *Rumball v. Ball*, 10 Mod. 38; *Norton v. Ellam*, 2 M. & W. 461. If the bill or note be payable after sight, it must be presented in order to charge the acceptor or maker.



*Dixon v. Nuttall*, 1 C. M. & R. 307; and see sect. 54 (1), *ante*, p. 363. But by sect. 52 (2), *ante*, p. 368, the acceptor is not in general discharged by non-presentation of the bill to him on the day it matures. As to when a bill falls due, *vide ante*, p. 362. By sect. 10 (1) (a), a bill payable at sight is payable on demand.

*Evidence under money claims.*] In an action by payee against acceptor if the plaintiff be also the drawer, the bill will be evidence of money had and received; *Thompson v. Morgan*, 3 Camp. 101; or on an account stated; *per Abbott, C.J., Rhodes v. Gent*, 5 B. & A. 245; but not where the payees or holders are third persons. *Semb., Early v. Bowman*, 1 B. & Ad. 889. An acknowledgment of his acceptance by the defendant to the holder is evidence of an account stated between them. *Per Bailey, J., Leaper v. Tatton*, 16 East, 423; *Highmore v. Primrose*, 5 M. & S. 65.

*Acceptance, effect of, in accrediting the drawing.*] Sect. 54 (2), *ante*, p. 363, defines the effect of an acceptance in admitting the drawing. For this purpose it matters not that the bill is accepted in blank; *L. & S. W. Bank v. Wentworth*, 5 Ex. D. 96. So an acceptor for the honour of the drawer is estopped from disputing the drawer's signature. *Phillips v. Im Thurn*, 18 C. B., N. S. 694; *L. R.*, 1 C. P. 463.

#### *Indorsee against Acceptor.*

In this action the plaintiff may be put to prove the indorsements alleged, besides the facts required to be proved in an action by the payee.

*Indorsement—Statute.*] By sect. 2, "Indorsement means an indorsement completed by delivery," *vide sect. 21, ante*, p. 353.

Sect. 8. "(1) When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable.

"(2.) A negotiable bill may be payable either to order or to bearer.

"(3.) A bill is payable to bearer which is expressed to be so payable, or on which the *only or last indorsement is an indorsement in blank*.

"(4.) A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer, or indicating an intention that it should not be transferable.

"(5.) Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option."

The rules laid down by the words in italics are new. As to restraining negotiability of bill, *vide sects. 34 (4) and 36 (1), post*, p. 370.

Sect. 31. "(1.) A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder" (*vide sect. 2, ante*, p. 350) "of the bill.

"(2.) A bill payable to bearer" (*vide sect. 2, ante*, p. 349) "is negotiated by delivery" (*vide sect. 21, ante*, p. 353).

"(3.) A bill payable to order" (*vide sect. 8 (4), supra*) "is negotiated by the indorsement of the holder completed by delivery" (*vide sect. 21, ante*, p. 353).

"(4.) Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor.

“(5.) Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability.” See sect. 16, *post*, p. 375, and sect. 26, *ante*, p. 358.

Sect. 32. “An indorsement, in order to operate as a negotiation, must comply with the following conditions, namely:—

“(1.) It must be written on the bill itself and be signed by the indorser. The simple signature” (*vide* sect. 91, *ante*, p. 350) “of the indorser on the bill, without additional words, is sufficient.

“An indorsement written on an allonge, or on a ‘copy’ of a bill issued or negotiated in a country where ‘copies’ are recognized, is deemed to be written on the bill itself.

“(2.) It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill.

“(3.) Where a bill is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.” In the case of dividend warrants the rule is otherwise, *vide* sect. 97 (3) (d), *ante*, p. 351.

“(4.) Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is mis-spelt, he may indorse the bill as therein described, adding, if he think fit, his proper signature.

“(5.) Where there are two or more indorsements on a bill, each indorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved.

“(6.) An indorsement may be made in blank or special.” (*Vide* sect. 34, *infra*.) “It may also contain terms making it restrictive.” (*Vide* sect. 35, *infra*.)

Sect. 34. “(1.) An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer.

“(2.) A special indorsement specifies the person to whom, or to whose order the bill is to be payable.

“(3.) The provisions of this act relating to a payee apply with the necessary modifications to an indorsee under a special indorsement.” (*Vide* sect. 7, *ante*, p. 352, and sect. 8, *ante*, p. 369.)

“(4.) When a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser’s signature a direction to pay the bill to or to the order of himself or some other person.” (*Vide* sect. 8 (3), *ante*, p. 369.)

Sect. 35. “(1.) An indorsement is restrictive which prohibits the further negotiation of the bill or which expresses that it is a mere authority to deal with the bill as thereby directed and not a transfer of the ownership thereof, as, for example, if a bill be indorsed ‘Pay D. only,’ or ‘Pay D. for the account of X,’ or ‘Pay D. or order for collection.’

“(2.) A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorize him to do so.

“(3.) Where a restrictive indorsement authorizes further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement.”

Sect. 36. “(1.) Where a bill is negotiable in its origin it continues to be negotiable until it has been (a) restrictively indorsed” (*vide* sect. 35, *supra*),

“or (b) discharged by payment or otherwise.” (*Vide* sect. 59, *post*, p. 401, sect. 60, *post*, p. 406, and sects. 61—63, *post*, p. 404.)

Sect. 37, *ante*, p. 354, relates to the negotiation of a bill to a party liable thereon.

Sect. 38, *ante*, p. 355, defines the rights and powers of the holder of a bill.

[*Indorsement, how proved.*] It appears from sects. 21 (*ante*, p. 353), and 32 (1) (*ante*, p. 370), that “indorsement” in general implies the writing of the holder’s name on the bill and the delivery thereof to the alleged indorsee as indorsee; “delivery” is defined by sect. 2, *ante*, p. 350; as to the requisites of valid delivery, see sect. 21 (2, 3), *ante*, p. 353. As against the acceptor it is not necessary that the indorser should intend to guarantee the indorsee, if the acceptor make default. See *Denton v. Peters*, L. R., 5 Q. B. 475, 477, and *Smith v. Johnson*, *post*, p. 375. The delivery need not be personal. Thus, if a general agent for the indorsee, being indebted to him, indorse and deposit a bill among other securities of the indorsee in his custody, it is sufficient. *Lysaght v. Bryant*, 9 C. B. 46; 19 L. J., C. P. 160. So, where A. indorsed a bill in blank and delivered it to the plaintiff, the manager of a bank, for value received from the bank, and the plaintiff, by direction of the directors of the bank, sued the acceptor upon it; it was held that those facts proved an indorsement to the plaintiff, inasmuch as an indorsement in blank enables the indorsee to hand it over and give title to any one to sue. *Law v. Parnell*, 7 C. B., N. S. 282; 29 L. J., C. P. 17; *Arcna v. Marks*, 7 H. & N. 686; 31 L. J., Ex. 163. But, there must be a delivery with intent to transfer the property, and, if the indorsed bill be delivered to an agent for a special purpose only, and he part with it improperly, this will not be an indorsement except in the hands of a *bonâ fide* holder for value; *Marston v. Allen*, 8 M. & W. 503; *Barber v Richards*, 6 Exch. 63; and therefore, where the bill was delivered by such agent to plaintiff when overdue without consideration, it was held no indorsement. *Lloyd v. Howard*, 15 Q. B. 995; 20 L. J., Q. B. 1.

An indorsement made in France of a bill drawn, accepted and made payable in England, is good, if made according to English law. *Lebel v. Tucker*, L. R., 3 Q. B. 77. And see sect. 72 (2), *ante*, p. 356. So, where the bill was also drawn in France, and there indorsed to an Englishman in England. *Smallpage and Brandon’s cases*, 30 Ch. D. 598. But, the indorsement of a French promissory note must be made according to French law to enable the indorsee to sue in England; *Trimbey v. Vignier*, 1 N. C. 151; so in the case of a French bill, even though accepted in England. *Bradlaugh v. De Rin*, L. R., 3 C. P. 538. This seems to have been assumed by the Ex. Ch. on appeal in this case, though they reversed the judgment on the ground that the C. P. had proceeded on an erroneous view of the law of France; and the court intimated that the judgment in *Trimbey v. Vignier*, *supra*, was wrong, on the same ground. L. R., 5 C. P. 473.

By sect. 54 (2), *ante*, p. 363, the acceptor is precluded from denying to a holder in due course the capacity of the payee to indorse, but not the genuineness or validity of his indorsement. Thus, where a bill is drawn by a partner in the name of his firm, his authority to indorse is not admitted by acceptance. *Garland v. Jacomb*, L. R., 8 Ex. 216, Ex. Ch. So, where a bill payable to the drawer’s own order was drawn and indorsed by procuration by the same person, it was held that the acceptance only admitted the drawing by procuration and not the indorsing. *Robinson v. Yarrow*, 7 Taunt. 455. But, where the drawing and indorsement are both forgeries, and the acceptor, with knowledge of this, negotiates the bills, he cannot dispute the regularity of the indorsement. *Beechman v. Duck*, 11 M. & W. 251. It seems that

under the Crim. P. Act, 1865, s. 8, *ante*, p. 141, an indorsement might be proved by comparing it with the drawer's signature, which the acceptor is estopped from denying; and that as an authority to draw bills is some evidence of an authority to indorse also, see *Prescott v. Flinn*, *infra*, the indorsement might be so proved, even when both signatures are *per* procreation.

By sect. 7 (3), *ante*, p. 360, where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer.

Where there was no proof of the handwriting of one of the indorsers, but it appeared that the indorsement was upon the bill when the defendant accepted it, *and that he promised to pay it*, Ryder, C.J., left the case to the jury, who found for the plaintiff, and the court refused a new trial. *Hunkley v. Wilson*, Sayer, 223. So, an offer made by the acceptor to pay a bill with certain names on it, is a sufficient admission of the plaintiff's title, so as to supersede the necessity of proof of each person's handwriting. *Bosanquet v. Anderson*, 6 Esp. 43. But, where the bill was shown to the defendant with the name of the payee indorsed upon it, and the defendant merely objected to the want of consideration, it was ruled that that did not supersede the necessity of proving the indorser's handwriting. *Duncan v. Scott*, 1 Camp. 101. An admission of his handwriting by the indorser, though evidence against himself, is not evidence of indorsement in an action against the acceptor. *Hemings v. Robinson*, Barnes, 436.

*Indorsement by agent.*] When the indorsement is by an agent, it is necessary to show that the person by whom the indorsement was written had the authority of the person whose name is written. In such a case an authority to *draw* does not of itself import an authority to *indorse* bills; but it is a fact which ought to go to the jury as evidence. The clerk of the payees of a bill having been accustomed to draw cheques for them, and in one instance authorized to indorse a bill, and two other bills indorsed by him having been discounted at the payee's bankers, and the proceeds received by them,—these facts were held evidence that the clerk had a general authority to indorse. *Prescott v. Flinn*, 9 Bing. 19. A power to A. to indorse and negotiate bills remitted to G., will not authorize the indorsement of a bill remitted to G., for a special purpose, and which G. could not have applied to his own use without fraud; and though the indorsement by G. himself would have transferred a good title to a *bonâ fide* holder, the indorsement by A. in G.'s name does not. *Fearn v. Filica*, 7 M. & Gr. 513. Where a bill payable to the drawer's order is handed by him to another, for a good consideration, with the intention of transferring the property to him, but the drawer omits to indorse it, the transferee has no authority to indorse by procreation in the drawer's name. *Harrop v. Fisher*, 10 C. B., N. S. 196; 30 L. J., C. P. 283. A farm bailiff, accustomed to pay and receive all moneys for his employer, has no implied authority to draw or indorse bills in the name of his principal. *Davidson v. Stanley*, 2 M. & Gr. 721. Though a wife, who carries on business for her husband, may be presumed to have authority to indorse in his name, yet an indorsement in her own name by a feme covert of a bill payable to her order, formerly conveyed no interest if without her husband's consent; *Barlow v. Bishop*, 1 East, 432; *aliter*, if the indorsement be made with the husband's consent; *Prestwick v. Marshall*, 7 Bing. 565. But under the Married Women's Property Act, 1882, 45 & 46 V. c. 75, s. 1, a married woman can indorse a bill of exchange payable to her. If the maker promise to pay a note, with the indorsement of a married woman upon it, it may be presumed as against him that she had authority from her husband to indorse it in her own name; *Cotes v. Davis*, 1 Camp. 485; recognized in *Prestwick v. Marshall*, *supra*; *Prince v. Brunatte*, 1 N. C. 435;

and *Lindus v. Bradwell*, 5 C. B. 583; but, it is to be observed that, as she was the *payee*, the defendant, as maker, was estopped, without any promise, from disputing her capacity to indorse; see sect. 54 (2) (c), *ante*, p. 363. Where the wife, who managed all the money part of the business, had power to indorse in the husband's name, it may be left to the jury to say whether the power authorized an indorsement by her daughter, in her presence, and by her direction. *Lord v. Hall*, 8 C. B. 627. A power to A. to draw or indorse in B.'s name may be exercised by a clerk of A. by his direction. *Ex parte Sutton*, 2 Cox, 84, cited *per cur.* in the last case. By sect. 32 (3), *ante*, p. 370, "where a bill is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others."

A partner may indorse for the whole firm by procuration. *Williamson v. Johnson*, 1 B. & C. 146. Where a bill of exchange indorsed to H. & F. was indorsed by H. & F. by procuration of J. D., a partner in the firm of H. & Co., who managed the business of the firm, and it was proved that J. D. was in the habit of indorsing bills in that manner, although there was no such person as F. in the firm of H. & Co., the indorsee was held to have a good title. S. C. A partner has no implied authority to indorse a bill in the name of the partnership as security for his private debt; and the acceptor is not estopped by his acceptance from showing this want of authority. *Garland v. Jacomb*, L. R., 8 Ex. 216, Ex. Ch. On the dissolution of a partnership, a power, given to one of the partners to receive and pay debts, does not authorize him to indorse a bill in the name of the partnership; and, the partnership being dissolved, he has no general authority to do so. *Kilgour v. Finlyson*, 1 H. Bl. 155. But, a retiring partner may orally give his late partners authority to indorse existing securities; and a statement by the ex-partner, that he has left the assets and securities in the hands of the continuing partners, and that he has no objection to their using the partnership name, is evidence from which a jury may infer an authority to indorse. *Smith v. Winter*, 4 M. & W. 454. The Partnership Act, 1890, 53 & 54 V. c. 39, s. 6, *post*, p. 556, does not affect any general rule of law relating to the power to indorse.

As to indorsement under the J. Act, 1884, s. 14, by a nominee of the court on refusal to indorse, in accordance with an order of court, *vide ante*, p. 138.

*Identity of the indorser.*] *Vide ante*, pp. 125, 135.

*Date of indorsement.*] By sect. 36, "(4) except where an indorsement bears date after the maturity of the bill, every negotiation is *prima facie* deemed to have been effected before the bill was overdue." A bill is presumed to be issued when dated. *Anderson v. Weston*, 6 N. C. 296. But the date of an indorsement cannot be inferred from the date of the drawing; and if it be material, plaintiff should be prepared to prove it, either directly or by inference from circumstances. *Rose v. Rowcroft*, 4 Camp. 245. See, however, *Anderson v. Weston*, 6 N. C. 296, *post*, p. 392.

*Proof of mesne indorsements.*] All the indorsements that have been stated, though unnecessarily, must (if traversed) be proved as against acceptor. *Waynam v. Bend*, 1 Camp. 175. But, an offer by the acceptor to the holder to give another bill was held by Ld. Ellenborough an admission of the holder's title, and of the defendant's liability, and so dispensed with proof of the mesne indorsements. *Bosanquet v. Anderson*, 6 Esp. 43. By sect. 8 (4), *ante*, p. 369, where a bill of exchange is not drawn payable to bearer, it now only becomes so when the *last*, or *only* indorsement is in

blank; hence it is not, as it formerly was, sufficient to prove an indorsement in blank, if there is a subsequent special indorsement. See *Smith v. Clarke*, Peake, 225; *Walker v. Macdonald*, 2 Exch. 527. In an action by the indorsee of a bill against the acceptor, the first count stated all the indorsements; the second count an indorsement by the payee to the plaintiff; Abbott, C.J., said that all the indorsements must be proved or struck out, though not stated in the declaration; and this need not be done before the trial. *Cocks v. Borrodale*, Chitty on Bills, 11th ed. 409. Indorsements may be struck out, even after the bill has been read in evidence and objected to on the ground of the omission to state them in the statement of claim. *Mayer v. Judis*, 1 M. & Rob. 247. By striking out intermediate indorsements, the plaintiff loses the security of those indorsers.

*Title of the plaintiff as indorsee.*] Sects. 21, 29 and 30, *ante*, pp. 353, 354, define the conditions necessary to entitle the plaintiff to sue as indorsee. When a bill is indorsed in blank, possession is sufficient *prima facie* title; and several plaintiffs, suing as indorsees, need not prove that they are in partnership, or that the bill was indorsed to them jointly. *Ord v. Portal*, 3 Camp. 239; *Rordasz v. Leach*, 1 Stark. 446; *Attwood v. Rattenbury*, 6 B. Moore, 579. But, where it is specially indorsed to a firm, the partnership must be proved to consist of the plaintiffs. 3 Camp. 240, n. Where the plaintiffs sue in a particular capacity, as trustees of a bankrupt, and allege an indorsement to them as such trustees, they must prove that the bills were indorsed to them in that capacity. *Bernasconi v. Argyle, Dk. of*, 3 C. & P. 29. On a traverse of the indorsement to the plaintiff, the defendant may show that the right to sue on it as indorsee is in other persons, and not in the plaintiff, though the indorsement is in blank. *Machell v. Kinnear*, 1 Stark. 499. In that case the plaintiffs were trustees of the estate of H., an insolvent; two of them were partners in the firm of L. & Co., but one was a stranger; the defendant sent the bill indorsed by him in blank to L. & Co., on account of H.'s estate; on objection being taken, Ld. Ellenborough held that, on these circumstances being shown, it was necessary for the plaintiffs to show that L. & Co. had transferred the bill to the plaintiffs, or had authorized them to sue. The defendant might also show that, though indorsed in blank, it was never delivered to the plaintiff as indorsee, but only as agent for another; *Adams v. Jones*, 12 Ad. & E. 455; or, had been delivered to the plaintiff on a condition which had not been complied with. *Bell v. Ingestre, Ltd.*, 12 Q. B. 317; *Dawson v. Isle*, (1906) 1 Ch. 633. So, on a traverse of a previous indorsement by A. to B., it might have been shown that A. had delivered it to B. as agent only, and B. had indorsed it in fraud of the true owner, with the plaintiff's privity. *Marston v. Allen*, 8 M. & W. 494. Again, where the payee indorsed specially to M., and handed it to him to get discounted, and he indorsed it to plaintiff without value when overdue, it was held on a traverse of the indorsement from the payee to M., that the defendant was entitled to the verdict. *Lloyd v. Howard*, 15 Q. B. 995; 20 L. J., Q. B. 1. But, in many of the above cases the defence must now be pleaded specially. See Rules, 1883, O. xix. r. 15, *ante*, p. 309. And, where the plaintiff was a *bona fide* holder for value, on a traverse of the indorsement by A., the payee, to a previous indorser, B., the defendant could not show that A. delivered the bill for a particular purpose, and B. fraudulently negotiated it. *Hayes v. Caulfield*, 5 Q. B. 81. So, where E. indorsed a bill in blank, and delivered it to B. to get discounted, and he deposited it with T. for value received by himself, it was held that this proved an indorsement from E. to T.; *Barber v. Richards*, 6 Exch. 63; 20 L. J., Ex. 135; for, if the holder put his name on the back of a bill, and deliver it to his agent for a particular

purpose, and he deliver it to a third person for value, that is an indorsement from the holder to such third person. *Per Parke, B., Ibid.* Nor, is it any answer, on a denial of the indorsement, that it was indorsed to the plaintiff by the directors of a company (intermediate indorsees), who had no authority to indorse; for, it is enough if the indorsement give a title to the bill, though the company may not be bound by such indorsement. *Smith v. Johnson*, 3 H. & N. 222; 27 L. J., Ex. 363. See also *Denton v. Peters*, L. R., 5 Q. B. 477, 479. An indorsement in blank by the maker of a note, and a delivery by his *executor* to the plaintiff, is no indorsement to the plaintiff so as to give him a title to sue. *Bromage v. Lloyd*, 1 Exch. 32. As to restricting the negotiability of a bill by the acceptance, see *Decroix v. Meyer*, *ante*, p. 364.

*Evidence under money claims.*] Although an acceptance has been said to be evidence of money had and received by the acceptor to the use of the holder (Bayley on Bills, 6th ed. 363), yet, on principle, it can be available upon the money claims only where there is privity; as, where the parties on the record are immediate parties on the bill, or, there has been a promise to pay, an account actually stated, or, acknowledgment of liability; and, the later authorities are to that effect. *Waynam v. Bend*, 1 Camp. 175; *Eales v. Dicker*, M. & M. 324; and the cases cited *ante*, p. 369.

#### Drawer against Acceptor.

When a bill, though not payable on the drawer's own order, has been dishonoured by the acceptor, and taken up by the drawer, he may sue the acceptor; *Simmonds v. Parminter*, 1 Wils. 185; and in such action may be obliged by proper defences to prove, 1. The acceptance, as to proof of which, see *ante*, pp. 362 *et seq.*; 2. The presentment to the defendant, as to proof of which, see *post*, pp. 376 *et seq.*, and his refusal to pay, which may be done by calling the person who presented the bill, or by proving a promise by the defendant to pay, which dispenses with proof of the presentment; and 3. The return of the bill to, and payment thereof by the plaintiff. To prove the latter fact, it has been held not sufficient to produce the bill with a general receipt on the back of it from the then holder; for the receipt *prima facie* imports that the bill was paid by the acceptor. *Scholey v. Walsby*, Peake, 25. But, the legitimacy of this last presumption is doubtful; *per cur.* in *Phillips v. Warren*, 13 M. & W. 379.

#### Payee or Indorsee against Drawer.

In an action by the payee or indorsee against the drawer, the plaintiff may have to prove, 1. The drawing of the bill; 2. Presentment to the drawee for acceptance or to acceptor for payment; 3. His default; 4. Due notice to the defendant of the default or dishonour; and 5, in the case of an indorsee, the indorsements, as to proof of which see *ante*, pp. 371 *et seq.*

*Drawing.—Statute.*] By sect. 55, "(1.) The drawer of a bill by drawing it—(a.) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken."

Sect. 16. "The drawer of a bill, and any indorser, may insert therein an express stipulation—

"(1.) Negating or limiting his own liability to the holder :

"(2.) Waiving as regards himself some or all of the holder's duties."

By sect. 72 (1), *ante*, p. 355, when a bill is payable abroad, the obligations of the acceptor, and therefore of the drawer and indorsers, are regulated by *lex loci* of performance of contract.

*Proof of the drawing.*] The drawing of the bill, when traversed, must be proved by evidence of the drawer's handwriting; or, if drawn by an agent, by proving the authority of the agent and his handwriting. A farm bailiff, intrusted to pay and receive money, has not any implied authority to bind his principal by drawing bills. *Davidson v. Stanley*, 2 M. & Gr. 721; and see further as to authority of agent, *ante*, pp. 366, 367. If drawn in the name of a partnership, the partnership must be proved, and the handwriting of the partner who drew the bill. See further, *Proof of acceptance of partners*, *ante*, p. 364. As to proof of partnership, see *post*, *Action for goods sold; delivery to partner*, *post*, pp. 555 *et seq.*

*Presentment to drawee for acceptance.—Statute.*] Sect. 39. "(1.) Where a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument.

"(2.) Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee, it must be presented for acceptance before it can be presented for payment.

"(3.) In no other case is presentment for acceptance necessary in order to render liable any party to the bill.

"(4.) Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers."

Sect. 40. "(1.) Subject to the provisions of this act" (*vide* sect. 41 (2), *infra*), "when a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time.

"(2.) If he do not do so, the drawer and all indorsers prior to that holder are discharged.

"(3.) In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case."

Sect. 41. "(1.) A bill is duly presented for acceptance which is presented in accordance with the following rules:—

"(a.) The presentment must be made by or on behalf of the holder to the drawee or to some person authorized to accept or refuse acceptance on his behalf at a reasonable hour on a business day and before the bill is overdue:

"(b.) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, then presentment may be made to him only:

"(c.) Where the drawee is dead, presentment may be made to his personal representative:

"(d.) Where the drawee is bankrupt" (*vide* sect. 2, *ante*, p. 350), "presentment may be made to him or to his trustee:

"(e.) Where authorized by agreement or usage, a presentment through the post office is sufficient.

"(2.) Presentment in accordance with these rules is excused, and a bill may be treated as dishonoured by non-acceptance—



“(a.) Where the drawee is dead or bankrupt, or is a fictitious person, or a person not having capacity to contract by bill :

“(b.) Where after the exercise of reasonable diligence, such presentment cannot be effected :

“(c.) Where, although the presentment has been irregular, acceptance has been refused on some other ground.

“(3.) The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured, does not excuse presentment.”

Sect. 42. “(1.) When a bill is duly presented for acceptance, and is not accepted within the customary time, the person presenting it must treat it as dishonoured by non-acceptance” (*vide* sect. 48, *post*, p. 380). “If he do not, the holder shall lose his right of recourse against the drawer and indorsers.” As to protesting a bill not returned by the drawee, *vide* sect. 51 (8), *post*, p. 386.

Sect. 43. “(1.) A bill is dishonoured by non-acceptance—

“(a.) when it is duly presented for acceptance, and such an acceptance as is prescribed by this act” (*vide* sect. 17 (2), *ante*, p. 362), “is refused or cannot be obtained; or

“(b.) when presentment for acceptance is excused and the bill is not accepted.

“(2.) Subject to the provisions of this act, when a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary.”

Sect. 44. “(1.) The holder of a bill may refuse to take a qualified acceptance (*vide* sect. 19 (2), *ante*, p. 362), “and if he does not obtain an unqualified acceptance may treat the bill as dishonoured by non-acceptance.

“(2.) Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorized the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill.

“The provisions of this sub-section do not apply to a partial acceptance” (*vide* sect. 19 (2) (b), *ante*, p. 362), “whereof due notice has been given. Where a foreign bill has been accepted as to part, it must be protested as to the balance.

“(3.) When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder, he shall be deemed to have assented thereto.”

[*Presentment to drawee for acceptance.*] Where a bill, presentment of which for acceptance is not required by sect. 39, *ante*, p. 376, has been presented and acceptance refused, due notice of such refusal must be given; *Blessard v. Hirst*, 5 Burr. 2670; *Goodall v. Dolley*, 1 T. R. 712; and all parties entitled to notice are discharged by want of it; S. CC.; and are not liable on a subsequent refusal of the drawee to pay; *Roscow v. Hardy*, 12 East, 434; and see sect. 42, *supra*. But by sect. 48 (1), *post*, p. 380, the drawer is not discharged by want of notice of non-acceptance, as against a subsequent holder in due course. It may be observed that what is said by the drawee on the bill being presented is evidence for the plaintiff of want of assets, but not what passed between the drawee and the holder afterwards. *Prideaux v. Collier*, 2 Stark. 57. The bill must be left with the drawee for 24 hours, unless during that time he either accept or refuse to do so; Bayley on Bills, 6th ed. 228; Marius, 3rd ed. 15; *Van Dicman's Land, Bank of, v. Victoria, Bank of*, L. R., 3 P. C. 526, 543. The drawee may revoke and cancel his acceptance before he parts with the bill. *Cox v. Troy*, 5 B. & A. 474.

It is not sufficient to show that the bill was presented to some person on the drawee's premises without connecting him with the drawee. *Cheek v. Roper*, 5 Esp. 175.

Where the payee delayed for eight months to present a bill drawn in Calcutta to the drawee at Hong Kong, payable sixty days after sight, the drawer was held discharged; *Mullick v. Radakissen*, 9 Moo. P. C. 46; although no actual loss or damage had been caused by the delay, and the parties to it continued solvent. S. C. The holder may, however, put the bill into circulation without presenting it. *Muilman v. D'Eguino*, 2 H. Bl. 565. And the question in such cases is, whether, looking at the situation and interests of each holder and drawer, there has been any unreasonable delay on the part of the former in forwarding the bill for acceptance or putting it into circulation. *Mellish v. Rawdon*, 9 Bing. 416. In that case, a delay of nearly five months on a foreign bill was allowed, the exchange having fallen against the plaintiff immediately after the purchase by him of the bill. See also *Chartered Mercantile Bank of India, &c. v. Dickson*, L. R., 3 P. C. 574. With regard to bills payable after sight, drawn by bankers in the country on their correspondents in London, "It does not seem unreasonable," says Ld. Tenterden, "to treat bills of this nature as not requiring immediate presentment, but as being retainable by the holders for the purpose of using them, within a moderate time (for indefinite delay, of course, cannot be allowed), as part of the circulating medium of the country." *Shute v. Robins*, M. & M. 136.

*Presentment for payment.—Statute.*] Sect. 45. "Subject to the provisions of this act a bill must be duly presented for payment. If it be not so presented, the drawer and indorsers shall be discharged.

"A bill is duly presented for payment which is presented in accordance with the following rules:—

- "(1.) Where the bill is not payable on demand, presentment must be made on the day it falls due" (*vide* sect. 14, *ante*, p. 361).
- "(2.) Where the bill is payable on demand, then, subject to the provisions of this act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable."

As to when a bill is payable on demand, see sect. 10, *ante*, p. 352.

"In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case.

- "(3.) Presentment must be made by the holder or by some person authorized to receive payment on his behalf at a reasonable hour on a business day, at the proper place as hereinafter defined, either to the person designated by the bill as payer, or to some person authorized to pay or refuse payment on his behalf if with the exercise of reasonable diligence such person can there be found.

"(4.) A bill is presented at the proper place:—

"(a.) Where a place of payment is specified in the bill and the bill is there presented.

"(b.) Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented.

"(c.) Where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business if known, and if not, at his ordinary residence if known.

"(d.) In any other case if presented to the drawee or acceptor wherever

he can be found, or if presented at his last known place of business or residence.

- “(5.) Where a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorized to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required.
- “(6.) Where a bill is drawn upon, or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all.
- “(7.) Where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found.
- “(8.) Where authorized by agreement or usage a presentment through the post office is sufficient.”

Sect. 52. “(4.) Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it.”

By sect. 72 (3), *ante*, p. 356, presentment of a bill payable abroad must be according to the law of the foreign country.

*Presentment for payment.*] Presentment must be proved, although the acceptor has become bankrupt or insolvent. *Russel v. Langstaffe*, 2 Dougl. 514; *Esdaile v. Sowerby*, 11 East, 114. And, where he is dead, it must be made to a personal representative, sect. 45 (7), *supra*; or, if there be none, at the house of the deceased. Molloy, b. 2, c. 10, s. 34; Chitty on Bills, 11th ed. 256. See *Smith v. N. S. Wales, Bank of*, L. R., 4 P. C. 194, 206, 207. But, if the bill be accepted payable at a particular place, a presentment at that place, though the acceptor is dead, is enough to charge the drawer. *Philpott v. Bryant*, 3 C. & P. 244, and see sect. 45 (4, 7), *ante*, p. 378, *et supra*. Where a bill is accepted by an agent, the drawee being abroad, presentment to the agent must be proved. *Philips v. Astling*, 2 Taunt. 206.

A bill, payable at a banker's, must be presented within banking hours; *Parker v. Gordon*, 7 East, 385; *Elford v. Teed*, 1 M. & S. 28; but, if presented after, and a servant at the banking-house returns for answer “no orders,” it is sufficient; *Garnett v. Woodcock*, 6 M. & S. 44; *Henry v. Lee*, 2 Chitty, 124. Presentment at 8 p.m. at the private residence of a merchant is good. *Barclay v. Bailey*, 2 Camp. 527. So, at the place where the bill is made payable (not being the banker's) between 7 and 8 p.m., though no one be there. *Wilkins v. Judis*, 2 B. & Ad. 188. Presentment to a banker's clerk at the clearing-house is a presentment at the banker's. *Reynolds v. Chettle*, 2 Camp. 596; *Harris v. Packer*, 3 Tyr. 370, n.

Where the bill is directed to a drawee by a certain address and accepted generally, it is enough to present it to an inmate of the house at such address, though the drawee has in the meantime removed. *Buxton v. Jones*, 1 M. & Gr. 83.

*Presentment—proof of.*] A part payment (*Vaughan v. Fuller*, Stra. 1246), or a promise to pay after the bill is due, is *primâ facie* evidence, as an admission that the bill was duly presented. *Lundie v. Robertson*, 7 East, 231; *Croxon v. Worthen*, 5 M. & W. 5.

*Presentment delayed or excused.—Statute.*] By sect. 46, “(1.) Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder” (*vide* sect. 2, *ante*, p. 350),

“and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

“(2.) Presentment for payment is dispensed with,—

“(a.) Where, after the exercise of reasonable diligence, presentment, as required by this act, cannot be effected.

“The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment.

“(b.) Where the drawee is a fictitious person.

“(c.) As regards the drawer where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented.

“(d.) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented.

“(e.) By waiver of presentment, express or implied.”

*Dishonour by non-payment.—Statute.]* Sect. 47. “(1.) A bill is dishonoured by non-payment—

“(a.) When it is duly presented for payment and payment is refused or cannot be obtained; or

“(b.) When presentment is excused and the bill is overdue and unpaid.

“(2.) Subject to the provisions of this act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder.”

*Vide* sects. 65 to 68, *post*, pp. 389, 390, as to acceptance, and payment for honour.

*Notice of dishonour and effect of non-notice.—Statute.]* Sect. 48. “Subject to the provisions of this act” (*vide* sect. 50, *post*, pp. 383, 387), “when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged; Provided that—

“(1.) Where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course” (*vide* sect. 29, *ante*, p. 354), “subsequent to the omission, shall not be prejudiced by the omission.

“(2.) Where a bill is dishonoured by non-acceptance, and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted.”

*Notice of dishonour—when sufficient.—Statute.]* Sect. 49. “Notice of dishonour, in order to be valid and effectual, must be given in accordance with the following rules:—

“(5.) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonoured by non-acceptance or non-payment.

“(6.) The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour.

“(7.) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication.

A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby."

*Notice of dishonour—when sufficient.*] Proof of knowledge of dishonour is not equivalent to proof of notice. See *Burgh v. Legge*, 5 M. & W. 418; and *Solarie v. Palmer*, 7 Bing. 530; 1 N. C. 194, D. P. Where H. is secretary to two companies, whether information he receives as secretary to one company is notice to him as secretary to the other depends on whether it "comes to him under such circumstances that it is his duty to communicate it to the other company." *Deep Sea Fishery Co.'s claim*, (1902) 1 Ch. 507.

Repeated calls at the drawee's house without effect are not evidence of notice, but may excuse notice altogether, and should be pleaded in excuse. *Allen v. Edmundson*, 2 Exch. 719.

If the presentment and notice of dishonour, as proved, be sufficient, the allegations in the statement of claim will be amended by the judge at the trial to meet the facts proved; as where the presentment for payment was stated to have been to the acceptor, and notice of dishonour to the defendant, the judge may amend, by stating—the death of the acceptor, that the defendant was his executor, and a presentment to the defendant for payment; *Cault v. Thompson*, 7 C. B. 400; or, the claim may be amended by alleging a waiver of notice; *Killby v. Rochussen*, 18 C. B., N. S. 357; *Cordery v. Colville*, 14 C. B., N. S. 374; 32 L. J., C. P. 210, cited *post*, p. 387.

*By whom notice should be given.—Statute.*] By sect. 49, "(1.) The notice must be given by or on behalf of the holder" (see sect. 2, *ante*, p. 350), "or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill.

"(2.) Notice of dishonour may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

"(3.) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given.

"(4.) Where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given."

"(13.) Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal."

*By whom notice should be given.*] A bill was drawn by A., indorsed by him to B., and by him to plaintiff, in whose hands it was dishonoured; plaintiff's attorney gave note of dishonour to A. in due time, either for plaintiff or B., but by mistake stated he applied for payment on behalf of B. (from whom he had no authority), and it was held that the notice was sufficient notwithstanding the misrepresentation. *Harrison v. Ruscoe*, 15 M. & W. 231. And, after a bill has in fact been dishonoured, an unequivocal notice that it has been dishonoured is good, if given by a party to the bill, though he had at the time no certain knowledge of the fact. *Jennings v. Roberts*, 4 E. & B. 615; 24 L. J., Q. B. 102. A notice by the holder's solicitor, not stating on whose behalf the notice is given, is sufficient. *Woodthorpe v. Laves*, 2 M. & W. 109.

*To whom notice should be given.—Statute.*] By sect. 49, "(8.) Where

notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf.

“(9.) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative if such there be, and with the exercise of reasonable diligence he can be found.

“(10.) Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee.

“(11.) Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others.”

“(13.) Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.”

By sub-sects. (3, 4), *ante*, p. 381, notice given by the holder or indorser enures for the benefit of other persons having remedies on the bill.

*To whom notice should be given.*] Where the drawers are in partnership, a notice to one is notice to all; and therefore where a bill is drawn by a firm upon one of that firm, and dishonoured, notice of the dishonour need not be given to the firm. *Porthouse v. Parker*, 1 Camp. 82. See also 53 & 54 V. c. 39, s. 16, *post*, p. 559. But, it seems that notice to a member of a public company or quasi-corporation is not notice to the company. *Steward v. Dunn*, 12 M. & W. 664, *per Parke*, B.; *Powles v. Page*, 3 C. B. 16. The indorser of a dishonoured bill was abroad, but had a house in England, and the bill was shown to his wife there, and payment demanded, and she was also informed of the non-payment: held sufficient. *Cromwell v. Hynson*, 2 Esp. 511; *Houseto v. Cowne*, 2 M. & W. 348. Where a substituted bill has been given and dishonoured, and the plaintiff sues on the first bill, he need not give notice of the dishonour of the substituted bill, the defendant being no party to it. *Bishop v. Rowe*, 3 M. & S. 362. Presentation at the banking-house where a bill is made payable “in need” by the indorsee is not notice of dishonour to the indorsers. *Expte. Prange*, L. R., 1 Eq. 1.

*Time within which notice must be given.—Statute.*] By sect. 49, “(12.) The notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter.

“In the absence of special circumstances notice is not deemed to have been given within a reasonable time unless—

“(a.) Where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill.

“(b.) Where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day, then by the next post thereafter.”

(13.) *supra*, regulates the time within which notice must be given by an agent in whose hands a bill of exchange is dishonoured.

“(14.) Where a party to a bill receives due notice of dishonour, he has, after the receipt of such notice, the same period of time for giving notice to antecedent parties that the holder has after the dishonour.”

Sect. 50. “(1.) Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving

notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the notice must be given with reasonable diligence."

By sect. 49 (15), *post*, p. 384, delay caused by miscarriage in the post office is excused.

By sect. 92, "Where, by this act, the time limited for *doing any act or thing* is less than three days, in reckoning time, non-business days are excluded.

"Non-business days for the purposes of this act mean—(a.) Sunday, Good Friday, Christmas Day: (b.) a bank holiday under the Bank Holidays Act, 1871, or acts amending it: (c.) a day appointed by Royal proclamation as a public fast or thanksgiving day."

"Any other day is a business day."

By sect. 72 (3), *ante*, p. 356, the necessity for and sufficiency of a notice of dishonour are determined by the law of the place where the bill is dishonoured.

As to excuse for delay under sect. 50 (1), *ante*, p. 382, on the ground that the holder does not know the address of the drawer or indorser, *vide post*, p. 389. As to what are holidays under the Bank Holidays Acts, *vide ante*, p. 361.

*Time within which notice must be given.*] The principle when there are several indorsements is that each indorser has his own day to give notice, but, the holder has not as many days to give notice to the drawer, or prior indorser, as there are intermediate indorsers. He can sue the drawer upon a notice given by the last indorser only *if* each and every prior indorser has in due time given notice of dishonour to the next preceding indorser. A single default breaks the chain of notices and disqualifies the holder from suing any indorser prior to the defective link, unless a direct and immediate notice has been given by the plaintiff to the person sued. *Rowe v. Tipper*, 13 C. B. 249; 22 L. J., C. P. 135; *Turner v. Leech*, 4 B. & A. 451; *Marsh v. Maxwell*, 2 Camp. 210, n. Where the holder employs a solicitor to ascertain the residence of a prior indorser, the latter has, after he has received it, a day before giving notice of dishonour. *Firth v. Thrush*, 8 B. & C. 387. When a bill has passed through several branch banks of the same establishment, each is to be considered as a separate party, so as to be entitled to the usual time for giving notice of dishonour, though the bill may have passed by delivery without indorsement. *Clode v. Bayley*, 12 M. & W. 51. So, where, in the ordinary course of business, it has passed through several independent banks. *Prideaux v. Criddle*, L. R., 4 Q. B. 455. In *Fielding v. Corry*, (1898) 1 Q. B. 268, C. A., it was held (by A. L. Smith and Rigby, L.J.J., *diss.* Collins, L.J.) that where the day after dishonour notice thereof had been posted, but directed to the wrong branch bank, and the following day notice of dishonour, not in itself sufficient (*vide Id.*, p. 275), was telegraphed to the right bank, the notice was sufficient. *Sed quere*.

If the notice of dishonour, sent to the drawer of a bill, arrives too late through misdirection, it is for the jury to say whether the holder used "due diligence" to find the drawer's address; *Siggers v. Brown*, 1 M. & Rob. 520; and, if the delay arose from the bill having been sent to a wrong person through a mistake caused by the indistinctness of the drawer's writing on the bill, he is not discharged. *Hewitt v. Thomson*, *Id.* 543.

*Notice, proof of, by admission.*] Admission of liability is evidence of notice; as, by a promise to pay; for this admits everything done to entitle the plaintiff to sue; *Lundie v. Robertson*, 7 East, 231; *Croxon v. Worthen*, 5 M. & W. 5; even though it is proved or admitted that notice was not in fact given. *Killby v. Rochussen*, 18 C. B., N. S. 357. So, a declaration by

the defendant made to a party to, but not the holder of the bill, of his intention to pay the bill, "and not to avail himself of the informality of notice," is evidence of due notice. *Brownell v. Bonney*, 1 Q. B. 39. So, where defendant knew that the bill was unpaid, and only objected to pay it on the ground of fraud in the holder, Lord Tenterden, C.J., held this evidence of due notice. *Wilkins v. Judis*, 1 M. & Rob. 41. A promise to pay, though conditional as to the mode of payment, is sufficient. *Campbell v. Webster*, 2 C. B. 258. So, where the drawer of a foreign bill, on being told it was dishonoured, said that his affairs are deranged, but that he would be glad to pay it as soon as his accounts with his agents are cleared, this is sufficient proof of a protest having been duly made. *Gibbon v. Coggon*, 2 Camp. 188; *Greenway v. Hindley*, 4 Camp. 52. Where the plaintiff gave in evidence an agreement made between the prior indorser and the defendant (the drawer), after the bill became due, reciting, that the defendant had drawn the bill in question, that it was overdue and ought to be in the hands of the prior indorser, and it was agreed that the latter should take the money due to him upon the bill by instalments; this agreement was held to dispense with other proof of notice of dishonour. *Gunson v. Metz*, 1 B. & C. 193. But, a mere offer, upon being arrested, to give another bill, was no evidence of notice. *Cuming v. French*, 2 Camp. 106, n. The drawer of a bill, being applied to for payment, said, "If the acceptor does not pay, I must; but exhaust all your influence with the acceptor first;" the drawer afterwards directed the applicant to raise the money on the lives of himself and the acceptor; it was held that this admission, though evidence, was not to be taken as *conclusive* of the defendant's having received, or waived, notice of dishonour of the bill. *Hicks v. Beaufort, Dk. of*, 4 N. C. 229.

*Notice, proof of delivery of.]* By sect. 49, "(15.) Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office."

And, when the notice must be given on a certain day, it is enough if the letter be put into the post at such an hour that it would, in the usual course, be delivered on that day; *Stocken v. Collin*, 7 M. & W. 515. The post-mark is not conclusive of the time of posting. S. C. If a notice be sent by post, the direction of the letter will be too general to an indorser, "Mr. H., Bristol." *Walter v. Haynes*, Ry. & M. 149. But, where the bill was dated "Manchester" only, it was held sufficient to direct to the drawer at "Manchester," generally. *Mann v. Moors, Id.* 249. So, where a person drew a bill, dating it generally "London," on an acceptor resident in London whose address was stated on the bill, it was held that proof of a letter containing notice of dishonour of the bill having been put into the post office, addressed generally to the drawer, "London," was evidence of due notice of dishonour. *Clarke v. Sharpe*, 3 M. & W. 166. And, in such a case, this is enough, as against the drawer, though the letter never reach him, and though his residence might have been found by inquiry at the drawee's address given on the bill. *Burmester v. Barron*, 17 Q. B. 828; 21 L. J., Q. B. 135. For the plaintiff had done all that the drawer himself required, who had supplied no better address; and there was sufficient evidence of due diligence. S. C.; and see *post*, p. 389. Where the plaintiff supplied goods to a company, and took in payment a bill of exchange accepted by the company, and indorsed by the defendant, a director, at the company's office, at which the defendant was in the habit of attending; it was held that notice of dishonour sent to the company's office was sufficient, although the company was then wound up, and the defendant ceased to attend at the office, and did not receive the notice till long after. *Berridge v. Fitzgerald*,



L. R., 4 Q. B. 639. If there be no post, the notice may be sent by any ordinary mode of conveyance; as in the case of a foreign bill, by the first regular ship bound for the place where notice is to be given. *Muilman v. D'Equino*, 2 H. Bl. 565. In proving a notice sent by post, it was ruled by Lord Ellenborough not to be sufficient to show that it was contained in a letter, which letter was put upon the table for the purpose of being carried to the post, and that, in the course of the business, all letters deposited upon that table were carried to the post; but, he said it might have been sufficient had the person, who was in the habit of carrying the letters to the post, been called, and stated that he invariably carried all such letters to the post. *Hetherington v. Kemp*, 4 Camp. 193. And, it was held in *Skilbeck v. Garbett*, 7 Q. B. 846, that if it be shown that the letter was put on the proper day with others in a box in the plaintiff's office, out of which the postman invariably called every day to take the letters, this is evidence of a sending by the post without calling the postman. To prove the sending of a notice by post, the plaintiff's clerk was called, who stated that a letter containing the notice was sent by post on a Tuesday morning, but he had no recollection whether it was put in by himself or another clerk; it was held that this was not sufficient evidence of putting into the post. *Hawkes v. Salter*, 4 Bing. 715. Proof that duplicate notices of dishonour were written; that a letter, of which the witness could not state the contents, was sent on the same day by the plaintiff to the defendant; and that the defendant having received notice to produce the letter written to him on that day, refused to do so;—was held slight *prima facie* evidence of the receipt of a notice. *Roberts v. Bradshaw*, 1 Stark. 28; see also *Curlewis v. Corfield*, 1 Q. B. 814.

[*Contents of notice, how proved.*] Where a written notice has been given by a letter, a duplicate or copy is good evidence without notice to produce the letter. *Kine v. Beaumont*, 3 B. & B. 288. And, in the case of *Swain v. Lewis*, 2 C. M. & R. 261, it was held, after conference with all the judges, that it is not necessary to give a notice to produce a notice of dishonour of a bill of exchange, whether by letter or otherwise. Secondary evidence of such notice is, therefore, admissible without notice to produce. But, where, in an action against the indorser of a bill, it became necessary to prove that notice of the dishonour of *other bills* had been given to the defendant, for which purpose examined copies of letters containing such notices were offered, Abbott, C.J., ruled that a notice to produce such letters was necessary, and that the case did not fall within the exception as to notices respecting bills which are the subject-matter of the action. *Lanauze v. Palmer*, M. & M. 31, *vide ante*, p. 8.

[*Protest of bill.—Statute.*] By sect. 51, “(1.) Where an inland bill” (*vide* sect. 4, *ante*, p. 351) “has been dishonoured it may, if the holder think fit, be noted for non-acceptance or non-payment, as the case may be; but it shall not be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser.

“(2.) Where a foreign bill, appearing on the face of it to be such, has been dishonoured by non-acceptance it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonoured by non-acceptance, is dishonoured by non-payment it must be duly protested for non-payment. If it be not so protested the drawer and indorsers are discharged. Where a bill does not appear on the face of it to be a foreign bill, protest thereof in case of dishonour is unnecessary.

“(3.) A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

“(4.) Subject to the provisions of this act” (*vide* sub-sect. (9) and sect.

93, *infra*), "when a bill is noted or protested, it must be noted on the day of its dishonour. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

"(5.) Where the acceptor of a bill becomes bankrupt or insolvent or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

"(6.) A bill must be protested at the place where it is dishonoured: Provided that—

"(a.) When a bill is presented through the post office, and returned by post dishonoured, it may be protested at the place to which it is returned and on the day of its return if received during business hours, and if not received during business hours, then not later than the next business day:

"(b.) When a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

"(7.) A protest must contain a copy of the bill, and must be signed by the notary" (*vide* sect. 94, *infra*) "making it, and must specify—

"(a.) The person at whose request the bill is protested:

"(b.) The place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found.

"(8.) Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

"(9.) Protest is dispensed with by any circumstance which would dispense with notice of dishonour. Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence."

Sept. 93. "For the purposes of this act, where a bill or note is required to be protested, within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting."

Sept. 94. "Where a dishonoured bill or note is authorized or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonoured, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonour of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill."

A form is given in Schedule 1 to the act, which if used is sufficient.

*Protest.*] In case of an inland bill, a protest is unnecessary and of no effect. *Windle v. Andrews*, 2 B. & A. 696; *Bonar v. Mitchell*, 5 Exch. 415.

In case of a foreign bill, notice of dishonour without notice of protest is sufficient, if the party to whom notice is given reside in this country; *Robins v. Gibson*, 1 M. & S. 288; and it is sufficient, though he should happen at the time of the dishonour to be absent abroad; *Cromwell v. Hyinson*, 2 Esp. 511. In giving notice of non-payment to the drawer of a foreign bill resident abroad, it is necessary to give him notice that the bill has been protested; *Robins v. Gibson*, 1 M. & S. 289, *per* Ld. Ellenborough, C.J.; but it is not necessary to send him a copy of the protest. *Goodman*

v. *Harvey*, 4 Ad. & E. 870. So, it was sufficient where the notice stated that the bill “had been duly presented and returned dishonoured.” *Ex pte. Lowenthal*, L. R., 9 Ch. 591. The production of the protest purporting to be attested by a notary public, when made abroad, is sufficient proof of the protest. *Anon.*, 12 Mod. 345; Bayley on Bills, 6th ed. 490. But a notarial protest is no evidence that a foreign bill of exchange has been presented for payment in England; *Chesmer v. Noyes*, 4 Camp. 129; and, a protest made in England, must, it is said, be proved in the ordinary way. Chitty on Bills, 11th ed. 340. But, there is a dictum of Ld. Abinger to the contrary in *Brain v. Preece*, 11 M. & W. 775. In *Geralopulo v. Wieler*, 10 C. B. 690; 20 L. J., C. P. 105, it was held (explaining *Vandewall v. Tyrell*, M. & M. 87), that upon payment *supra* protest for the honour of a party it is enough if, before payment, the bill be in fact protested, and a declaration of payment for honour be made and noted in the notarial register, and that the formal protest may be drawn up afterwards, even after action brought; and, that a duplicate protest made from the notary’s book was primary evidence, as much as the protest sent abroad. A promise to pay (though qualified) is an admission by the defendant of due protest for non-acceptance, and notice of it. *Campbell v. Webster*, 2 C. B. 258.

*Waiver or dispensation of notice.—Statute.*] By sect. 50, “(2.) Notice of dishonour is dispensed with—

“(a.) When, after the exercise of reasonable diligence, notice as required by this act cannot be given to or does not reach the drawer or indorser sought to be charged :

“(b.) By waiver express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice :

“(c.) As regards the drawer in the following cases, namely, (1) where drawer and drawee are the same person” (*vide* sect. 2, *ante*, p. 350), “(2) where the drawee is a fictitious person or person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill, (5) where the drawer has countermanded payment.”

*Waiver or dispensation of notice.*] See sect. 50 (2), *supra*. Whenever the want of notice is excused, the circumstances relied upon as the excuse must appear in the statement of claim. See Rules, 1883, App. C., s. 4, No. 6. Therefore, when the defendant told the indorsee beforehand not to send such notice, and that he would pay the amount, this is not evidence to support an averment of notice, but should have been pleaded as a dispensation of it. *Burgh v. Legge*, 5 M. & W. 418. A mere promise to pay made in anticipation that the bill will be dishonoured, does not dispense with notice of dishonour. *Pickin v. Graham*, 1 Cr. & M. 725. But, if the drawer, a few days before the bill becomes due, call on the holder, and tell him that he has no regular residence, but he will call and see if the bill be paid by the acceptor, this dispenses with notice of dishonour. *Phipson v. Kneller*, 4 Camp. 285. So, if the holder send a dishonoured bill to the place of business of the indorser, for the purpose of giving notice, and find it closed, he can recover against him without having left a notice, as these facts go to prove a dispensation of notice. *Allen v. Edmundson*, 2 Exch. 719; *Crosse v. Smith*, 1 M. & S. 545.

The effect of a promise to pay a dishonoured bill is thus summed up by Byles, J., in *Cordery v. Colville*, 14 C. B., N. S. 374; 32 L. J., C. P. 210, 211. “A promise to pay may operate either as evidence of notice of

dishonour, or as a prior dispensation, or as a subsequent waiver of notice. Whether made after, or even before, the time for giving notice has expired,—inasmuch as notice may be given at any time within the limit prescribed by law,—a promise to pay is always evidence from which a jury may infer due notice. But even when the other evidence is conclusive to show that due notice was not given, or when a jury refuses to draw the inference that it was given, yet a promise to pay made within the time for giving notice is a dispensing with notice, and made after that time is a waiver of notice. It is true that a prior dispensation, or subsequent waiver of notice, should be pleaded, but the C. L. P. Act, 1852, s. 222” (and now also Rules, 1883, O. xxviii. r. 1, *ante*, p. 291), “enables and obliges the court to amend the record, whenever an amendment is necessary in order to decide the real question in controversy between the parties. The practical consequence is, that in almost every case proof of a promise to pay cures the want of notice of dishonour.” See also *Woods v. Dean*, 3 B. & S. 101; 32 L. J., Q. B. 1; and *post*, p. 392.

*Notice excused; no effects.*] By sect. 50 (2) (c) (2), *ante*, p. 387, notice of dishonour is dispensed with where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill. Notice of dishonour to the drawer is unnecessary if he had not, at the time of drawing or before the time of becoming due, any effects either in the hands of the drawee, or consigned on their way to him; *Bickerdike v. Bollman*, 1 T. R. 405; 2 Smith’s L. Cases; nor a reasonable expectation of having any; *Claridge v. Dalton*, 4 M. & S. 226. See *Carew v. Duckworth*, L. R., 4 Ex. 313, the case of a cheque. This excuse must be alleged in the statement of claim; *per Parke, B.*, in *Burge v. Legge*, 5 M. & W. 421. When issue is joined on the want of effects in the hands of the drawee, the terms of the allegation will sufficiently indicate the required proof. The averment is disproved if it be shown that the drawer had effects on their way to the drawee, though they never reached him. *Rucker v. Hiller*, 3 Camp. 217; 16 East, 43. So, if the drawer had some effects in the drawee’s hands at the time when the bill was drawn, though at the time the bill was presented for acceptance and thence until presentment for payment he had not any. *Orr v. Maginnis*, 7 East, 359. So, though there were no effects at the time the bill was drawn or accepted, provided there were effects when it became due; for the whole period must be looked to from the drawing of the bill till it is due; and notice is requisite if the drawee had any effects at any time during that interval. *Hammond v. Dufrene*, 3 Camp. 145; *Thackray v. Blackett*, *Id.* 164. So, if the drawer has effects in the hands of the drawee, though he is indebted to the drawee greatly beyond that amount. *Blackham v. Doren*, 2 Camp. 503. So, where there is a running account between the drawer and the drawee, and a fluctuating balance between them, and the drawer has reasonable grounds to expect that he shall have effects in the drawee’s hands when the bill becomes due; *per Ld. Ellenborough, C. J.*, *Brown v. Maffey*, 15 East, 221; or, where the bill is drawn in the reasonable expectation that, in the ordinary course of mercantile transactions, it would be accepted or paid; *Claridge v. Dalton*, *supra*; *Lafitte v. Slatte*, 6 Bing. 623; and see *Carew v. Duckworth*, *supra*; or, where the acceptor has received from the drawer his acceptances upon which he has raised money, and some of which have been dishonoured, and some are outstanding; *Spooner v. Gardiner*, Ry. & M. 84. And, in general, where the drawer would have any remedy over against a third person (as in the case of a bill drawn for the accommodation of a person to whom he indorses it), notice ought to be alleged and proved. *Cory v. Scott*, 3 B. & A. 619; *Norton v.*

*Pickering*, 8 B. & C. 610; *Lafitte v. Slatter*, *supra*; *Turner v. Samson*, 2 Q. B. D. 23, C. A.; *Foster v. Parker*, 2 C. P. D. 18. It is no excuse of notice, that the plaintiff and the defendant are both shareholders in a joint-stock company, and that the defendant drew the bill on the company (the acceptors) in order to raise money for them, and as an additional security to the plaintiff who advanced the money. *Maltass v. Siddle*, 6 C. B., N. S. 494; 28 L. J., C. P. 257.

The fact that the drawer of a bill made it payable at his own house is evidence that the bill is an accommodation bill, and so excuses notice of dishonour. *Sharp v. Bailey*, 9 B. & C. 44.

*Notice dispensed with by ignorance of drawer's residence.*] Where either want of notice or delay is sought to be excused by the holder's ignorance of the place of residence of the defendant, it is a question for the jury whether he used due diligence to find it; *Bateman v. Joseph*, 12 East, 433; and time may be allowed for inquiries by post; *Baldwin v. Richardson*, 1 B. & C. 245. It is not enough to show that inquiries as to an indorser's residence were made at the place at which the bill was payable. *Beveridge v. Burgis*, 3 Camp. 262. Inquiry should be promptly made of some of the other parties to the bill or note; and of persons of the same name, &c. Bayley on Bills, 6th ed. 281-2; *Chapcott v. Curlew*, 2 M. & Rob. 484. Where the holder does not know the drawer's residence, notice of dishonour is to be given, not on the day after the bill becomes due, but on the day after that on which the holder after using reasonable diligence is in a position to give the notice. *Gludwell v. Turner*, L. R., 5 Ex. 61, *per* Martin, B. Calling on the indorser the day after the bill becomes due, to know where the drawer lives, and, on his not being in the way, calling again the next day, and then giving the drawer notice, has been considered sufficient. *Browning v. Kinnear*, Gow, 81. In one case it was held sufficient, on the dishonour of a promissory note, to make inquiry at the maker's house for the residence of the defendant, the payee, and indorser. *Sturges v. Derrick*, Wightw. 76. See further as to special circumstances excusing delay, *The Elmville*, (1904) P. 319.

Where the holder is excused by ignorance from giving notice until after the usual day, the common allegation of notice is still sufficient if actually given as soon as possible. *Firth v. Thrush*, 8 B. & C. 387. But, generally, excuse of any notice does not prove an averment of notice; *ante*, p. 387.

*Account stated.*] Where the drawer, knowing the plaintiff to be the indorsee of an overdue bill, promises to pay him it, the plaintiff may recover on an account stated. *Oliver v. Dovatt*, 2 M. & Rob. 230. See *ante*, p. 375.

#### *Payee or Indorsee against Acceptor supra Protest, or for Honour.*

*Statute.*] Sect. 15. "The drawer of a bill and any indorser may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonoured by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may think fit."

By sect. 65, "(1.) Where a bill of exchange has been protested for dishonour by non-acceptance, or protested for better security, and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *supra* protest, for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

“(2.) A bill may be accepted for honour for part only of the sum for which it is drawn.

“(3.) An acceptance for honour *supra* protest in order to be valid must—

“(a.) be written on the bill, and indicate that it is an acceptance for honour :

“(b.) be signed by the acceptor for honour.

“(4.) Where an acceptance for honour does not expressly state for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer.

“(5.) Where a bill payable after sight is accepted for honour, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour.” This provision in italics is new.

Sect. 66. “(1.) The acceptor for honour of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment, and protested for non-payment, and that he receives notice of these facts.

“(2.) The acceptor for honour is liable to the holder and to all parties to the bill subsequent to the party for whose honour he has accepted.”

Sect. 67. “(1.) Where a dishonoured bill has been accepted for honour *supra* protest, or contains a reference in case of need” (*vide* sect. 15, *ante*, p. 389), “it must be protested for non-payment before it is presented for payment to the acceptor for honour, or referee in case of need.

“(2.) Where the address of the acceptor for honour is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity ; and where the address of the acceptor for honour is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him.

“(3.) Delay in presentment or non-presentment is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment.” *Vide* sect. 46, *ante*, p. 379.

“(4.) When a bill of exchange is dishonoured by the acceptor for honour, it must be protested for non-payment by him.”

Sect. 68. “(1.) Where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

“(2.) Where two or more persons offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill shall have the preference.

“(3.) Payment for honour *supra* protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honour which may be appended to the protest or form an extension of it.

“(4.) The notarial act of honour must be founded on a declaration made by the payer for honour, or his agent in that behalf, declaring his intention to pay the bill for honour, and for whose honour he pays.

“(5.) Where a bill has been paid for honour, all parties subsequent to the party for whose honour it is paid are discharged, but the payer for honour is subrogated for, and succeeds to both the rights and duties of, the holder as regards the party for whose honour he pays, and all parties liable to that party.

“(6.) The payer for honour on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonour is entitled to receive both the bill itself and the protest. If the holder do not on demand deliver them up he shall be liable to the payer for honour in damages.

“(7.) Where the holder of a bill refuses to receive payment *supra* protest he shall lose his right of recourse against any party who would have been discharged by such payment.”

Sect. 96 repeals stats. 2 & 3 W. 4, c. 98, and 6 & 7 W. 4, c. 58, and the provisions of those statutes are replaced by the above sections.

As to presentment, *vide ante*, pp. 376 *et seq.*, and as to protest, *vide ante*, pp. 385 *et seq.* An acceptor for the honour of the drawer is estopped from setting up what the drawer himself would be estopped from setting up, and he cannot therefore dispute the drawer's signature. *Phillips v. Im Thurn*, 18 C. B., N. S. 694; L. R., 1 C. P. 463.

#### *Indorsee against Indorser.*

In an action by an indorsee against the indorser of a bill, the plaintiff must prove the following matters, if traversed: 1. The indorsement by the defendant; 2. The indorsements between that of the defendant and the plaintiff, when stated in the statement of claim; 3. The presentment to the drawee or acceptor, and the dishonour; 4. Due notice of the dishonour to the defendant.

As to the requisites of a valid indorsement, see sect. 32, *ante*, p. 370. As to indorsement in blank and special indorsement, sect. 34, *ante*, p. 370. As to restrictive indorsement, sect. 35, *ante*, p. 370.

By sect. 2, “Indorsement means an indorsement completed by delivery.” By sect. 21 (1), delivery is necessary to complete an indorsement. As to what amounts to delivery, see sect. 21 (2), *ante*, p. 353.

By sect. 55, “(2.) The indorser of a bill by indorsing it—

“(a.) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken;

“(b.) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements;

“(c.) Is precluded from denying to his immediate or subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto.” See *Chamberlain v. Young*, (1893) 2 Q. B. 206, C. A.

Sect. 56. “Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course.”

Sect. 71. “(2.) Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if the said parts were separate bills.”

It seems that sect. 56 does not apply to promissory notes; *vide ante*, pp. 244, 245.

As between indorsee and indorser, to make a valid indorsement the holder must not only write his name and manually deliver the bill with intent to transfer the property therein, but he must intend to stand in the ordinary position of indorser, and guarantee payment of the bill, if the acceptor make default. *Denton v. Peters*, L. R., 5 Q. B. 475. This defence was held to arise on a traverse of the indorsement. S. C. As to now pleading defences specially, *vide post*, p. 394. Sects. 55 (2), 56 apply only to a bill which is perfect at the time of the indorsement. *Jenkins v. Coomber*, (1898) 2 Q. B. 168.

By sect. 20 (1), *ante*, p. 353, a simple signature on blank stamped paper delivered by the signer in order to be converted into a bill, operates as a

*prima facie* authority to fill it up to any amount the stamp will cover, using the signature as that of the drawer, or the acceptor, or an indorser. But if a signature be fraudulently obtained on the back of a bill without any intention in the writer to indorse the bill, he will not, unless he has been guilty of negligence, be liable as indorser, even at the suit of a *bonâ fide* holder of the bill; and this defence has been held to arise on a traverse of the indorsement. *Foster v. Mackinnon*, L. R., 4 C. P. 704. In this case the indorsement of the defendant, a very old man, was obtained on the back of a bill, which he was induced to sign under the fraudulent misrepresentation that it was a guarantee, and the court held that the defendant was not liable, if he had been guilty of no negligence.

The Rules, 1883, O. xix. r. 15, *ante*, p. 309, would probably now require the defences above stated to be specially pleaded.

By sect. 36 (4), *ante*, p. 373, a bill is in general presumed to have been indorsed before it became due. A bill being drawn and indorsed in the name of the firm under which defendant and another carried on business, a question arose whether the indorsement was before or after the dissolution of the partnership had been advertised. The bill was dated before the advertisement, but the indorsement was not dated. Held, that the date was *prima facie* the true date, and that it was properly left to the jury to say whether it was indorsed before or after the advertisement; and that, as it was drawn payable to the defendant's own order, the jury might reasonably infer that it was indorsed shortly after the drawing. *Anderson v. Weston*, 6 N. C. 296. As to indorsement by one of several partners after dissolution, see *ante*, p. 373.

An indorsement in the form, "pay J. S., or order, value in account with H. C. D.," was, in an action by a subsequent indorsee against the indorser, held not to be a restrictive indorsement; it merely means that value has been received in a certain manner and has the same effect as if this were stated on the face of the bill. *Buckley v. Jackson*, L. R., 3 Ex. 135.

In suing an indorser on non-payment of the bill by the drawee, it is unnecessary to state an acceptance; and, if stated, it need not be proved; *Tanner v. Bean*, 4 B. & C. 312. It is only necessary to prove a presentment for payment at the place, if any, pointed out in the acceptance. *Parks v. Edge*, 1 Cr. & M. 429. The rules with regard to the presentment of the bill and notice of dishonour are, in general, the same in this action as in an action by the payee against the drawer. See *ante*, pp. 375 *et seq.*

No evidence of a demand upon the drawer or prior indorsers is necessary. *Bromley v. Frazier*, Str. 441; *Heylyn v. Adamson*, 2 Burr. 669.

By sect. 50, "(2.) Notice of dishonour is dispensed with. . . .

"(d.) As regards the indorser in the following cases, namely, (1) where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the bill; (2) where the indorser is the person to whom the bill is presented for payment; (3) where the bill was accepted or made for his accommodation."

As to the meaning of "a fictitious person," *vide ante*, p. 361. As to "person," *vide* sect. 2, *ante*, p. 360. Proof of notice of dishonour will be dispensed with by a promise of the defendant to pay; *Wilkes v. Jacks*, Peake, 202; provided it be an unambiguous one; thus, the following letter from the indorser was held not to waive the proof of notice: "I cannot think of remitting till I receive the draft; therefore, if you think proper you may return it to Trevor & Co., if you think me unsafe." *Borradale v. Lowe*, 4 Taunt. 93. A promise to pay not made to the plaintiff, but to another person who was holder of the bill at the time, will be sufficient. *Potter v. Rayworth*, 13 East, 417. So, allowing judgment to go by default in an action brought



by the then holder of the same bill dispenses with proof of notice of dishonour. *Rabey v. Gilbert*, 6 H. & N. 536; 30 L. J., Ex. 170. And see further, *ante*, pp. 387 *et seq.*, as to what will dispense with proof of notice of dishonour.

By sect. 37, *ante*, p. 354, where a bill is negotiated back to a prior indorser, such person is not in general entitled to enforce payment of the bill against any intervening party to whom he was previously liable. But circumstances may be specially pleaded, showing that the defendant could not sue the plaintiff on his indorsement. *Wilders v. Stevens*, 15 M. & W. 208; *Wilkinson v. Unwin*, 7 Q. B. D. 636, C. A. And, in an action by indorsee against indorser, where the issue was only on the want of notice to the defendant of non-payment by drawee, defendant was not permitted to show that the plaintiff (who had given due notice) and the drawer were one and the same person; the defence should have been specially pleaded. *Williams v. Clarke*, 16 M. & W. 834.

Although a prior indorser is *primâ facie* liable to indemnify a subsequent one, yet the whole circumstances of the making, &c., of the note or bill may be referred to in order to show the true relation of the parties *inter se*, and the relative position of the parties may be thereby altered. Thus, where three directors of a company, in order to become sureties for the company to a bank, successively indorsed three notes of the company, it was held that they were not liable to indemnify each other in accordance to the priority of their indorsements, but were only liable to contribute equally *inter se*. *Macdonald v. Whitfield*, 8 Ap. Ca. 733, J. C.

*Evidence under money claims.*] An indorsement is *primâ facie* evidence of money lent by the indorsee to his immediate indorser. *Kessebower v. Tims*, Bayley on Bills, 6th ed. 363. But where the indorser told his indorsee, just *before presentment*, that the bill would not be paid, that notice need not be sent to him, and that he would send the money on a future day, this was held no evidence on an account stated; it being no proof of a debt due from the indorser at the time of the promise, but only a conditional promise in a certain event. *Burgh v. Legge*, 5 M. & W. 418. Though as between indorser and his indorsee the bill is evidence of an account stated, this may be rebutted by showing that the defendant indorsed in blank, and delivered it to F., who carried it to the plaintiff to be discounted. *Burmester v. Hogarth*, 11 M. & W. 97.

#### *Damages Generally.*

*Statute.*] By sect. 57, "Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:—

"(1.) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser—(a) The amount of the bill; (b) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case; (c) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest.

"(2.) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment.

“(3.) Where by this act, interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.”

Sect. 57 (1) does not apply to the case of a foreign bill dishonoured and protested here, on which the drawer, A., is liable to the holder in damages for re-exchange; A. may, notwithstanding this section, recover these damages against the acceptor under sect. 97 (2), *ante*, p. 351. *Ex pte. Gillespie*, 18 Q. B. D. 285, C. A. But the expenses of protest for better security on the bankruptcy of the acceptor before maturity, are not recoverable from the acceptor; *Ex pte. Bank of Brazil*, (1893) 2 Ch. 438; nor is commission paid to the drawer's bankers, for acceptance by them, *supra protest*, for the honour of the drawer. S. C. Where a bill has been dishonoured abroad, sect. 57 (2) limits the damages to the re-exchange and interest thereon, and the holder has no option to recover interest under sect. 57 (1). *In re Commercial Bank of S. Australia*, 36 Ch. D. 522.

The re-exchange is the value of the foreign coin expressed in English money at the rate of exchange on the day of dishonour, with interest and expenses; see *Suse v. Pompe*, 8 C. B., N. S. 538; 30 L. J., C. P. 75; and evidence of custom amongst merchants, giving the holder the option of recovering the sum which he gave for the bill in England or the re-exchange, is not admissible, as it would contradict the obligation implied by the written instrument. S. C. See further, as to the right to re-exchange, or to a fixed sum by custom in lieu thereof, *Willans v. Ayers*, 3 Ap. Ca. 133, J. C. As to the mode of calculating interest on bills and notes, see *Action for interest, post*, p. 623.

As to the damages recoverable by the drawer against the acceptor for dishonouring bills accepted under the terms of a letter of credit, see *Prehn v. Royal Bank of Liverpool*, L. R., 5 Ex. 92.

#### *Defences, generally, to Actions on Bills of Exchange.*

By Rules, 1883, O. xxi. r. 2, “in actions upon bills of exchange, promissory notes, or cheques, a defence in denial must deny some matter of fact; e.g., the drawing, making, indorsing, accepting, presenting, or notice of dishonour of the bill or note.” See, also, O. xix. r. 17, *ante*, p. 310. The proofs required on these traverses have already been considered. The following are some of the most usual defences to actions on bills, not already noticed.

*Negotiation of overdue or dishonoured bill.*] By sect. 36, “(2.) Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title” (*vide* sect. 29 (2), *ante*, p. 354) “affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had.

“(3.) A bill payable on demand” (*vide* sect. 10, *ante*, p. 352) “is deemed to be overdue within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact.”

Sub-sect. (3) applies to cheques, sect. 73, *post*, p. 405, but not to promissory notes, sect. 86 (3), *post*, p. 412.

“(4.) Except where an indorsement bears date after the maturity of the bill, every negotiation is *primâ facie* deemed to have been effected before the bill was overdue.

“(5.) Where a bill which is not overdue has been dishonoured, any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour, but nothing in this sub-section shall affect the rights of a holder in due course” (*vide* sect. 29, *ante*, p. 354).

In sub-sect. (2) and throughout the act the term “defect of title” is used as equivalent to an equity attaching to the bill itself. See *Holmes v. Kidd*, 3 H. & N. 891; 28 L. J., Ex. 113, Ex. Ch. But the indorsee taking it overdue does not take it subject to claims arising out of collateral matters; *Burrough v. Moss*, 10 B. & C. 588; *Oulds v. Harrison*, 10 Exch. 572; 24 L. J., Ex. 66. Thus, the indorsee of an overdue bill of exchange is not liable to have a debt from the drawer to the acceptor set off against his bill. S. C.

*Loss of bill.*] Unless the loss is specially pleaded, the plaintiff may, after proving the loss, give secondary evidence of the bill. *Blackie v. Pidding*, 6 C. B. 196. See sects. 69, 70, *ante*, pp. 356, 357, as to lost bills.

*Wrong stamps, &c.*] *Vide ante*, pp. 222, 240, 241. By sect. 97 (3) (a), the provisions of the Stamp Acts are not affected by the B. of Ex. Act, 1882.

*Alteration.*] By sect. 64, “(1.) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers.

“*Provided that,*

“*Where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course*” (*vide* sect. 29, *ante*, p. 354), “*such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour.*

“(2.) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor’s assent.”

The provision in italics is new.

The defence of alteration under this section arises apart from the objection that a bill altered in any material particular after it has been issued is a fresh instrument and requires a new stamp, as to which *vide ante*, pp. 244, 245, for sect. 97 (3) (a) saves the effect of the Stamp Acts. As to cancellation of acceptance by mistake, *vide* sect. 63 (3), *post*, p. 404.

The drawee, L., accepted a bill for 500*l.*, which was after acceptance fraudulently altered by the drawer into a bill for 3,500*l.*; the bill bore a stamp sufficient to cover 3,500*l.*, and had spaces on its face in which the words and figures were inserted by the drawer; in an action on the bill by a holder in due course it was held that L. was liable to the amount of 500*l.* only. *Scholfield v. Londesborough*, *El. of*, (1896) A. C. 514, D. P. See *Imperial Bank of Canada v. Bank of Hamilton*, (1903) A. C. 49, J. C., cited *post*, p. 611.

The alteration is “apparent” if the party liable on the bill can at once discern it on the face of the bill, though it is not obvious to all the world. *Leeds Bank v. Walker*, 11 Q. B. D. 84.

The alteration may be material although the contract is unaffected thereby; in such case it is necessary to inquire what was the object of the part which

is altered. *Suffell v. Bank of England*, 9 Q. B. D. 555, C. A. Thus, the number on a Bank of England note has been held to be a material part thereof. S. C.

After a joint and several note, made payable "with lawful interest," had been signed by three makers, two of the makers, with the assent of the plaintiff, the payee and holder, wrote on the left-hand corner of it, "with interest at six per cent.;" held that this avoided it as against the third maker who was sued alone. *Warrington v. Early*, 2 E. & B. 763; 23 L. J., Q. B. 47. So, the addition of a memorandum, which fixes the rate of exchange at which a foreign bill is payable, avoids it. *Hirschfield v. Smith*, L. R., 1 C. P. 340. And, where the defendant gave a blank acceptance for valuable consideration, it was held that the person to whom it was delivered was only entitled to draw a bill with a general acceptance, and that the insertion of a particular place of payment before the acceptance vitiated the bill, at all events as between the immediate parties. *Hanbury v. Lovett*, 18 L. T. 366, E. T. 1868, Ex.; see also *Crotty v. Hodges*, *infra*. So, altering a joint and several note signed by two into a note signed by three, by getting a third maker to join, vitiates the note as against one of the makers who did not assent to the alteration. *Gardner v. Walsh*, 5 E. & B. 83; 24 L. J., Q. B. 285. Where the defendant had paid two years' interest on an altered note, this was held to be evidence that the alteration was by his consent. *Curiss v. Tattersall*, 2 M. & Gr. 890. It is for the party who sues on an instrument evidently altered, to give some evidence to explain the alteration. *Clifford v. Parker*, *Id.* 909. In a suit by drawer against acceptor: Plea, 1, traverse of acceptance; 2, alteration after acceptance; the proof was, that the bill was drawn in France on the defendant in London, and the defendant had expressly accepted the bill for a less sum than in the body of it, and that the sum had been altered accordingly, but by whom or when did not appear: held that plaintiff ought to recover; for it might be presumed that the defendant consented to alter the bill, and *non constat*, but that the alteration was made in France, so as not to require an impressed stamp. *Hamelin v. Bruck*, 9 Q. B. 306. The addition of the words "on demand," to a promissory note which expressed no time for payment, was held to be an immaterial alteration. *Aldous v. Cornwell*, L. R., 3 Q. B. 573. See further in 1 Smith's L. Cases, notes to *Master v. Miller*, and cases cited *ante*, pp. 244, 245, and 357.

An alteration of such a kind as to discharge the acceptor is admissible in evidence under a denial of the acceptance; when the bill is declared on in its altered form. *Hirschman v. Budd*, L. R., 8 Ex. 171, following *Cock v. Coxwell*, 2 C. M. & R. 20, and overruling *Parry v. Nicholson*, 13 M. & W. 778. Where, however, the instrument is sued on in its unaltered form, or the altered part does not appear in the claim, it is necessary to plead the alteration specially. *Mason v. Bradley*, 11 M. & W. 590. The defendant authorized W. to put his name to a general acceptance on a blank stamp; this was done, and on filling the bill up, the payee added a place of payment to the acceptance, the bill being declared on without stating the place of payment: on a traverse of the acceptance, the defendant was held entitled to succeed, on the ground apparently that the acceptance never existed on a perfect bill as a general acceptance; and a special one was not authorized by the defendant. *Crotty v. Hodges*, 4 M. & Gr. 561. And see *Hanbury v. Lovett*, *supra*.

Where the drawer made an alteration fatal to the bill, as between him and the acceptor, he may recover on a claim for the original consideration; *Atkinson v. Hawdon*, 2 Ad. & E. 628; *aliter*, as between indorsee and drawer, the alteration being made by the former. *Alderson v. Langdale*, 3 B. & Ad. 660. A note so altered as to avoid it may be used by the payee

as evidence of an account stated by the maker at the time it was given. *Gould v. Coombs*, 1 C. B. 543.

*Failure or want of consideration.*] Sect. 27, *ante*, p. 354, defines valuable consideration for a bill and a holder for value.

Sect. 28. "(1.) An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor and for the purpose of lending his name to some other person.

"(2.) An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not."

Want of consideration alone is only a defence, when the parties to the action are the parties as between whom there was the alleged want of consideration, or as between parties who are in privity with them. A *bonâ fide* holder for value is not affected by any want of consideration as between antecedent parties to the bill or note.

Formerly, any facts or circumstances which invalidated the original consideration of a bill or note were admitted in support of a general plea of want of consideration; see *Mills v. Oddy*, 2 C. M. & R. 103, cited *post*, p. 398; but it would seem that the facts relied on should now be specially pleaded. Rules, 1883, O. xix. r. 15, *ante*, p. 309.

Where a debt is due on a judgment between the parties, there is a good consideration, as the taking the security imports a promise on the part of the judgment debtor to suspend proceedings on the judgment till the maturity of the bill or note; *Baker v. Walker*, 14 M. & W. 465; the same principle applies where there is a debt from the third person to the payee. *Poplewell v. Wilson*, Str. 264. A solicitor's bill, though not delivered according to law, is a good consideration. *Jeffreys v. Evans*, 14 M. & W. 210. In an action by payee against the acceptor of a bill at three months, drawn in consideration of money to be paid in one month by payee to drawer, and accepted for the accommodation of the drawer, if the money be not paid, the consideration fails, and the plaintiff cannot recover. *Astley v. Johnson*, 5 H. & N. 137; 29 L. J., Ex. 161. A note given by the defendant on the faith of a misrepresentation by the plaintiff of either matter of fact or of law, though made without fraud, may be impeached as for want of consideration. *Southall v. Rigby*, and *Forman v. Wright*, 11 C. B. 481; 20 L. J., C. P. 145. So, a note given for past gratuitous services, and in consideration for future services, as to which there was no binding contract. *Hulse v. Hulse*, 17 C. B. 711; 25 L. J., C. P. 177. But the compromise of a claim, made *bonâ fide*, though unfounded, and known by the defendant to be so, but for which the claimant threatened to sue, is a good consideration. *Cook v. Wright*, 1 B. & S. 559; 30 L. J., Q. B. 321. See *Callisher v. Bischoffsheim*, L. R., 5 Q. B. 449; and *Miles v. New Zealand Alford Estate Co.*, 32 Ch. D. 266, C. A., dissenting from the observations of Brett, L.J., in *Ex pte. Banner*, 17 Ch. D. 480, 490. So is forbearance by the plaintiff, at the defendant's request, to sue A., although there was no contract by the plaintiff to abstain from suing. *Crears v. Hunter*, 19 Q. B. D. 341, C. A.

In an action by indorsee against acceptor, it is not even *primâ facie* evidence of want of consideration between the defendant and the drawer, to show that the drawer, on the day before the bill became due, procured all the indorsements to be made without consideration, in order that the action might be brought by the indorsee, and on the understanding that the money should be divided between one of the indorsees and the drawer.

*Whitaker v. Edmunds*, 1 Ad. & E. 638. Where the defence to an action on a note states an executory consideration for it, which was never executed,

the defendant is not precluded from proving his defence, although the note professes, on the face of it, to be founded on a past consideration. *Abbott v. Hendricks*, 1 M. & Gr. 791. And generally the consideration or alleged "value received" apparent on the face of a note may be contradicted, but not the contract or promise itself. *Easter v. Jolly*, 1 C. M. & R. 703; and see *ante*, p. 19.

In general, the declarations of a former holder of a bill are not admissible to prove the want of consideration. *Shaw v. Broom*, 4 D. & Ry. 730. But where the plaintiff and the party whose declarations are offered in evidence, are identified in title; as where the plaintiff took the bill from him after it became due; such declarations are admissible. *Benson v. Marshall*, cited *Id.* 732; *Beauchamp v. Parry*, 1 B. & Ad. 89. So, where the plaintiff, though he did not take the bill after it was due, sues as agent for the party who made the declarations. *Welstead v. Levy*, 1 M. & Rob. 138.

*Fraud.*] See sect. 29 (2, 3), and observations thereon, *ante*, p. 354.

Fraud, which makes the contract void or voidable as against the defendant, must be specially pleaded. Rules, 1883, O. xix. r. 15, *ante*, p. 309. Formerly, when the effect of the fraud was that the defendant never made the contract sued on, the defence arose on a traverse of the indorsement or acceptance, as the case might be. *Foster v. Muckinnon*, L. R., 4 C. P. 704, *vide ante*, p. 392. So, when the fraud was one which avoided the consideration, it might be given in evidence under a general plea denying the consideration. *Mills v. Oddy*, 2 C. M. & R. 103. But a special defence would be required now, under r. 15, *supra*. The maker of a note pleaded that it was made and delivered to W. only to get it discounted, and that W. fraudulently indorsed it to the plaintiff, who gave no consideration and knew of the fraud: replication *de injuriâ*; letters written by W., while holder of the note, are not admissible against the plaintiff to prove the fraud, without first establishing, *aliunde*, a privity between the plaintiff and him. *Phillips v. Cole*, 10 Ad. & E. 106. A knowledge by the plaintiff indorsee, of fraud in the concoction of a bill, is no defence if he received it for good consideration from an innocent indorser. *May v. Chapman*, 16 M. & W. 355. As to how far a company are affected by knowledge of their director, from whom they have bought bills which had been fraudulently obtained by him, see *Ex pte. Oriental Commercial Bank*, L. R., 5 Ch. 358.

The holder without indorsement of a draft payable to order, though taken by him *bonâ fide* and for value, has no better title than the person from whom he took it; and such holder is affected by fraud of which he has notice before he obtains the formal indorsement. *Whistler v. Forster*, 14 C. B., N. S. 248; 32 L. J., C. P. 161.

*Forgery.*] See sect. 24, *ante*, p. 358. Forgery of the defendant's signature is, of course, evidence under a traverse of the making, &c.; but, for the purpose of proving the forgery, the defendant cannot be permitted to prove that other bills, with forged signatures of his, had been in the hands of the plaintiff and circulated by him. *Griffiths v. Payne*, 11 Ad. & E. 131. As to the acknowledgment by the defendant of a forged signature, so as to render himself liable thereon by estoppel or ratification, *vide ante*, pp. 367, 368.

Cancellation so imperfectly effected that the bill is still apparently uncancelled, affords no answer as against a *bonâ fide* holder. Therefore, where the acceptor of a bill tore it in two for the purpose of destroying it before circulation, and the drawer fraudulently rejoined the pieces, and passed the bill to a *bonâ fide* holder for value, the acceptor was held liable, whether the fraud amounted to forgery or not. *Ingham v. Primrose*, 7 C. B., N. S. 82; 28 L. J., C. P. 294. The decision in this case was,

however, dissented from by Brett, L.J., in *Buxendale v. Bennett*, 3 Q. B. D., 525, 532, 533, C. A. As to the alteration of the figures in the margin of a bill accepted in blank, see *Garrard v. Lewis*, *ante*, p. 368.

*Illegality.*] See *Defences to Actions on Simple Contracts*,—*Illegality*, *post*, pp. 665 *et seq.* Where a bill has been accepted for good consideration, it seems that in an action against the acceptor, it is no defence that the plaintiff took the bill for illegal consideration. *Flower v. Sadler*, 10 Q. B. D. 572, 575; *per Brett and Cotton*, L.JJ.

*Want of consideration.*—*Onus probandi.*] Sect. 27, *ante*, p. 354, defines valuable consideration and who is a holder for value.

Sect. 30. “(1.) Every party whose signature appears on a bill is *primâ facie* deemed to have become a party thereto for value.

“(2.) Every holder of a bill is *primâ facie* deemed to be a holder in due course” (*vide* sect. 29, *ante*, p. 354); “but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.”

In a case alleged to fall within the latter part of sect. 30 (2), *supra*, the judge is not bound to decide whether fraud has been proved in order to throw this burden on the plaintiff, but only whether there is *any* evidence of fraud for the jury. *Harvey v. Towers*, 5 Exch. 658; 20 L. J., Ex. 318; *Berry v. Alderman*, 14 C. B. 95; 23 L. J., C. P. 34. When the plea alleged that the bill was founded on a wager, and that the indorsements were without value, proof of a wager, void but not unlawful, was held to show only want of consideration and not illegality, and to raise no presumption that the plaintiff was not a *bonâ fide* holder for value; it lay on the defendant, therefore, to prove this. *Fitch v. Jones*, 5 E. & B. 238; 24 L. J., Q. B. 293. Where fraud or illegality, &c., is admitted or proved, the plaintiff must prove that value has been given, in good faith and without notice of the fraud. *Tatum v. Haslar*, 23 Q. B. D. 345.

In cases prior to the J. Acts and B. of Ex. Act, 1882, it was held that an admission of fraud or illegality on the record throws on the plaintiff the burthen of proof as to consideration, but not as to absence of notice of the fraud or illegality, though the reason of the distinction is not very clear. The cases in support of this proposition are collected *ante*, pp. 77, 78; but it is very doubtful if, especially having regard to the terms of sect. 30 (2), *supra*, they would now be followed.

In *Hogg v. Skeen*, 18 C. B., N. S. 426; 34 L. J., C. P. 153, some of the defendants, acceptors, pleaded non-acceptance: held that proof under this issue, that the acceptance was by one of the defendants, who had let judgment go by default, in fraud of the others, his partners, but without showing the plaintiff's privity, obliged the plaintiff to show that he gave value for the bill; in this case *Musgrave v. Drake*, 5 Q. B. 185, was distinguished. It would seem that Rules, 1883, O. xix. r. 15, *ante*, p. 309, would require this defence to be specially pleaded. A bill was sent to the plaintiff by a clerk with a message, which, if delivered, would have shown that the plaintiff had such notice as would have made him not a *bonâ fide* holder for value; the bill was delivered, but the clerk was not called, and it was not proved whether the message had been given or not: held, in an action of trover, that the evidence was not sufficient to rebut the presumption that plaintiff was a *bonâ fide* holder. *Middleton v. Barued*, 4 Exch. 241.

*Illegality of consideration; bona fides of holder.*] See *Defence in actions on simple contracts—Illegality, post*, pp. 665 *et seq.* See sect. 29 (2), *ante*, p. 354, and sect. 30 (2), *ante*, p. 399, and sect. 90, *ante*, p. 350. Where a stolen note was for full value and *bona fide* changed by the plaintiff, a money-changer, who had then no knowledge that it had been stolen, although he had received notices a year previously of this and other stolen notes, and kept such notices filed in his office, but did not examine them, he was, notwithstanding this negligence, held entitled to recover. *Raphael v. Bank of England*, 17 C. B. 161; 25 L. J., C. P. 33; *Bengal, Bank of v. Macleod*, 7 Moo. P. C. 35. See also *L. Joint Stock Bank v. Simmons*, (1892) A. C. 201, D. P. Gross negligence may, however, be evidence of *malu fides*, though not equivalent to it. *Goodman v. Harvey*, 4 Ad. & E. 870. Buying the bill at a considerable undervalue, with a wilful avoidance of inquiry about it, may be evidence of notice of fraud in the concoction of the bill. *Jones v. Gordon*, 2 Ap. Ca. 616, D. P.

Where the bill was given for money lost by gaming, or upon an usurious contract, or to secure money paid to induce a bankrupt's creditors to sign his certificate, various statutes made it a void security, even in the hands of a *bona fide* holder; but, by 5 & 6 W. 4, c. 41, so much of the former statutes as made the securities *void* was repealed, and it was enacted that they should be deemed to have been given for an illegal consideration. So much of sects. 1, 2, as relates to stat. 9 A. c. 19 (which applies to gaming and betting) was not repealed by the Stat. Law Rev. Act, 1874; and under these sections where a cheque drawn by H. was given by him to A. in payment of wagers lost on horse races, and indorsed by A. to W. for value, with notice of its original consideration, W. cannot recover thereon. *Woolf v. Hamilton*, (1898) 2 Q. B. 337, C. A. But the payee of a promissory note given him in repayment of money paid by him at the request of the maker, L., in satisfaction of L.'s gaming debts, might have recovered thereon. *Expte. Pyke*, 8 Ch. D. 754, C. A. Since stat. 55 & 56 V. c. 9, s. 1, *post*, p. 591, however, there would be no consideration for the note. Before the repeal of 5 & 6 W. 4, c. 41, the defendant accepted a bill of exchange to secure a loan at usurious interest; after the repeal, he accepted fresh bills for the amount of the loan and the *usurious* interest, and it was held (Martin, B., *diss.*) that there was good consideration for the new bills. *Flight v. Reed*, 1 H. & C. 703; 32 L. J., Ex. 265. In *Rimini v. Van Praagh, infra*, Cockburn, C.J., intimated that the judgment of Martin, B., in this case, was right. A cheque given in France for gaming debts, and valid there, cannot be sued on here. *Moulis v. Owen*, (1907) 1 K. B. 746, C. A. Where the defence was usury in the indorsement, the usury must have been proved; suspicion is not sufficient to put the plaintiff to proof of consideration; thus, in an action by indorsee against one who had indorsed the bill for the accommodation of the drawer, it was shown that one J., a relation of the plaintiff, got the bill discounted for the drawer, and although it appeared that usurious discount was deducted by J., it was held that, whatever suspicion there might be against the plaintiff, this did not prove usury as against him. *Bassett v. Dodgin*, 10 Bing. 40. The earlier Bankruptcy Acts are now repealed, and the Bankruptcy Acts, 1883, 1890, contain no provision avoiding a security given to induce a creditor to forbear opposing the bankrupt; the consideration, however, for such a security is illegal; *vide post*, p. 671. See *Rimini v. Van Praagh*, L. R., 8 Q. B. 1.

A promissory note given in consideration of the payee's forbearing to prosecute a charge of misdemeanor against the maker cannot be enforced. *Clubb v. Hutson*, 18 C. B., N. S. 414. See also *Brook v. Hook*, L. R., 6 Ex. 89.

Mere wagers, not made *unlawful* by any statutes against gaming, &c., are made *void*, by 8 & 9 V. c. 109, s. 18, which avoids all contracts, parol



or in writing, "by way of gaming or wagering." But, the act does not in terms avoid a security given to pay a wager; it would, therefore, be only without consideration. See *Fitch v. Jones*, ante, p. 399, and *Beeston v. Beeston*, 1 Ex. D. 13.

On issue taken on a defence that a note was given for an illegal consideration, the plaintiff is not bound to produce the note as part of his own case. *Read v. Gamble*, 10 Ad. & E. 597, n.

By sect. 30 (2), ante, p. 399, illegality in the concoction or transfer of a bill, as well as fraud, felony, &c., will, if proved, put the holder on proof of consideration. See cases cited ante, p. 399.

*Agreement at variance with the bill.*] The terms of a bill or note cannot be varied by oral evidence to contradict it, even as between original or immediate parties to it; as by an agreement to renew the bill at maturity. *New London Credit Syndicate v. Neale*, (1898) 2 Q. B. 487, C. A. But it may be varied by a contemporaneous memorandum in writing, whether on the same or a separate paper. *Leeds v. Lancashire*, 2 Camp. 235; *Bowerbank v. Monteiro*, 4 Taunt. 844. The two together may thus form one agreement, and must be treated as such. The defence need not allege that the contemporaneous agreement was in writing; *Young v. Austen*, L. R., 4 C. P. 553; *Corkling v. Massey*, L. R., 8 C. P. 395; but it will not be proved unless an agreement in writing is given in evidence in support of it at the trial. *Young v. Austen*, supra; *Abrey v. Cruix*, L. R., 5 C. P. 37.

In order that the agreement and promissory note may form one agreement, the agreement or memorandum must be between the same parties, and not merely collateral. Thus, in a suit by payee against maker, it is no answer that by an independent contemporary written agreement between the plaintiff on one side, and the defendant and others on the other side, it was agreed that the note should not be payable except in a certain contingency. *Webb v. Spicer*, 13 Q. B. 894; 3 H. L. C. 510. Where a plea alleged a subsequent agreement to vary a note, it could be supported only by proof of an agreement founded on good consideration. *McManus v. Bark*, L. R., 5 Ex. 65.

*Payment.*] Sect. 33. "Where a bill purports to be indorsed conditionally the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not."

Sect. 59. "(1.) A bill is discharged by payment in due course by or on behalf of the drawee or acceptor.

"Payment in due course' means payment made at or after the maturity of the bill to the holder thereof in good faith" (vide sect. 90, ante, p. 350) "and without notice that his title to the bill is defective.

"(2.) Subject to the provisions hereinafter contained, when a bill is paid by the drawer or an indorser it is not discharged; but

"(a.) Where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill:

"(b.) Where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill.

"(3.) Where an accommodation bill is paid in due course by the party accommodated the bill is discharged."

See sect. 60, post, p. 406, as to the payment by the banker on whom it is drawn, of a bill payable on demand.

Sect. 71 (3), *ante*, p. 355, relates to the payment of bills drawn in sets.

“(5.) When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof.

“(6.) Subject to the preceding rules, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged.”

Payment or satisfaction must be specially pleaded. For presumptive evidence in support of such plea, see the cases cited *ante*, pp. 36 *et seq.* Payment of the exact sum due on a note by the defendant in full satisfaction of debt and damages is sufficient, and entitles the defendant to a verdict, and the jury are not bound to give interest, or even nominal damages, for the detention of the debt. *Beaumont v. Greathead*, 2 C. B. 494. This was an action of debt; but in an action by indorsee against acceptor, a plea *puis darrein continuance*, that an earlier indorser had paid to plaintiff, then the holder, who accepted the full amount of the bill, and also interest thereon, in full satisfaction of the bill, and all moneys due in respect thereof, not mentioning damages or costs, was bad. *Goodwin v. Cremer*, 18 Q. B. 757; 22 L. J., Q. B. 30; see also *Ash v. Pouppeville*, L. R., 3 Q. B. 86. Satisfaction to one of several partners is a satisfaction to all. *Jacaud v. French*, 12 East, 317; see also 53 & 54 V. c. 39, s. 5, *post*, p. 556. And, payment by one, not sued, of several joint and several makers of a promissory note, is payment by the defendant. *Beaumont v. Greathead*, *supra*. So, renewal of a joint and several note by one of the makers, and payment of such renewed note, is payment by all of the first note. *Thorne v. Smith*, 10 C. B. 659; 20 L. J., C. P. 71. But, the mere acceptance by the payee, from one of two joint and several makers of a note, of a mortgage and covenant to pay the amount of the note, is no defence to an action against the other; for the securities are not co-extensive; and proof that the mortgage was given to secure the same debt does not prove that it was accepted in lieu and satisfaction of the note. *Ansell v. Baker*, 15 Q. B. 20.

A judgment and execution, without satisfaction, against a subsequent party to a bill, will be no discharge of a prior party; it is only an extinguishment between the parties to the judgment. *Hayling v. Mulhall*, 2 W. Bl. 1235; as explained in *English v. Darley*, 2 B. & P. 62. So, the acceptor was liable at the suit of an indorsee, although judgment had been obtained against the acceptor on the bill at the suit of a subsequent indorsee, and he had been taken in execution on that judgment. *Woodward v. Pell*, L. R., 4 Q. B. 55. But, a composition with the acceptor, and the taking of a third person's note as a security for it, operates as a satisfaction of the bill. *English v. Darley*, *supra*; *Lewis v. Jones*, 4 B. & C. 506. Where the plaintiff paid money to A. for a bill accepted by a third party and indorsed in blank; the plaintiff intending to buy the bill and be the holder thereof, and A. believing he was paying the amount for the acceptor; the court held, that if the plaintiff did not make the payment in order to discharge the acceptor, nor by his expressions and conduct led A. so to suppose, he might recover on the bill. *Lyon v. Maxwell*, 18 L. T. 28; Ex. H. T. 1868. Where the first bill is “renewed” by a second, no action can be maintained during the currency of the latter. *Kendrick v. Lomax*, 2 C. & J. 405. But, where the plaintiff held a bill accepted by defendant, who, when it became due, asked for time, and three months afterwards gave plaintiff another bill for the same amount, plaintiff telling him at the same time that something was due for interest, and continuing to hold the first bill; and the second bill was paid after it became due; it was held that the plaintiff was entitled to sue on the first

bill to recover the interest. *Lumley v. Musgrave*, 4 N. C. 9. Where one of three partners, after a dissolution of partnership, undertook, by deed, to pay a partnership debt on two bills of exchange drawn by them, and the owner consented to take the separate notes of the one partner for the amount, reserving his right against all three, and retaining possession of the original bills; it was held that, the separate notes having proved unproductive, he might resort to his remedy against the other partners, and that the taking of the separate notes, and afterwards renewing them several times successively, did not amount to satisfaction of the joint debt. *Bedford v. Deakin*, 2 B. & A. 210. So, where, on a bill of exchange being dishonoured, the acceptor transmitted a new bill for a larger amount to the payee, but had not any communication with him respecting the first; and the payee discounted the second bill with the holder of the first, which he received back as part of the amount, and afterwards, for a valuable consideration, indorsed it to the plaintiff; it was held that the second bill was merely a collateral security, and that the receipt of it by the payee did not exonerate the drawer of the first. *Pring v. Clarkson*, 1 B. & C. 14; see also *Adams v. Bingley*, 1 M. & W. 192.

The principle of sect. 59 (2), *ante*, p. 401, applies to a part payment, and to cases in which the bill is not strictly an accommodation bill. *Cook v. Lister*, 13 C. B., N. S. 543; 32 L. J., C. P. 121. But, where an accommodation acceptor pleaded payment by the drawer in an action by an indorsee, proof that the drawer had handed a forged acceptance to the indorsee for the purpose of retiring the outstanding bill, and that the indorsee, being his banker, had credited the drawer for the amount in his banking account, was held insufficient to prove payment, the forged acceptance being, in fact, no payment at all. *Bell v. Buckley*, 11 Exch. 631; 25 L. J., Ex. 163. Payment by drawer, who is also payee, to the plaintiff himself, his indorsee, is no answer to an action against the acceptor for value, if the bill were left in the plaintiff's hand, to sue on it as trustee for the drawer; *Williams v. James*, 15 Q. B. 498; 19 L. J., Q. B. 445; nor, if he sue against the will of the drawer. *Jones v. Broadhurst*, 9 C. B. 173. If the acceptor discount his own acceptance for the drawer, this is not payment so as to bar an action on the bill against the drawer by a *bonâ fide* indorsee for value, who has taken under an indorsement by the acceptor. *Attenborough v. Mackenzie*, 25 L. J., Ex. 224. "Retiring" a bill by acceptor is equivalent to payment, and stops the circulation; but retiring by an indorser only takes it out of circulation as regards himself, and he retains the same remedies as if he had paid his indorsee in due course. *Elsam v. Denny*, 15 C. B. 87; 23 L. J., C. P. 190.

Where B., a banker or other agent, is employed by H., the holder of a bill, to receive payment of it from the acceptor, and receives payment from him clogged with a condition, without assent to which H. is not entitled to retain the money paid, B. is not entitled to treat such conditional payment as if it were an absolute payment, and to cancel the bill as paid, before he has received H.'s assent to the condition. *Bank of Scotland v. Dominion Bank (Toronto)*, (1891) A. C. 592, D. P. If before receiving such assent, B. allow the bill to be cancelled, he is liable to H. for the damage he thereby sustains. S. C.

On a defence of payment, neither the plaintiff nor the defendant is bound to produce the security; and where a plea stated, by way of introduction to an allegation of payment, that the note was given in lieu of a former one, and the plaintiff replied *de injuriâ* generally, it was held enough to show payment without proving the superfluous introductory statement. *Shearm v. Burnard*, 10 Ad. & E. 593. But, if on a special defence of satisfaction, it become necessary for the defendant to prove the bill or note, he cannot

give secondary evidence of it without having given notice to produce it. *Goodred v. Armour*, 3 Q. B. 956.

By sect. 24, *ante*, p. 358, a person claiming under a forged indorsement cannot give a discharge for the bill, except under sect. 60, *post*, p. 406, in the case of a banker.

*Voluntary discharge and waiver.*] Sect. 61. "When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged." "In his own right" here means "having a right not subject to that of any one else but his own—good against all the world," and is not used in contradistinction to a right in a representative capacity. *Nash v. De Freville*, (1900) 2 Q. B. 72, 89, C. A.

Sect. 62. "(1.) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor, the bill is discharged.

"The renunciation must be in writing, unless the bill is delivered up to the acceptor.

"(2.) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation."

Sect. 63. "(1.) Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged.

"(2.) In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any indorser who would have had a right of recourse against the party whose signature is cancelled, is also discharged.

"(3.) A cancellation made unintentionally, or under a mistake, or without the authority of the holder is inoperative; but where a bill or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority."

A promissory note payable on demand with interest, is "at maturity," within sect. 62, as soon as it is given. *Edwards v. Walters*, (1896) 2 Ch. 157, C. A.; *In re George*, 44 Ch. D. 627.

The provision in sect. 62 (1), as to the renunciation being in writing, is new. It must itself be the record of an absolute and unconditional renunciation of rights, not a mere note of the renunciation, or of an intention to renounce: S. C. As to signature, *vide*, S. C. *Id.* 632.

The renunciation must be unequivocal:—Thus, a declaration by the holder, that "he should look to the drawer for payment, and that he wanted no more of the acceptor than another debt not connected with the bill," will not be sufficient to discharge the acceptor. *Parker v. Leigh*, 2 Stark. 228; *Adams v. Gregg*, *Id.* 531.

Delivery up of the bill to the devisee of the acceptor is not within sec. 62. *Edwards v. Walters*, *supra*. *Semble*, delivery to his personal representative is sufficient. S. C.

*Alteration of the position of the parties, giving time, &c.*] Giving time to or releasing a principal discharges a surety, *vide post*, p. 484; and therefore giving time to the acceptor discharges the drawer and indorsers. *English v. Darley*, 2 B. & P. 61. So, giving time to any prior party discharges subsequent ones. *Hall v. Cole*, 4 Ad. & E. 577. This defence must be pleaded specially; so that the pleadings on the record sufficiently apprise the parties of the nature of the requisite proofs. There must be a binding agreement founded on a good consideration, on which an action would lie, if broken.

*Moss v. Hall*, 5 Exch. 46. An agreement between the drawer of an accommodation bill, and the holder for its renewal does not discharge the acceptor who refuses to accept a bill in renewal thereof. *Torrance v. Bank of British N. America*, L. R., 5 P. C. 246. Forbearance to sue the acceptor is not of itself equivalent to giving time. *Walwyn v. St. Quintin*, 1 B. & P. 652; *English v. Darley*, *supra*; *Price v. Kirkham*, 3 H. & C. 437; 34 L. J., Ex. 35. An agreement between the plaintiff and a stranger to give time to the acceptor, will not discharge an indorser, unless the acceptor, the principal debtor, was party to the agreement. *Lyon v. Holt*, 5 M. & W. 250; *Fraser v. Jordan*, 8 E. & B. 303; 26 L. J., Q. B. 288. Taking a *cognovit* from the acceptor, after action brought, by which the time of obtaining judgment against him is not deferred, is not a giving of time. *Jay v. Warren*, 1 C. & P. 532; *Lee v. Levy*, 4 B. & C. 390.

It is a good equitable defence, that the defendant made the note jointly with A. as surety only for him, of which the plaintiff had notice at the time and that the plaintiff gave time to A. without the defendant's knowledge; *Pooley v. Harradine*, 7 E. & B. 431; 26 L. J., Q. B. 156; *Taylor v. Burgess*, 5 H. & N. 1; 29 L. J., Ex. 7; *Greenough v. M'Clelland*, 30 L. J., Q. B. 15, Ex. Ch.; even though, although the plaintiff knew the defendant was only surety, he did not agree, nor did the defendant stipulate, that he should be treated by the plaintiff as surety only, or otherwise than as a maker of the note. S. C. So, in equity, giving time to the drawer or indorser of an accommodation acceptance, with notice that it is such, releases the acceptor. *Bailey v. Edwards*, 4 B. & S. 761; 34 L. J., Q. B. 41; *Edwin v. Lancaster*, 6 B. & S. 571. It is sufficient if the plaintiff knew the position of the defendant before time is given, though he did not know it at the time of the contract. *Oriental Financial Cor. v. Overend, Gurney & Co.*, L. R., 7 Ch. 142; L. R., 7 H. L. 348.

If, however, the agreement for giving time to or releasing the principal be qualified by a reservation of remedies against the surety, the surety is not discharged. *Bateson v. Gosling*, L. R., 7 C. P. 9; *Muir v. Crawford*, L. R., 2 H. L. Sc. 456; and cases cited *post*, pp. 484, 485.

The indorser of a bill of exchange who has paid it at maturity is entitled to the benefit of any securities deposited to secure the payment thereof by prior parties thereto. *Duncan v. N. & S. Wales Bank*, 6 Ap. Ca. 1, D. P. *Vide post*, p. 485.

*Infancy.*]—An acceptance given by an infant, even for necessities, is void. *Williamson v. Watts*, 1 Camp. 552. And by 55 & 56 V. c. 4, s. 5, *post*, p. 676, any instrument, negotiable or other, given by an infant, after he has come of age, to secure payment of money which in whole or part represents a loan made to him during infancy, shall, so far as represents such loan, be void absolutely against all persons whomsoever.

#### ACTION ON CHEQUES.

*Statute.*] The general provisions of the B. of Ex. Act, 1882, relating to cheques are as follows:—

Sect. 73. "A cheque is a bill of exchange drawn on a banker" (*vide* sect. 2, *ante*, p. 350) "payable on demand.

"Except as otherwise provided in this Part" (*i.e.* Part III. comprising sects. 73 to 82), "the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque."

These provisions of the Act will be found under appropriate headings, *ante*, pp. 350 *et seq.*

Sect. 74. "Subject to the provisions of this Act—

"(1.) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid.

"(2.) In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.

"(3.) *The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him.*"

Sect. 75. "The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by—

"(1.) Countermand of payment:

"(2.) Notice of the customer's death."

Sect. 60. "When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee, or any subsequent indorsement, was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority."

The Stat. 16 & 17 V. c. 59, s. 19, also provides "that any draft or order drawn upon a banker for a sum of money payable to order on demand which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such indorsement, or any subsequent indorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable either by the drawer or any indorser thereof." This provision, which is still in force, has been extended to any document issued by the Paymaster-General, in pursuance of Stat. 35 & 36 V. c. 44, which authorizes the payment of money. *Id.*, s. 11.

These sections apply to bankers only. *Halifax Union v. Wheelwright*, L. R., 10 Ex. 183. An indorsement "*per proc.*," or "as agent," is within them. *Charles v. Blackwell*, 1 C. P. D. 548; 2 C. P. D. 151, C. A. Where a banker, A., has two customers, B. and C., a cheque drawn by B. on A., and indorsed by C. without authority, and paid by him to his account with A., and credited by A. to C., is paid by A. to C. within these sections. *Bissell v. Fox*, 53 L. T. 119, E. T., 1885, C. A.; *Gordon v. L. City & Midland Banking Co.*, 1902, 1 K. B. 242, C. A.; affirm. on this point, (1903) A. C. 240, D. P. They protect only the banker on whom the cheque is drawn, and the drawer may, in an action for money had and received, recover the amount of the cheque from any person who has obtained payment thereof, through a forged indorsement. *Ogden v. Benas*, L. R., 9 C. P. 513; *Bobbett v. Pinkett*, 1 Ex. D. 368; *Gr. W. Ry. Co. v. L. & County Banking Co.*, post, p. 411. So might the owner of a cheque; even against a banker who had received the money for a customer. *Arnold v. Cheque Bank*, 1 C. P. D. 578; *Gordon v. L. City & Midland Banking Co.*, supra. See also *Lacave v. Credit Lyonnais*, (1897) 1 Q. B. 148. Now, however, by sect. 82, post,

p. 410, where the cheque is crossed, "a banker who has in good faith and without any negligence received payment for a customer," is protected in such a case. *Matthiessen v. L. & County Bank*, 5 C. P. D. 7, decided on 39 & 40 V. c. 81, s. 12. A banker's draft addressed by one branch of a bank to another branch is a draft or order within 16 & 17 V. s. 59, s. 19, *supra*. *Gordon v. L. City & Midland Banking Co.*, *ante*, p. 406, in D. P. reversing C. A. on this point.

The only effect of the initialling of a cheque by the drawer's banker is to show "on the face that it is drawn in good faith on funds sufficient to meet its payment," and to add the credit of the bank. *Gaden v. Newfoundland Savings Bank*, (1899) A. C. 281, J. C.

There is now no restriction on the amount of a cheque for the Stat. 48 G. 3, c. 88, s. 2, is repealed by the B. of Ex. Act, 1882, s. 96.

A cheque is not invalid by reason of being ante- or post-dated, see sect. 13 (2), *ante*, p. 353. Nor is it now illegal, under the stamp laws, to post-date a cheque, whether payable to bearer or order; *vide ante*, p. 238; but a partner in a non-trading firm cannot bind his firm by drawing a post-dated cheque in the name of the firm. *Forster v. Mackreth*, L. R., 2 Ex. 163. It may be mentioned that the drawer thereof is under no obligation for the benefit of a third person to stop its payment before it is due. *Ex. pte. Richdale*, *infra*. As to a banker's liability with respect to post-dated cheques, *vide post*, p. 409.

As to effect of taking an overdue cheque, see sect. 36 (2, 3), *ante*, p. 394. See also *L. & County Banking Co. v. Groome*, 8 Q. B. D. 288.

*Payee, bearer, or indorsee against drawer.*] The plaintiff may be put to prove the drawing and the presentment to, and non-payment by, the banker, and also notice to the drawer of the non-payment, unless the facts excuse such notice. The evidence necessary in support of the plaintiff's case will be gathered from what has been said under the head of *Bills of exchange*, *ante*, pp. 361 *et seq.*

A banker who has carried to the credit of his customer's account the amount of a cheque handed to him for that purpose becomes a holder thereof for value, and may sue the drawer thereon, whether the account is over-drawn; *Currie v. Misa*, L. R., 10 Ex. 153, Ex. Ch.; affirmed on another ground, in D. P., 1 Ap. Ca. 554; *M'Lean v. Clydesdale Banking Co.*, 9 Ap. Ca. 95; or not; *Ex pte. Richdale*, 19 Ch. D. 409, C. A. The banker may recover the full amount of the cheque from the drawer, although on its dishonour he debited his customer's account with the amount. *R. Bank of Scotland v. Tottenham*, (1894) 2 Q. B. 715, C. A.

Sect. 45 (2), *ante*, p. 378, provides that presentment must be within a reasonable time after issue, having regard to the usage of trade and particular circumstances.

As between holder and drawer mere delay in presenting for payment, short of six years, is no answer, unless the defendant has been prejudiced by it; as by the failure of the bank after the drawing of the cheque. *Robinson v. Hawksford*, 9 Q. B. 52; *Laws v. Rand*, 3 C. B., N. S. 442; 27 L. J., C. P. 76; in which case the drawer is released from liability; sect. 74 (1), *ante*, p. 406. The reasonable time under sect. 74 (1, 2), *ante*, p. 406, for presentation in order to avoid this risk, is the day following the day of receipt. *Moule v. Brown*, 4 N. C. 266; *Alexander v. Burchfield*, 7 M. & Gr. 1061. But, if the holder of the cheque do not live in the same place with the drawee, he may send it to his banker or other agent by the post the next day after he received it, and the agent should present it not later than the day after he received it; *Rickford v. Ridge*, 2 Camp. 537; *Hare v. Henty*, 10 C. B., N. S. 65; 30 L. J., C. P. 302; *Pridcaux v. Criddle*,

L. R., 4 Q. B. 455; and this holds good as between banker and customer. S. CC.; *Bailey v. Bodenham*, 16 C. B., N. S. 288; 33 L. J., C. P. 262.

*In re Boyse*, 33 Ch. D. 612, it was held that a delay in presentment exceeding six years was no answer.

The process of presenting cheques through the banker's clearing house, is described in the special verdict, in *Warwick v. Rogers*, 5 M. & Gr. 340, 348. Such presentment has been held to be good, *vide ante*, p. 379. Presentment of a cheque to a banker through the post is a proper mode of presentment. *Heywood v. Pickering*, L. R., 9 Q. B. 428, following *Prideaux v. Criddle*, L. R., 4 Q. B. 455, 461. If so presented and the banker delay to return the cheque or to remit the money, any loss thereby occasioned will, as between the holder and the drawer, fall on the latter. *Heywood v. Pickering*, *supra*.

By sect. 50 (2) (c), (4), *ante*, p. 387, notice of dishonour is excused where the banker is as between himself and the drawer under no obligation to pay the cheque, or (5), where the drawer has countermanded payment. See *Carew v. Duckworth*, L. R., 4 Ex. 313.

A person taking a cheque payable to order, but without indorsement, has no better title than the person from whom he took it, although he took it *bonâ fide* and without notice; and he is affected by that person's fraud, of which he had notice before he obtained a formal indorsement. *Whistler v. Forster*, 14 C. B., N. S. 248; 32 L. J., C. P. 161. See sect. 31, *ante*, p. 369, and sect. 29, *ante*, p. 354.

*Indorsee against indorser.*] Where the cheque has been indorsed, and the indorser is sued by the holder, the plaintiff is bound to show due diligence in endeavouring to obtain payment, and giving notice of non-payment to the defendant. By sect. 45 (2), *ante*, p. 378, the cheque must be presented within a reasonable time or the indorser will be discharged. As to reasonable time, see *Moule v. Brown*, and other cases cited *ante*, p. 407.

By sect. 56, "where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course." As to a holder in due course, see sect. 29, *ante*, p. 354.

*Banker's liability in respect of cheques.*] Although by sect. 53 (1), *ante*, p. 355, "a bill of itself does not operate as an assignment of funds in the hands of the drawer available for payment thereof, and the drawee of a bill who does not accept as required by this Act, is not liable" thereon, yet there is an implied contract by a banker with his customer to cash cheques within a reasonable time after he has effects; *Marzetti v. Williams*, 1 B. & Ad. 415; and the customer, if a trader, is entitled to temperate damages on his cheque being, under such circumstances, dishonoured, without showing special damage; *Rolin v. Steward*, 14 C. B. 595; 23 L. J., C. P. 148; but evidence of special damage, that is, loss of credit and custom from particular individuals, cannot be recovered unless alleged in the claim. *Fleming v. Bank of New Zealand*, (1900) A. C. 577, J. C. A banker who had been in the habit of cashing cheques of the plaintiff when there were securities of his at the bank, though the cash balance was against him, was held liable for dishonouring his cheques. *Cumming v. Shand*, 5 H. & H. 95; 29 L. J., Ex. 129. So, where the customer placed in his bankers' hands a sum to meet a particular bill, and the bankers, instead of meeting the bill, placed it to the credit of an overdrawn account, it was held that the bankers were liable for the amount of the bill. *Hill v. Smith*, 12 M. & W. 618. But the bankers may, unless they have agreed otherwise, without notice to their customer, combine accounts he has with several branches of the bank, and dishonour his cheques, if on the whole state of account he have not sufficient



assets; *Garnett v. McKewan*, L. R., 8 Ex. 10; for such branches form but one bank; *Prince v. Oriental Bank Cor.*, 3 Ap. Ca. 325, J. C.; except for the purpose of honouring cheques drawn on a particular branch; *Woodland v. Fear*, 7 E. & B. 519; 26 L. J., Q. B. 202; and, of calculating the time for giving notice of dishonour. *Clode v. Bayley*, 12 M. & W. 51, ante, p. 383. Where all debts of a customer, R., in the hands of his banker, W., have been attached under Rules S. C., 1883, O. lxv. r. 1, to answer the judgment debt of H. against R., W. is not bound to honour any cheque drawn on him by R., although R.'s balance in W.'s hands exceeds the judgment debt. *Rogers v. Whiteley*, (1892) A. C. 118, D. P. *Secus*, after W. has paid into court the amount of the judgment debt. *Yates v. Terry*, (1902) 1 K. B. 527, C. A. As to what amounts to the closing of a customer's account, see *Berry v. Halifax, &c., Banking Co.*, (1901) 1 Ch. 188.

Where A. hands his banker, B., a cheque drawn by C. on B., with directions to place it to A.'s account, B. takes the cheque as agent for A., to be dealt with as a cheque upon another banker, and if B. dishonours the cheque and gives A. notice in due course, B. is not liable. *Boyd v. Emmerson*, 2 Ad. & E. 184. *Secus*, if B. on receiving the cheque had agreed to cash or give credit for it. S. C., *Id.* 200, 202.

A customer is bound by the custom of bankers. *Emanuel v. Roberts*, 9 B. & S. 121. In this case, bankers were, on this ground, held justified in dishonouring a cheque which had been previously presented at the bank before it was due, and then marked "post-dated" by them. In consequence, however, of the repeal of the enactments prohibiting the post-dating of cheques (*vide ante*, p. 238) this custom no longer exists, and a banker will now pay a cheque, when due, although it has been marked "post-dated."

*Crossed cheques.—Statute.*] Sect. 76. "(1.) Where a cheque bears across its face an addition of—

"(a.) The words 'and company' or any abbreviation thereof between two parallel transverse lines, either with or without the words 'not negotiable'; or

"(b.) Two parallel transverse lines simply, either with or without the words 'not negotiable';

that addition constitutes a crossing, and the cheque is crossed generally.

"(2.) Where a cheque bears across its face an addition of the name of a banker, either with or without the words 'not negotiable,' that addition constitutes a crossing, and the cheque is crossed specially, and to that banker."

Sect. 77. "(1.) A cheque may be crossed generally or specially by the drawer.

"(2.) Where a cheque is uncrossed, the holder may cross it generally or specially.

"(3.) Where a cheque is crossed generally the holder may cross it specially.

"(4.) Where a cheque is crossed generally or specially, the holder may add the words 'not negotiable.'

"(5.) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection.

"(6.) Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself."

Sect. 78. "A crossing authorized by this Act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorized by this Act, to add to or alter the crossing."

Sect. 79. "(1.) Where a cheque is crossed specially to more than one

banker except when crossed to an agent for collection, being a banker, the banker on whom it is drawn shall refuse payment thereof.

“(2.) Where the banker on whom a cheque is drawn which is so crossed, nevertheless pays the same, or pays a cheque crossed generally, otherwise than to a banker, or if crossed specially, otherwise than to the banker to whom it is crossed, or his agent for collection, being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

“Provided, that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to, or altered otherwise than as authorized by this Act, the banker paying the cheque in good faith, and without negligence shall not be responsible, or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorized by this Act, and of payment having been made otherwise than to a banker or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker, as the case may be.”

Sect. 80. “Where the banker, on whom a crossed cheque” (*vide* sects. 76, 77, *ante*, p. 409) “is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof.”

Sect. 81. “Where a person takes a crossed cheque which bears on it the words ‘not negotiable,’ he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.”

Sect. 82. “Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.”

Sect. 95. “The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend.”

The above sections replace the Crossed Cheques Act, 1876 (39 & 40 V. c. 81), which was in very similar terms.

By the Revenue Act, 1883 (46 & 47 V. c. 55), s. 17, the above sections, 76—82, “shall extend to any document, issued by a customer of any banker, and intended to enable any person or body corporate, to obtain payment from such banker, of the sum mentioned in such document, and shall so extend, in like manner, as if the said document were a cheque”; it does not, however, “render such document a negotiable instrument.” It applies to such documents drawn on the Paymaster-General by public officers.

The holder who may cross a cheque or add a special crossing to a general one under sect. 77 (3), *ante*, p. 409, need not be a holder for value. *Akrokerri Mines v. Economic Bank*, *post*, p. 411.

As the crossing is by sect. 78, *ante*, p. 409, a material part of the cheque, any alteration thereof will in general (see sect. 64 (1), *ante*, p. 395) avoid the cheque.

The above sections do not affect the negotiability of a cheque, whether crossed *generally* or *specially*, unless also marked “not negotiable.” See *Smith v. Union Bank of London*, L. R., 10 C. P. 291; 1 Q. B. D. 31, C. A.

Hence it seems that the *bonâ fide* holder for value of a cheque crossed only, without the addition of the words "not negotiable," is the *true owner* thereof, to whom the banker paying the cheque otherwise than as directed by the crossing is liable under sect. 79 (2), *ante*, p. 410, and, that the payee or other person who was formerly holder, but lost the cheque while in a negotiable state, has no remedy given him by the section. See S. C. If, however, the cheque is also marked "not negotiable," then, although it continues to be *transferable* so that the holder for the time being can sue thereon, yet, by sect. 81, the holder can have no better title than his transferor had. *Gt. W. Ry. Co. v. L. & County Banking Co.*, *infra*. A banker, however, who *bonâ fide* and without negligence collects such a cheque for a customer is protected by sect. 82. See S. C.; *Matthiessen v. L. & County Bank*, 5 C. P. D. 7. The protection of sect. 82 applies although the customer's account is overdrawn when the cheque is paid in. *Clarke v. L. & County Banking Co.*, (1897) 1 Q. B. 552. But it extended only to a cheque paid in for collection; where the banker B. at once credited the customer C. with the amount and allowed him to draw against it, before the cheque was cleared, B. was not protected by sect. 82. *Gordon v. L. City & Midland Banking Co.*, (1902) 1 K. B. 242, C. A.; (1903) A. C. 240, D. P. Where however, B., although at once crediting C. in his ledger, did not enter it in C.'s pass-book or allow C. to draw against it until it had been cleared, B. was protected. *Akrockeri Mines v. Economic Bank*, (1904) 2 K. B. 465. And now by 6 E. 7, c. 17, s. 1, "a banker receives payment of a crossed cheque for a customer within the meaning of" sect. 82, "notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof."

There is no protection in respect of the collection of cheques paid by C. to his account with B., uncrossed, and which are afterwards crossed by B. *Gordon v. L. City & Midland Banking Co.*, *supra*. As to what is negligence within sect. 82, see *Bissell v. Fox*, 51 L. T. 663; affirm. on this point in C. A. 53 L. T. 119, E. S. 1885. "The character in which a bank received payment of a cheque is a question of fact," *per* Ld. Macnaghten, (1903) A. C. 244. Sect. 82 applies only to the case of a customer of the bank. *Lacave v. Crédit Lyonnais*, (1897) 1 Q. B. 148. Whether a person is such customer is a question of fact. *Gt. W. Ry. Co. v. L. & County Banking Co.*, (1899) 2 Q. B. 172; (1900) 2 Q. B. 464, 472, *per* A. L. Smith, M.R. The decision in this case was reversed in D. P. on the ground that the person was *not* a customer. S. C., (1901) A. C. 414. To make a person A., a customer of a banker B., there must be some sort of account between them, either a deposit account, or a current account, or some similar relation. *Id.* 420, *per* Ld. Davey. The habitual lodging of cheques by A. with B. for presentation on behalf of A. and, *when honoured*, the crediting and payment of the amount to A. seems sufficient. *Id.* 422, *per* Ld. Brampton. Where however, A., who has no account with B., hands B. a cheque drawn by C. on another bank, and B. by his direction places part of the amount to the credit of a customer D. and at once pays A. the balance in cash, A. does not thereby become a customer of B., and B. collects the amount of the cheque for B. himself, and not for A. S. C. And where such cheque, crossed "not negotiable," had been fraudulently obtained by A. from C., C. may recover from B. the amount of the cheque which B. had collected. S. C. A banker's draft addressed by one branch of a bank to another branch is not a cheque within sect. 82, or 46 & 47 V. c. 55, s. 17, *supra*. *Gordon v. L. City & Midland Banking Co.*, *supra*.

The drawer of a cheque may disallow payment made by his banker to a banker other than the one named in the crossing or he may ratify it, and thereby make the payment a good payment by himself to the holder. *Bobbett v. Pinkett*, 1 Ex. D. 368. The transferability of a cheque is not restricted

by a direction, written on its face above a crossing to a bank, to pay the amount to the account of the payee at that bank. *National Bank v. Silke*, (1891) 1 Q. B. 435, C. A.; see *Akrokkerri Mines v. Economic Bank*, *ante*, p. 411.

*Defences generally to Actions on Cheques.*

*Vide ante*, p. 394.

#### ACTION ON PROMISSORY NOTES.

*Statute.*] The general provisions of the B. of Ex. Act, 1882, relating to promissory notes are as follows:—

By sect. 83, “(1.) A promissory note is an unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay, on demand, or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.

“(2.) An instrument in the form of a note payable to maker’s order is not a note within the meaning of this section unless and until it is indorsed by the maker.

“(3.) A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof.

“(4.) A note which is, or on the face of it purports to be, both made and payable within the British Islands is an inland note. Any other note is a foreign note.”

Sect. 84. “A promissory note is inchoate and incomplete until delivery” (*vide* sects. 2, 21, *ante*, pp. 350, 353) “thereof to the payee or bearer.”

Sect. 85. “(1.) A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally, according to its tenour.

“(2.) Where a note runs ‘I promise to pay,’ and is signed by two or more persons, it is deemed to be their joint and several note.”

Sect. 86. “(1.) Where a note payable on demand” (*vide* sect. 10, *ante*, p. 352) “has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it be not so presented the indorser is discharged.

“(2.) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case.

“(3.) Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue.”

Sect. 89. “(1.) Subject to the provisions in this Part” (*i.e.*, Part IV., comprising sects. 83 to 89), “and, except as by this section provided, the provisions of this Act” (sects. 1—72, *vide ante*, pp. 349—405), “relating to bills of exchange apply, with the necessary modifications, to promissory notes.

“(2.) In applying those provisions, the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill, payable to drawer’s order.

“(3.) The following provisions as to bills do not apply to notes; namely, provisions relating to—

“(a.) Presentment for acceptance;

“(b.) Acceptance;

“(c.) Acceptance *supra* protest;

“(d.) Bills in a set.

“(4.) Where a foreign note is dishonoured protest thereof is unnecessary.”

Sect. 91 (2), *ante*, p. 350, enables, but does not require, a corporation to make a note under its common seal.

Sect. 86 (3), *ante*, p. 412, prevents sect. 36 (3), *ante*, p. 394, from applying to notes. It seems that by reason of the Stamp Acts (see sect. 97 (3 a), *ante*, p. 351), sect. 56, *ante*, p. 391, does not apply to notes. *Vide ante*, pp. 244, 245.

It follows from sect. 89, *ante*, p. 412, that the decisions on the corresponding sections relating to bills of exchange will apply to notes, *vide ante*, pp. 349-405.

A promissory note is not invalidated by a clause therein allowing time, &c., to be given without prejudicing the rights of the holder. *Kirkwood v. Carroll*, (1903) 1 K. B. 531, C. A.

*Bank notes—Amount of note.]* The Acts relating to the issue of promissory notes payable to bearer on demand, or bank notes, are cited under *Stamps—Bank notes, ante*, pp. 237, 238. Such notes must not be for less than 5*l.*; stat. 7 G. 4, c. 6, s. 3. Other restrictions were placed by stats. 48 G. 3, c. 88, s. 2, and 17 G. 3, c. 30, s. 1, but these are now repealed by the B. of Ex. Act, 1882, s. 96.

The plaintiff must be the holder of the note. Where a note was deposited with a stakeholder for the payee, and the stakeholder has refused to hand it over, the payee cannot sue on the note as holder. *Latter v. White*, L. R., 5 H. L. 578.

#### *Payee against Maker.*

*Liability of maker.]* Sect. 88. "The maker of a promissory note by making it—

"(1.) Engages that he will pay it according to its tenour;

"(2.) Is precluded from denying to a holder in due course" (*vide* sect. 29, *ante*, p. 354) "the existence of the payee and his then capacity to indorse."

*Proof of making the note.]* The making of the note is proved by proving the handwriting of the defendant; or, if made by an agent, by proof of the handwriting and authority of such agent. An admission by the defendant that the handwriting is his will be sufficient proof, though it was made pending a treaty for a compromise. *Waldridge v. Kennison*, 1 Esp. 143. An offer on the part of the defendant, after the note has become due, to give another note to the plaintiff instead of it, is an admission of the plaintiff's title. *Bosanquet v. Anderson*, 6 Esp. 43. An admission of his signature by one of the parties, not being partners, will only be evidence against himself. *Gray v. Palmers*, 1 Esp. 135.

An agent who makes a note in his own name will be personally liable unless he distinctly show on the face of it that he signs as agent only. See sect. 26, *ante*, p. 358. Thus, "on demand we jointly and severally promise to pay E. H. or order 250*l.*, value received, for and on behalf of the W. N. Association; P. S., J. W., Directors," was held to mean jointly and personally, and, therefore, to make the persons signing individually liable. *Healey v. Story*, 3 Exch. 3; *Penkivill v. Connell*, 5 Exch. 381; *Bottomley v. Fisher*, 1 H. & C. 211; 31 L. J., Ex. 417. The same rule applies where the note is a joint one only. *Price v. Taylor*, 5 H. & N. 540; 29 L. J., Ex. 331; *Gray v. Raper*, L. R., 1 C. P. 694; and *Courtauld v. Sanders*, 16 L. T. 562; T. T. 1867, C. P. So, where a note is signed by the directors of a company, and the seal of the company is affixed, they are personally liable, unless it appear

on the note that they signed for the company only. *Dutton v. Marsh*, L. R., 6 Q. B. 361. But where the defendants, being directors of the company, signed the following note: "Three months after date we jointly promise to pay F. S. or order, 600*l.*, for value received in stock, on account of the L. & B. Company, Limited, J. M., H. W. W., J. H., Directors," it was held that it sufficiently appeared that the note was made in the name of the company, within 19 & 20 V. c. 47, s. 43; and that the defendants were not personally liable. *Liudus v. Melrose*, 3 H. & N. 177; 27 L. J., Ex. 326, Ex. Ch.; *Aggs v. Nicholson*, 1 H. & N. 165; 25 L. J., Ex. 348. So, a promissory note in the form, "On demand, I promise to pay A. & Co., or order, the sum of 1,500*l.*, with legal interest thereon until paid, value received. For Mistley, Thorpe, and Walton Ry. Co., J. S., Secretary," was held not to bind the secretary personally, although the directors were not empowered by their act of incorporation to bind the company by notes. *Alexander v. Sizer*, L. R. 4 Ex. 102. The Companies Act, 1862, s. 47, is similar, though wider in its terms; it is not affected by the B. of Ex. Act, 1882, *vide* sect. 97 (2 *b*), *ante*, p. 351. In *Aggs v. Nicholson*, *supra*, the court also rested their decision on the fact, which they held was in effect pleaded, that the defendants did not deliver the note, nor the plaintiffs take it, except as a note on behalf of the company; this is pointed out by Bramwell, B., in *Price v. Taylor*, *ante*, p. 413; and this would, at any rate, be an equitable defence; *per* Wilde, B., S. C. See *Courtauld v. Sanders*, 16 L. T. 468, where such a plea was pleaded; and *Wake v. Harrop*, 6 H. & N. 768; 30 L. J., Ex. 273; S. C. *in error*, 1 H. & C. 202; 31 L. J., Ex. 451. See further cases cited *ante*, pp. 365 *et seq.*

When a note payable to the maker's own order is indorsed, it becomes a note payable to *bearer*, or to the *indorsee*, or his order, according as the indorsement is in blank or to a named person. *Hooper v. Williams*, 2 Exch. 13; *Absolon v. Marks*, 11 Q. B. 19; *Brown v. De Winton*, and *Guy v. Lunder*, 6 C. B. 336. And, it makes no difference that there is a footnote to it making it payable at a particular place. *Masters v. Baretto*, 8 C. B. 433. By sect. 7 (2), *ante*, p. 352, a note may now be made payable to the holder of an office for the time being: this provision is new, see *Cowie v. Stirling*, 6 E. & B. 333; 25 L. J., Q. B. 335, Ex. Ch. "I promise to pay A. B. or order, three months after date, 100*l.*, as per memorandum of agreement," is on the face of it a negotiable promissory note; and if the effect of the agreement is to make it conditional, the defendant must show it by his statement of defence. *Jury v. Barker*, E. B. & E. 459; 27 L. J. Q. B. 255.

As to the effect of making a note in blank, *vide* sect. 20, *ante*, p. 353, and *Herdman v. Wheeler*, *ante*, p. 368.

*Presentment for payment.*] By sect. 87 (1), "Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable." When a place for payment is specified in the body of the note, presentment there must be proved, though the maker may not be there to pay, and may have absconded, and left no effects there or other means of payment. *Sands v. Clarke*, 8 C. B. 751. The words "payable at," &c., at the foot of a note is, from mercantile usage, a memorandum only; *Masters v. Baretto*, *supra*; and *per curiam* in *Warrington v. Early*, 2 E. & B. 766; 23 L. J., Q. B. 48. See the cases on presentment to acceptor, *ante*, pp. 378 *et seq.* In an action on a note payable on demand, a demand need not be alleged or proved; for the action itself is a demand. *Rumball v. Ball*, 10 Mod. 38. It is otherwise if payable after sight. *Holmes v. Kerrison*, 2

Taunt. 323. By sect. 10 (1) (a), *ante*, p. 352, replacing (34 & 35 V. c. 74) s. 2, promissory notes payable at sight, or on presentation, are payable on demand. If a note be made payable at a particular town, and the maker have no residence there, a presentment at the banking-house there will support an allegation that it was presented there to the maker. *Hardy v. Woodroffe*, 2 Stark. 319. If a note be payable at two places, presentment at either is sufficient. *Beeching v. Gower*, Holt, N. P. 313. Notice of dishonour to the maker is unnecessary, for he is in the position of the acceptor of a bill. Sect. 89 (2), *ante*, p. 412.

There are days of grace in the case of a promissory note; see sect. 89 (1), *ante*, p. 412, and sect. 14 (1), *ante*, p. 361. So, in respect of each instalment where the note is payable by instalments, even where upon default in payment of any instalment the whole shall become due. See sect. 83 (1), *ante*, p. 412, and sect. 9 (1), (c), *ante*, p. 352. This follows the old law. *Oridge v. Sherborne*, 11 M. & W. 374; *Carlton v. Kenealy*, 12 M. & W. 139; *Miller v. Biddle*, 14 W. R. 110, M. T. 1865, Ex.

[Evidence under money claims.] A promissory note is evidence on the money claims only between immediate parties. *Waynam v. Bend*, 1 Camp. 175. It is evidence of money lent by the payee to the maker. Bayley on Bills, 6th ed. 362. A promissory note dated August, 1844, purporting to be for the amount of interest due on another note for 117*l.* down to 6th July, 1844, is evidence of an account stated in August, 1844, of a then subsisting debt of 117*l.* *Perry v. Slade*, 8 Q. B. 115. Where a note cannot be given in evidence for want of a proper stamp, the plaintiff may recover on the consideration of the note. *Farr v. Price*, 1 East, 58, and *Id.*, n. And, the note may be used as evidence of the terms of a loan of money, though avoided by an alteration without a fresh stamp. *Sutton v. Toomer*, 7 B. & C. 416.

The plaintiff cannot resort to the money counts if the note have been lost, *ante*, pp. 356, 357. Nor can he resort to them where he has made a note his own by laches, for this operates as payment. *Camidge v. Allenby*, 6 B. & C. 373. See *Smith v. Mercer*, L. R., 3 Ex. 51; *Hopkins v. Ware*, L. R., 4 Ex. 268. A special defence may be necessary in both cases.

#### *Indorsee against Maker.*

In an action on a promissory note by an indorsee against the maker, the plaintiff will have to prove, in addition to the making of the note by the defendant, the indorsement stated in the statement of claim, if traversed.

It has been already stated, *ante*, pp. 371 *et seq.*, in what manner an indorsement may be proved, and what indorsements are to be proved. Where indorsements are unnecessarily mentioned, as in claiming upon a note made to payee or bearer, they must, if traversed, be proved. *Waynam v. Bend*, 1 Camp. 175. But *semb.*, the finding on such issues will be immaterial, if the plaintiff appear to be bearer; and the indorsements may be struck out at the trial. See *Macgregor v. Rhodes*, *post*, p. 416.

Where A. made a promissory note payable to B.'s order, on demand, and gave it him as security for a debt, for which A. afterwards gave B. a mortgage; A. transferred the mortgage to C., and received payment from him, and indorsed the note for value to D., who took without notice. A. was held to have no defence to an action on the note by D. *Glasscock v. Balls*, 24 Q. B. D. 13, C. A.

*Indorsee against Indorser.*

In an action by an indorsee against the indorser of a promissory note, the traversable allegations are, the defendant's indorsement; the presentment to the maker; his default; and notice to the defendant of the dishonour.

By sect. 87. "(2.) Presentment for payment is necessary in order to render the indorser of a note liable.

"(3.) Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice."

It seems that sect. 56 does not apply to notes, *vide ante*, pp. 244, 245.

In what manner an indorsement may be proved has been already stated, *ante*, pp. 371 *et seq.* An indorsement admits all prior indorsements, and also the handwriting of the maker. *Lambert v. Oakes*, 1 Ld. Raym. 443; *Free v. Hawkins*, Holt, N. P. 550; *Maegregor v. Rhodes*, 6 E. & B. 266; 25 L. J., Q. B. 318.

In what manner a note or bill of exchange must be presented for payment has been stated *ante*, p. 378. A promissory note must be presented within a time which is reasonable, under all the circumstances. *Chartered Mercantile Bank of India, &c. v. Dickson*, L. R., 3 P. C. 574.

It has been before stated by and to whom, and within what time, notice of dishonour must be given, and what will be considered sufficient proof of the delivery of the notice and of its contents, &c., *ante*, pp. 380 *et seq.* It has also been shown in what cases proof of notice may be dispensed with by an acknowledgment or otherwise, *ante*, pp. 387 *et seq.* Where the payee of a note indorses it for the accommodation of the maker, it is still necessary to give notice to the payee in order to charge him as indorser, and oral evidence is not admissible that it was agreed between the parties that the note should not be put in force until after a given event. *Free v. Hawkins*, 8 Taunt. 92.

*Evidence under money claims.*] An indorsement is evidence of money lent by the indorsee to the indorser. *Keesebower v. Tims*, Bayley on Bills, 6th ed., 363.

*Damages generally.*

*Vide* sect. 57, *ante*, p. 393.

*Defences, generally, to Actions on Promissory Notes.*

*Vide ante*, p. 394.

## ACTION ON POLICY OF INSURANCE.

## MARINE INSURANCE.

The law as to marine insurance has now been codified by the Marine Insurance Act, 1906 (6 E. 7, c. 41), which, by sect. 93, came into operation on January 1st, 1907. The several sections of this Act, therefore, now replace



a large number of decisions relating to this subject, which were collected in prior editions of this work. See the observations of Ld. Herschell on the construction of consolidation Acts, in *Bank of England v. Vagliano*, cited *ante*, p. 350.

The interpretation section is as follows:—

Sect. 90. "In this Act, unless the context or subject-matter otherwise requires—

"Action includes counter-claim and set off:

"Freight includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage money:

"Moveables means any moveable tangible property, other than the ship, and includes money, valuable securities, and other documents:

"Policy means a marine policy."

The following sections are general in their application:—

Sect. 91. "(1.) Nothing in this Act, or in any repeal effected thereby, shall affect—

"(a.) The provisions of the Stamp Act, 1891, or any enactment for the time being in force relating to the revenue;

"(b.) The provisions of the Companies Act, 1862, or any enactment amending or substituted for the same;

"(c.) The provisions of any statute not expressly repealed by this Act.

"(2.) The rules of the common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance."

Marine insurance is defined as follows:—

Sect. 1. "A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure."

Sect. 2. "(1.) A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage.

"(2.) Where a ship in course of building, or the launch of a ship, or any adventure analogous to a marine adventure, is covered by a policy in the form of a marine policy, the provisions of this Act, in so far as applicable, shall apply thereto; but, except as by this section provided, nothing in this Act shall alter or affect any rule of law applicable to any contract of insurance other than a contract of marine insurance as by this Act defined."

Sect. 3. "(1.) Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance.

"(2.) In particular there is a marine adventure where—

"(a.) Any ship goods or other moveables are exposed to maritime perils. Such property is in this Act referred to as 'insurable property';

"(b.) The earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, is endangered by the exposure of insurable property to maritime perils;

"(c.) Any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils.

"'Maritime perils' means the perils consequent on, or incidental to, the navigation of the sea, that is to say, *perils of the seas*, fire, war perils, *pirates*, rovers, *thieves*, captures, *seisures*, *restraints*, and *detainments of princes and peoples*, jettisons, *barratry*, and *any other perils*, either of the like kind or which may be designated by the policy."

The terms and expressions in italics in the last paragraph are defined in Sched. I. rr. 7-12, *post*, pp. 435, 442, 440, 441.

Sect. 87. "(1.) Where any right, duty, or liability would arise under a contract of marine insurance by implication of law, it may be negatived or varied by express agreement, or by usage, if the usage be such as to bind both parties to the contract.

"(2.) The provisions of this section extend to any right, duty, or liability declared by this Act which may be lawfully modified by agreement."

Sect. 88. "Where by this Act any reference is made to reasonable time, reasonable premium, or reasonable diligence, the question what is reasonable is a question of fact."

The plaintiff may be called upon to prove the following facts:—*viz.*, the subscription or execution of the policy by the defendant; the interest of the party as averred; the putting of the goods, &c., on board, when the policy is on goods; the inception of the risk; compliance with warranties; a licence for the purpose of legalizing the voyage, in some cases; the loss, and amount of it.

*Form of policy.*] By sect. 22. "Subject to the provisions of any statute, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act. The policy may be executed and issued either at the time when the contract is concluded, or afterwards."

Sect. 23. "A marine policy must specify—

"(1.) The name of the assured, or of some person who effects the insurance on his behalf:

"(2.) The subject-matter insured and the risk insured against:

"(3.) The voyage, or period of time, or both, as the case may be, covered by the insurance:

"(4.) The sum or sums insured:

"(5.) The name or names of the insurers."

These provisions are substantially the same as those comprised in the Stamp Act, 1891, sects. 92, 93, *ante*, pp. 266, 267, which are still in force, see sect. 91 (1a), *ante*, p. 417.

Sect. 24. "(1.) A marine policy must be signed by or on behalf of the insurer, provided that in the case of a corporation the corporate seal may be sufficient, but nothing in this section shall be construed as requiring the subscription of a corporation to be under seal.

"(2.) Where a policy is subscribed by or on behalf of two or more insurers, each subscription, unless the contrary be expressed, constitutes a distinct contract with the assured."

Sect. 21. "A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract, although it be unstamped."

Sect. 89. "Where there is a duly stamped policy, reference may be made, as heretofore, to the slip or covering note, in any legal proceeding."

As to the effect of an insurance slip, *vide ante*, p. 268. An open cover or proposal by A. to insure before the goods to be insured were shipped, given to M. that he might give it to the charterer, B., is a subsisting proposal, and on application by B. after the goods are shipped, there is a contract with him to issue a policy in terms of the open cover. *Bhugwandass v. Netherlands, &c., Insur. Co. of Batavia*, 14 Ap. Ca. 83, J. C. But by reason of the Stamp Act, 1891, ss. 92, 93, such contract cannot usually be enforced, *vide ante*, pp. 266, 267.

Sect. 25. "(1.) Where the contract is to insure the subject-matter at and from, or from one place to another or others, the policy is called a 'voyage policy,' and where the contract is to insure the subject-matter for a definite period of time the policy is called a 'time policy.' A contract for both voyage and time may be included in the same policy."

(2.) Subject to the provisions of sect. 1 E. 7, c. 7, *ante*, pp. 266, 268, a time policy which is made for any time exceeding 12 months is invalid.

Sect. 26. "(1.) The subject-matter insured must be designated in a marine policy with reasonable certainty.

"(2.) The nature and extent of the interest of the assured in the subject-matter insured need not be specified in the policy.

"(3.) Where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered.

"(4.) In the application of this section regard shall be had to any usage regulating the designation of the subject-matter insured."

An underwriter "on goods" may re-insure by the same description; and the policy need not be expressed to be a re-insurance. *Mackenzie v. Whitworth*, L. R., 10 Ex. 142; 1 Ex. D. 36, Ex. Ch.

Sect. 27. "(1.) A policy may be either valued or unvalued.

"(2.) A valued policy is a policy which specifies the agreed value of the subject-matter insured.

"(3.) Subject to the provisions of this Act, and in the absence of fraud, the value fixed by the policy is, as between the insurer and assured, conclusive of the insurable value of the subject intended to be insured, whether the loss be total or partial.

"(4.) Unless the policy otherwise provides, the value fixed by the policy is not conclusive for the purpose of determining whether there has been a constructive total loss."

Sect. 28. "An unvalued policy is a policy which does not specify the value of the subject-matter insured, but, subject to the limit of the sum insured, leaves the insurable value to be subsequently ascertained, in the manner herein-before specified."

Sect. 29. "(1.) A floating policy is a policy which describes the insurance in general terms, and leaves the name of the ship or ships and other particulars to be defined by subsequent declaration.

"(2.) The subsequent declaration or declarations may be made by indorsement on the policy, or in other customary manner.

"(3.) Unless the policy otherwise provides, the declarations must be made in the order of dispatch or shipment. They must, in the case of goods, comprise all consignments within the terms of the policy, and the value of the goods or other property must be honestly stated, but an omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith.

"(4.) Unless the policy otherwise provides, where a declaration of value is not made until after notice of loss or arrival, the policy must be treated as an unvalued policy as regards the subject-matter of that declaration." See *Gledstanes v. R. Exch. Insur. Co.*, *post*, p. 427.

Sect. 30. "(1.) A policy may be in the form in the First Schedule to this Act." The form here given is known as "Lloyds S. G. policy," on which see Chalmers and Owen on Marine Insurance Act, 1906, (1907) p. 140, n.

Sect. 30. "(2.) Subject to the provisions of this Act, and unless the context of the policy otherwise requires, the terms and expressions mentioned in the First Schedule to this Act shall be construed as having the scope and meaning in that schedule assigned to them."

The form of policy is followed by "the rules referred to by this Act for

the construction of a policy in the above or other like form, where the context does not otherwise require."

Rules 1 to 14 will be found distributed in this chapter in conjunction with the sections of the Act to which they relate.

R. 15. "The term 'ship' includes the hull, materials and outfit, stores and provisions for the officers and crew, and, in the case of vessels engaged in a special trade, the ordinary fittings requisite for the trade, and also, in the case of a steamship, the machinery, boilers, and coals and engine stores, if owned by the assured."

R. 16. "The term 'freight' includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage money."

R. 17. "The term 'goods' means goods in the nature of merchandise, and does not include personal effects or provisions and stores for use on board.

"In the absence of any usage to the contrary, deck cargo and living animals must be insured specifically, and not under the general denomination of goods."

Sect. 31. "(1.) Where an insurance is effected at a premium to be arranged, and no arrangement is made, a reasonable premium is payable.

"(2.) Where an insurance is effected on the terms that an additional premium is to be arranged in a given event, and that event happens but no arrangement is made, then a reasonable additional premium is payable." See sect. 88, *ante*, p. 418.

The greater part of a policy is usually printed, with written words added; these latter, should there be any reasonable doubt as to the sense of the whole, are to have greater effect attributed to them than the printed words, as the written words are selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects. *Robertson v. French*, 4 East, 130, 136; *Margetson v. Glynn*, (1893) A. C. 351, D. P.

By sect. 86. "Where a contract of marine insurance is in good faith effected by one person on behalf of another, the person on whose behalf it is effected may ratify the contract even after he is aware of a loss." But notwithstanding the wide terms in which policies are usually expressed to be effected, "only those persons are entitled on whose behalf the policy was in fact effected." *Boston Fruit Co. v. British, &c., Marine Insur. Co.*, (1905) 1 K. B. 637, 652, *per Romer, L.J.*; *accord.* (1906) A. C. 336, D. P. It is immaterial in what part of the policy the subject-matter of insurance appears. *Griffiths v. Bramley-Moore*, 4 Q. B. D. 70, C. A.

As to the construction in a policy including risk of craft, of a clause that each craft was "to be deemed a separate insurance," see *S. British, &c., Insur. Co. of N. Zealand v. Du Costa*, (1906) 1 K. B. 456, 460, 461. As to an "all risks" Lloyd's policy, see *Yuill v. Scott Robson*, (1907) 1 K. B. 685.

The policy is sometimes so framed that no action is maintainable on the policy till the loss has been adjusted. *Scott v. Avery*, 5 H. L. C. 811; 25 L. J., Ex. 308; *Tredwen v. Holman*, 1 H. & C. 72; 31 L. J., Ex. 398. But on this last case see *Edwards v. Aberayron Mutual Ship Insur. Soc.*, 1 Q. B. D. 563, 596, *per Brett, J.*

*Payment of the premium.*] Sect. 52. "Unless otherwise agreed, the duty of the assured or his agent to pay the premium, and the duty of the insurer to issue the policy to the assured or his agent, are concurrent conditions, and the insurer is not bound to issue the policy until payment or tender of the premium."

Sect. 53. "(1.) Unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the broker is directly responsible to

the insurer for the premium, and the insurer is directly responsible to the assured for the amount which may be payable in respect of losses, or in respect of returnable premium.

“(2.) Unless otherwise agreed, the broker has, as against the assured, a lien upon the policy for the amount of the premium and his charges in respect of effecting the policy; and, where he has dealt with the person who employs him as a principal, he has also a lien on the policy in respect of any balance on any insurance account which may be due to him from such person, unless when the debt was incurred he had reason to believe that such person was only an agent.”

*Assignment of policy.*] By sect. 50. “(1.) A marine policy is assignable unless it contains terms expressly prohibiting assignment. It may be assigned either before or after loss. (2.) Where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected. (3.) A marine policy may be assigned by indorsement thereon or in other customary manner.”

The Act does not apply to the case of an assignment of the policy, where the policy has lapsed; *N. of England, &c., Co. v. Archangel Maritime Insur. Co.*, L. R., 10 Q. B. 249. It will not extend to an agreement only for an assignment. See *Spencer v. Clarke*, 9 Ch. D. 137. As to raising a defence under the latter part of sub-sect. 2, *vide post*, p. 449g.

The J. Act, 1873, s. 25 (6), *ante*, p. 307, contains a general provision with reference to the assignment of choses in action.

Sect. 51. “Where the assured has parted with or lost his interest in the subject-matter insured, and has not, before or at the time of so doing, expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative: Provided that nothing in this section affects the assignment of a policy after loss.”

*Proof of the policy.*] On a defence denying the making of the policy, the policy must be produced and proved; and if subscribed by an agent of the defendant, the handwriting and authority of the agent must be proved. If the authority of the agent were in writing it should generally be produced; but the authority may also be proved by showing that the defendant has recognized the act of the agent in this instance, or in other similar instances in which he has subscribed policies for the defendant; as where a witness stated that he was authorized by power of attorney, but added, that the defendant had been in the habit of paying losses upon policies which the witness had subscribed in his name, the power need not be produced. *Haughton v. Ewbank*, 4 Camp. 88; *Brocklebank v. Sugrue*, 5 C. & P. 21. Where a witness proved the agent's handwriting, and swore that he had often observed him sign policies for the defendant, but did not know that the defendant had given any authority to sign that policy, *Ld. Kenyon* held the agency proved; *Neal v. Erving*, 1 Esp. 61; but where the witness added that he did not know of any instance in which the defendant had paid a loss upon any policy so subscribed, *Ld. Ellenborough* held the proof of agency was incomplete; *Courteen v. Touse*, 1 Camp. 43, n. The authority given to an insurance broker to effect a policy does not extend to warrant him in cancelling it. *Xenos v. Wickham*, L. R., 2 H. L. 296.

The principal P. is bound where the agent A. contracts in P.'s name within A.'s authority, though from an indirect but unknown motive. *Hambro v. Burnand*, (1901) 2 K. B. 10 C. A. A custom that an agent's authority

to underwrite policies is limited to a particular sum is good, although the assured is not aware of the limitation, and if the agent exceed the sum, the principal is not bound by the policy at all. *Baines v. Ewing*, L. R., 1 Ex. 320.

In the case of incorporated joint-stock companies for insurance the policies often provide expressly on the face of them that the capital stock and funds of the company shall alone be charged, and that no proprietor shall be liable beyond his share in it. In such cases the insured cannot sue the proprietors as general partners jointly liable *in solido*, even if the stock and funds be adequate; and it is questionable whether such a policy amounts to a joint contract at all, or to a contract with each proprietor in proportion to his share, or to a separate contract with the directors who signed the policy in pursuance of the deed of settlement. See *Halket v. Merchant Traders' Insurance Co.*, 13 Q. B. 960; *Hallett v. Dowdall*, 18 Q. B. 2; 21 L. J., Q. B. 98, Ex. Ch.

The usage of a particular trade will be regarded in the construction of policies, and every underwriter is supposed to be acquainted with it. *Noble v. Kennoway*, 2 Dougl. 510, and cases cited *ante*, pp. 21 *et seq.* As to the stamp and alteration of the policy, see *ante*, pp. 266-268.

An action will lie at the suit of the agent or other person in whose name the insurance was effected; *Provincial Insur. Co. of Canada v. Ledue*, L. R., 6 P. C. 224; or the action may be brought in the name of the person interested, *vide ante*, p. 92. By sect. 86, *ante*, p. 420, a principal may after knowledge of loss, ratify an insurance made for his benefit. Policies are frequently under seal, but the matters to be proved are substantially the same whatever be the form of the statement of claim.

*Insurable interest and value.*] By sect. 4. "(1.) Every contract of marine insurance by way of gaming or wagering is void.

"(2.) A contract of marine insurance is deemed to be a gaming or wagering contract—

"(a.) Where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest; or

"(b.) Where the policy is made 'interest or no interest,' or 'without further proof of interest than the policy itself,' or 'without benefit of salvage to the insurer,' or subject to any other like term:

"Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer."

This section is general in its terms and replaces (see sect. 92 and Sched. II.) stat. 19 G. 2, c. 37, s. 1, which applied only to British ships and goods or effects laden or to be laden thereon. A policy without further proof of interest than the policy itself is known as a "P. P. I." or "honour" policy. Interest is not in issue unless traversed. The Court will not, however, enforce a policy which contravenes the statute, although the defence of absence of interest in the plaintiff has not been raised. *Gedge v. R. Exch. Assur.*, (1900) 2 Q. B. 214.

Sect. 5. "(1.) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure.

"(2.) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof."

As to the definition of marine adventure, see sect. 3, *ante*, p. 417. A mere

agent, who has not possession, nor any lien on the goods, has no insurable interest in them. *Seagrave v. Union Marine Insur. Co.*, L. R., 1 C. P. 305.

Sect. 6. "(1.) The assured must be interested in the subject-matter insured at the time of the loss, though he need not be interested when the insurance is effected: Provided that where the subject-matter is insured 'lost or not lost,' the assured may recover although he may not have acquired his interest until after the loss, unless at the time of effecting the contract of insurance the assured was aware of the loss, and the insurer was not.

"(2.) Where the assured has no interest at the time of the loss, he cannot acquire interest by any act or election after he is aware of the loss."

Sect. 7. "(1.) A defeasible interest is insurable, as also is a contingent interest.

"(2.) In particular, where the buyer of goods has insured them, he has an insurable interest, notwithstanding that he might, at his election, have rejected the goods, or have treated them as at the seller's risk, by reason of the latter's delay in making delivery or otherwise."

The question whether A. has an insurable interest in goods contracted to be sold to him depends on whether he is liable for the price whether they be lost or not. *Anderson v. Morice*, L. R., 10 C. P. 609, Ex. Ch.; 1 Ap. Ca. 713, D. P.; *Stock v. Inglis*, 12 Q. B. D. 564, C. A.; 10 Ap. Ca. 263, D. P. See also *Colonial Insur. Co. of New Zealand v. Adelaide Marine Insur. Co.*, 12 Ap. Ca. 128, J. C. In *Stockdale v. Dunlop*, 6 M. & W. 224, it was held that the buyer of goods at sea had no insurable interest unless the contract of sale was enforceable under the Statute of Frauds, s. 17. Now, however, see *Taylor v. Gt. E. Ry. Co.*, (1901) 1 K. B. 774, *post*, p. 527.

Sect. 8. "A partial interest of any nature is insurable."

Sect. 9. "(1.) The insurer under a contract of marine insurance has an insurable interest in his risk, and may re-insure in respect of it." See *Mackenzie v. Whitworth*, *ante*, p. 419.

"(2.) Unless the policy otherwise provides, the original assured has no right or interest in respect of such re-insurance."

Sect. 10. "The lender of money on bottomry or respondentia has an insurable interest in respect of the loan."

In a contract of bottomry there is a loan repayable by the owner or master with interest on the safe arrival of the ship, and the lender has a maritime lien for the amount due. Respondentia is a similar loan on the cargo. In either case the loan is at sea risk, and therefore insurable. So the lender L., of money for the repairs of a ship, has an insurable interest where he has a right under 3 & 4 V. c. 65, s. 6, to sue for advances by an action *in rem*, and for that purpose to arrest the ship. *Morgan, Galloway & Co. v. Uzielli*, (1905) 2 K. B. 555. Where there is an absolute mortgage of the ship to L. for his loan, L. has no insurable interest for the loan is not at sea risk. *Stainbank v. Fenning*, 11 C. B. 51; 20 L. J., C. P. 226; *accord. Id. v. Shepard*, 13 C. B. 418; 22 L. J., Ex. 341, Ex. Ch.

Sect. 11. "The master or any member of the crew of a ship has an insurable interest in respect of his wages."

Sect. 12. "In the case of advance freight, the person advancing the freight has an insurable interest, in so far as such freight is not repayable in case of loss." *Vide post*, p. 468.

Sect. 13. "The assured has an insurable interest in the charges of any insurance which he may effect."

Sect. 14. "(1.) Where the subject-matter insured is mortgaged, the mortgagor has an insurable interest in the full value thereof, and the mortgagee has an insurable interest in respect of any sum due or to become due under the mortgage.

"(2.) A mortgagee, consignee, or other person having an interest in the

subject-matter insured may insure on behalf and for the benefit of other persons interested as well as for his own benefit.

“(3.) The owner of insurable property has an insurable interest in respect of the full value thereof, notwithstanding that some third person may have agreed, or be liable, to indemnify him in case of loss.”

A mortgagor may recover although the assignment is in terms absolute. *Ward v. Beck*, 13 C. B., N. S. 668; 32 L. J., C. P. 113.

Sect. 15. “Where the assured assigns or otherwise parts with his interest in the subject-matter insured, he does not thereby transfer to the assignee his rights under the contract of insurance, unless there be an express or implied agreement with the assignee to that effect. But the provisions of this section do not affect a transmission of interest by operation of law.”

By sect. 50, *vide ante*, p. 421, the assignee, after loss, of the policy of insurance, may recover in his own name.

Insurable value is defined by—

Sect. 16. “Subject to any express provision or valuation in the policy, the insurable value of the subject-matter insured must be ascertained as follows:—

“(1.) In insurance on ship, the insurable value is the value, at the commencement of the risk, of the ship, including her outfit, provisions and stores for the officers and crew, money advanced for seamen’s wages, and other disbursements (if any) incurred to make the ship fit for the voyage or adventure contemplated by the policy, plus the charges of insurance upon the whole:

“The insurable value, in the case of a steamship, includes also the machinery, boilers, and coals and engine stores if owned by the assured, and, in the case of a ship engaged in a special trade, the ordinary fittings requisite for that trade:

“(2.) In insurance on freight, whether paid in advance or otherwise, the insurable value is the gross amount of the freight at the risk of the assured, plus the charges of insurance:

“(3.) In insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole:

“(4.) In insurance on any other subject-matter, the insurable value is the amount at the risk of the assured when the policy attaches, plus the charges of insurance.”

As to the meaning of “freight,” see sect. 90, *ante*, p. 417, and Sched. I. r. 16, *ante*, p. 420. As to the nature of insurance thereon, see *Potter v. Rankin*, L. R., 6 H. L. 83; in this case the insurance was of specific chartered freight, to be earned on a future voyage, against perils to be incurred in the current one. See further *Asfar v. Blundell*, (1896) 1 Q. B. 123, C. A. In a valued policy, the Court will inquire of what freight insured consisted, to ascertain whether the claim has been satisfied or not. *Williams v. N. China Insur. Co.*, 1 C. P. D. 757, C. A.; *The Main*, (1894) P. 320.

By the Merchant Shipping Act, 1894 (57 & 58 V. c. 60), insurance effected (sect. 335) against liabilities arising under Part III. of the Act, or (sect. 506) “against the happening, without the owner’s actual fault or privity, of any or all of the events in respect of which the liability of owners is limited under,” Part VIII. of the Act (*vide post*, pp. 474, 787), “shall not be invalid by reason of the nature of the risk.”

*Interest in the ship, how proved.*] The interest in the ship, as stated in the claim, may be proved, *primâ facie*, by evidence of possession of the ship; or, as acts of ownership, as directing the loading of the ship, purchasing the stores, paying the people employed, &c. *Amery v. Rogers*, 1 Esp. 209; *Thomas v. Foyle*, 5 Esp. 88. A common mode of proof is to call the master,



who will prove that he was appointed and employed by the parties in whom the interest is averred; and, though it should appear on cross-examination, that the plaintiff claims under a bill of sale, it is not, on that account, necessary for him to produce the bill, or the ship's register, unless such further evidence should be rendered necessary in support of the *primâ facie* proof of ownership, in consequence of proof to the contrary. *Robertson v. French*, 4 East, 136; *Pirie v. Anderson*, 4 Taunt. 652. Where the interest is averred in persons who have never been in possession of the ship, it may be proved by showing the ownership of the persons under whom such parties claim, and the derivative title from them—viz., the bill of sale; but now, by the Merchant Shipping Act, 1894 (57 & 58 V. c. 60), s. 64 (2), *ante*, p. 130, the register, or an examined or certified copy thereof, may be used as *primâ facie* proof of ownership. See also *Effect of ship's register*, *ante*, p. 218.

*Interest in goods, how proved—Bill of lading.*] The interest in goods may be proved *primâ facie* like the interest in the ship, by evidence of possession and acts of ownership. It is also frequently proved by the production of the bill of lading. A bill of lading directing the delivery of the goods to the consignee is evidence of interest in him, the captain proving that he received the goods under it; *M. Andrew v. Bell*, 1 Esp. 373; and where the goods are made deliverable to the consignor, the bill indorsed by him, either specially or in blank, is evidence of interest in the indorsee, or holder: *Lickbarrow v. Mason*, 2 T. R. 71; but such evidence is *primâ facie* only, and not conclusive. *Seagrave v. Union Marine Insurance Co.*, L. R., 1 C. P. 305. The signature of deceased master to the bill of lading, as it has the effect of charging himself, is evidence of the interest of the consignee; but, if the master qualifies his acknowledgment by the words "contents unknown," it is then no evidence *per se*. *Haddow v. Parry*, 3 Taunt. 303. Where, to prove property in a cargo by purchase beyond seas, the plaintiff produced a bill of parcels of one G., at Petersburg, with his receipt to it, and proved his hand, Lee, C.J., admitted it as evidence against the insurers. *Russel v. Boheme*, Str. 1127.

*Inception and end of risk.*] By sect. 30 (2), *ante*, p. 419, and Sched. I. where the context does not otherwise require, the following rules are to apply to the construction of the policy:—

R. 1. "Where the subject-matter is insured 'lost or not lost,' and the loss has occurred before the contract is concluded, the risk attaches unless at such time the assured was aware of the loss, and the insurer was not."

R. 2. "Where the subject-matter is insured 'from' a particular place, the risk does not attach until the ship starts on the voyage insured."

R. 3. "(a.) Where a ship is insured 'at and from' a particular place, and she is at that place in good safety when the contract is concluded, the risk attaches immediately.

"(b.) If she be not at that place when the contract is concluded the risk attaches as soon as she arrives there in good safety, and, unless the policy otherwise provides, it is immaterial that she is covered by another policy for a specified time after arrival.

"(c.) Where chartered freight is insured 'at and from' a particular place, and the ship is at that place in good safety when the contract is concluded the risk attaches immediately. If she be not there when the contract is concluded, the risk attaches as soon as she arrives there in good safety.

"(d.) Where freight, other than chartered freight, is payable without special conditions and is insured 'at and from' a particular place, the risk attaches *pro rata* as the goods or merchandise are shipped; provided that

if there be cargo in readiness which belongs to the shipowner, or which some other person has contracted with him to ship, the risk attaches as soon as the ship is ready to receive such cargo."

Sect. 42. "(1.) Where the subject-matter is insured by a voyage policy 'at and from' or 'from' a particular place, it is not necessary that the ship should be at that place when the contract is concluded, but there is an implied condition that the adventure shall be commenced within a reasonable time, and that if the adventure be not so commenced the insurer may avoid the contract.

"(2.) The implied condition may be negatived by showing that the delay was caused by circumstances known to the insurer before the contract was concluded, or by showing that he waived the condition."

A voyage policy is defined in sect. 25 (1), *ante*, p. 419.

Sect. 43. "Where the place of departure is specified by the policy, and the ship, instead of sailing from that place, sails from any other place, the risk does not attach."

Sect. 44. "Where the destination is specified in the policy, and the ship, instead of sailing for that destination, sails for any other destination, the risk does not attach."

Sect. 45. "(1.) Where, after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy, there is said to be a change of voyage.

"(2.) Unless the policy otherwise provides, where there is a change of voyage, the insurer is discharged from liability as from the time of change, that is to say, as from the time when the determination to change it is manifested; and it is immaterial that the ship may not in fact have left the course of voyage contemplated by the policy when the loss occurs."

Where the insurance is at and from a port, the risk begins as soon as the ship is geographically within the port; *Haughton v. Empire Marine Insur. Co.*, L. R., 1 Ex. 206. The words "port or ports of loading" in the province of B. A. include, not merely those places technically called ports, but all places to which ships are accustomed to resort for the purpose of taking in cargo. *Harrover v. Hutchinson*, L. R., 4 Q. B. 523. It makes no difference that by the regulations of the province a vessel which has loaded at such port cannot proceed direct homewards. S. C. The judgment was reversed on other grounds, but these points were affirmed by majority of the Ex. Ch., L. R., 5 Q. B. 584, 589. The term "port" must be understood in its popular or commercial sense. *Hunter v. N. Marine Insur. Co.*, 13 Ap. Ca. 717, D. P.; and see *Price v. Livingstone*, and *Sailing Ship Garston Co. v. Hickie*, cited *post*, p. 468.

By a charter-party, a vessel, after discharging her outward cargo for owner's benefit, was to proceed to G. or I., as ordered at C. or S. by the charterer's agents, and there load a cargo, and therewith proceed homewards, and discharge at a port in the United Kingdom, and so end the voyage; it was held that the voyage commenced from the period of the discharge of the outward cargo. *Bruce v. Nicolopulo*, 11 Exch. 129; 24 L. J., Ex. 321. See *Valente v. Gibbs*, 6 C. B., N. S. 270; 28 L. J., C. P. 229. A charter-party, with the usual clause against sea perils during the voyage, stipulated that a certain steamer at N., being tight, &c., and fitted for the voyage, should proceed to the usual place of loading at N. (or as near thereto as could safely be got), and there load and proceed to A.; it was held, that the voyage commenced from her starting from her then berth for the loading place, and that the exception applied to that portion of the voyage. *Barker v. McAndrew*, 18 C. B., N. S. 759; 34 L. J., C. P. 191. See also *Nottebohn v. Richter*, 18 Q. B. D. 63, C. A.

In the case of a *time* policy (*i.e.*, an insurance within certain dates

without regard to a particular voyage, *vide* sect. 25 (1), *ante*, p. 419), the risk begins at the first date. See *Staffordshire Tramways Co. v. Sickness, &c., Assur.*, *post*, p. 455.

Where the vessel is lost in the course of a voyage for which she is insured, some proof of the inception of the voyage, or risk, must be given. *Koster v. Innes, Ry. & M.* 333. This may be proved by some of the crew; or proof of a particular destination by charter-party will afford a presumption that she sailed on the chartered voyage; so, proof of her clearing out for a particular port would be evidence that she set sail for that port; *per* *Ld. Ellenborough, C.J. Cohen v. Hinckley*, 2 Camp. 52. So, proof of a convoy-bond for a particular port, signed by the captain, coupled with the testimony of the custom-house officer that a certificate and other papers for such a voyage would, in the regular course of office, be delivered to the captain before he sailed, together with proof of his sailing, is *primâ facie* evidence of the ship having sailed on such voyage. *S. C.* A licence for the port mentioned in the policy is *primâ facie* evidence to the same effect. *Marshall v. Parker*, 2 Camp. 69. If the statement of claim aver that the ship sailed *after* the making of the policy, but in fact it was before, the variance is not material. *Peppin v. Solomons*, 5 T. R. 496.

The risk in the case of a voyage policy on the ship to a port without any provision as to her safety there, terminates when she is anchored at the port in the usual place for discharge of her cargo. *Stone v. Marine Insur. Co. &c.*, 1 Ex. D. 81. But, the policy usually extends in terms to the end of a period of 24 hours after mooring in safety in port, and the underwriters are not liable for a seizure after the 24 hours, though for smuggling committed on the voyage; *Lockyer v. Offley*, 1 T. R. 252; but, where during the 24 hours the ship is compelled to go back for performance of quarantine, the risk continues; *Waples v. Eames*, 2 Str. 1243. A ship was insured from L. to certain ports and during 30 days' stay in her last port of discharge, and in another part of the policy the risk was stated to continue until she had moored at anchor 24 hours in good safety; held that the 30 days did not begin to run till the expiration of the 24 hours. *Mercantile Marine Insur. Co. v. Titherington*, 5 B. & S. 765; 34 L. J., Q. B. 11; *Gambles v. Ocean Marine Insur. Co.*, 1 Ex. D. 141, C. A. Where the risk was "at and from A. to B., and for 30 days after arrival," "upon the ship, &c., until she hath moored at anchor 24 hours in good safety," it was held, that after the expiration of 30 days from the arrival and mooring of the vessel, and her having remained as a vessel, though not sound, for 24 hours, the underwriters were not responsible for a subsequent total loss. *Lidgett v. Secretan*, L. R., 5 C. P. 190. In the case of a policy similar, but omitting "24 hours" the "30 days" are reckoned as 30 consecutive periods of 24 hours, from the hour of the safe mooring of the vessel. *Cornfoot v. R. Exch. Assur. Cor.*, (1904) 1 K. B. 40, C. A.

As to re-insurance by one insurance company under a running policy with another company, see *Gledstones v. R. Exch. Ins. Co.*, 5 B. & S. 797; 34 L. J., Q. B. 30; such policy is good, although the subject-matter of the insurance was declared after notice to all parties of the loss of the vessel, and it was not then known that the insurers had any insurable interest therein. *S. C.*

In the case of goods, the risk depends on the agreement of the parties, but it usually begins with the loading on board, and ends with the safe discharge, including their passage to the shore by usual means. *Tierney v. Etherington*, cited *per Cur.*, 1 Burr. 348; 3 Kent, Com. 309; see *Australian Agricultural Co. v. Saunders*, L. R., 10 C. P. 668; and *Colonial Insurance Co. of New Zealand v. Adelaide Marine Insur. Co.*, 12 Ap. Ca. 128, J. C.

By Sched. I. r. 4. "Where goods or other moveables are insured 'from

the loading thereof,' the risk does not attach until such goods or moveables are actually on board, and the insurer is not liable for them while in transit from the shore to the ship."

R. 5. "Where the risk on goods or other moveables continues until they are 'safely landed,' they must be landed in the customary manner and within a reasonable time after arrival at the port of discharge, and if they are not so landed the risk ceases." As to "reasonable time," see sect. 88, *ante*, p. 418.

Where the insurance was on goods "at and from a given port, beginning the adventure from the loading at as above," a constructive loading at the port is sufficient; as, if the goods had been partially reloaded, or there had been a material alteration in the ownership of the goods or the voyage on the arrival of the ship at the port with the goods already aboard. *Carr v. Montefiore*, 5 B. & S. 408, 425; 33 L. J., Q. B. 57, 256. See also *Joyce v. Realm Marine Insur. Co.*, L. R., 7 Q. B. 580. It seems that evidence of brokers and merchants is admissible to prove what is the custom as to when the outward bound risk determined, in order to show when the homeward bound risk commenced. *Camden v. Cowley*, 1 W. Bl. 417. The risk may include land transit. *Rodocanachi v. Elliott*, L. R., 8 C. P. 649; L. R., 9 C. P. 518, Ex. Ch. But not unless the policy for the voyage attaches. *Simon v. Sedwick*, (1893) 1 Q. B. 303, C. A. A policy including "all risk of craft until the goods are discharged and safely landed," does not cover the risk to the goods while waiting on lighters at the port of discharge for delivery on an export vessel. *Houlder v. Merchants' Marine Insur. Co.*, 17 Q. B. D. 354, C. A.

*Shipment of the goods.*] The shipment of goods on board is usually proved by the captain; and, if he be dead, the production of the bill of lading, and proof of his handwriting, will be evidence of the shipping as well as of the interest, but not if he add "contents unknown;" *Haddow v. Parry*, 3 Taunt. 303; nor, if he be alive; *Dickson v. Lodge*, 1 Stark. 226. The copy of an official report, made in pursuance of the Customs Acts, 12 C. 2, by the searcher of the customs, containing an account of the cargo exported, has been admitted to prove the shipping, without calling the searcher. *Johnson v. Ward*, 6 Esp. 48.

In an action upon a policy on freight, the assured must show that some freight would have been earned, either by proving that some goods were put on board, or that there was some contract for doing so. *Flint v. Flemyng*, 1 B. & Ad. 45; *Devaux v. J'Anson*, 5 R. C. 419.

*Compliance with warranties.*] Sect. 33. "(1.) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

"(2.) A warranty may be express or implied.

"(3.) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date."

Sect. 34. "(1.) Non-compliance with a warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law.

"(2.) Where a warranty is broken, the assured cannot avail himself of

the defence that the breach has been remedied, and the warranty complied with, before loss.

“(3.) A breach of warranty may be waived by the insurer.”

Sect. 35. “(1.) An express warranty may be in any form of words from which the intention to warrant is to be inferred.

“(2.) An express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy.

“(3.) An express warranty does not exclude an implied warranty, unless it be inconsistent therewith.”

Where the policy contains an express warranty, and the defence raises the point of non-compliance therewith, a literal and strict compliance with it must be proved; it is not sufficient to show something tantamount to a performance, unless it be a waiver or dispensation of performance, which must be pleaded as such, and not as a compliance. *Pawson v. Watson*, Cowp. 785; 2 Wms. Saund. 201, 201 a (1); *Croockewit v. Fletcher*, 1 H. & N. 893; 26 L. J., Ex. 153. But an amendment to admit evidence of such a defence would be allowed in a proper case, *vide ante*, pp. 291 *et seq.*

A warranty may be waived by a memorandum on the policy without a stamp, under the Stamp Act, 1891, s. 96 (*ante*, p. 268); *Hubbard v. Jackson*, 4 Taunt. 169; *Weir v. Aberdeen*, 2 B. & A. 325; decided under 35 G. 3, c. 63, s. 13.

A warranty of “no iron . . . exceeding the net registered tonnage” is broken by a shipment of steel beyond that amount. *Hart v. Standard Marine Insur. Co.*, 22 Q. B. D. 499, C. A.

*Warranty of sailing.*] To satisfy a warranty “to depart” on or before a particular day, the vessel must be out of port on or before that day; *Moir v. R. Exch. Assur. Co.*, 3 M. & S. 461; 6 Taunt. 241; but a warranty “to sail” is satisfied by the ship breaking ground and getting under way; S. C.; *Lang v. Anderdon*, 3 B. & C. 495. Where the insurance was from an inland port, as Lyons, and the ship left that port before the day, without her masts and heavy tackle, which she afterwards took in at Marseilles (this being the usual course) without unreasonable delay, but did not sail thence till after the day; it was held that, looking at the nature of the voyage, and the mercantile usage in similar adventures, she had complied with the warranty to sail by the given day, and with the implied warranty of seaworthiness. *Bouillon v. Lupton*, 15 C. B., N. S. 113; 33 L. J., C. P. 37; and see *Dixon v. Sadler*, *post*, p. 431. But, unless the ship is unmoored, the warranty to sail is not complied with. *Nelson v. Salvador*, M. & M. 309. Sailing before the vessel has got her clearances, and is equipped for the voyage, is not a sailing within the warranty. *Ridsdale v. Newnham*, 3 M. & S. 456. So, if the ship leave the harbour on the day without a sufficient crew on board, though the remainder of the crew are engaged and ready to sail. *Graham v. Barras*, 5 B. & Ad. 1011. Where a vessel sailed from St. Anne’s, Jamaica, within the time of warranty with her cargo and clearances on board, and called at another usual port in Jamaica for convoy, where she was detained by an embargo until after the time of warranty, it was held that this was a sufficient sailing from Jamaica. *Bond v. Nutt*, Cowp. 601; *Thellusson v. Fergusson*, 1 Doug. 360. A warranty to sail from Q. on or before November 1st, contained in a policy on a vessel “at and from” New York to Q., and thence to England, is confined to the part of the voyage from Q. to England, and the insurer is therefore liable for a loss occurring after November 1st, on the voyage from New York to Q. *Baines v. Holland*, 10 Exch. 802; 24 L. J., Ex. 204. In a time policy a warranty not to sail for a particular country after a certain day is complied with

by getting out of the dock, and endeavouring to leave the harbour in the prosecution of the voyage; it might be otherwise if the warranty were to sail from some particular *terminus*. *Cockrane v. Fisher*, 1 C. M. & R. 809, Ex. Ch. So where the ship, when ready for sea, left the wharf, anchored 500 yards off and sailed away next day, the day of sailing depended on the intention with which she was so manœuvred. *Sea Insur. Co. v. Blogg*, (1898) 2 Q. B. 398, C. A. A ship having been proved to have sailed under convoy, to prove the time of sailing the log-book of the commander of the convoy is evidence. *D'Israeli v. Jowett*, 1 Esp. 427.

*Warranty of neutrality.*] Sect. 36. “(1.) Where insurable property, whether ship or goods, is expressly warranted neutral, there is an implied condition that the property shall have a neutral character at the commencement of the risk, and that, so far as the assured can control the matter, its neutral character shall be preserved during the risk.

“(2.) Where a ship is expressly warranted ‘neutral’ there is also an implied condition that, so far as the assured can control the matter, she shall be properly documented, that is to say, that she shall carry the necessary papers to establish her neutrality, and that she shall not falsify or suppress her papers, or use simulated papers. If any loss occurs through breach of this condition, the insurer may avoid the contract.”

See *Hobbs v. Henning*, *post*, p. 440.

*Warranty of flag.*] On a policy on goods, in order to prove a warranty that the ship insured was Danish, proof of her carrying the flag of that nation at times when she was free from the danger of capture, and that the captain addressed himself to the consul of that nation in a foreign port, was held *prima facie* evidence. *Arcangelo v. Thompson*, 2 Camp. 620. By sect. 37, “There is no *implied* warranty as to the nationality of a ship, or that her nationality shall not be changed during the risk.”

*Warranty of good safety.*] Sect. 38. “Where the subject-matter insured is warranted ‘well’ or ‘in good safety’ on a particular day, it is sufficient if it be safe at any time during that day.”

*Implied warranties.*] There are also certain *implied* warranties, the breach of which will prevent the insured from recovering. Such implied warranties are:—that there shall be no deviation from the voyage insured; that it shall be commenced without unreasonable delay; that all material circumstances should be disclosed to the underwriters; and that the ship shall be seaworthy; and a breach of these conditions entitles the insurer to avoid the policy whether there be fraud or not. *Small v. Gibson*, 16 Q. B. 158; 20 L. J., Q. B. 158, Ex. Ch., *per Cur.*

*Warranty of seaworthiness.*] Sect. 39. “(1.) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.

“(2.) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.

“(3.) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.

"(4.) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured."

A "voyage policy" is defined by sect. 25 (1), *ante*, p. 419.

By being seaworthy "is meant that the ship shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it. If the assurance attaches before the voyage commences, it is enough that the state of the ship be commensurate to the then risk; and, if the voyage be such as to require a different complement of men, or state of equipment in different parts of it, as if it were a voyage down a canal or river and thence across to the open sea, it would be enough if the vessel were, at the commencement of each stage of the navigation, properly manned and equipped for it. But the assured makes no warranty to the underwriters that the vessel shall continue seaworthy, or that the master or crew shall do their duty during the voyage, and their negligence or misconduct is no defence to an action on the policy where the loss had been immediately occasioned by the perils insured against." *Per* Parke, B., in delivering judgment of the Court in *Dixon v. Sadler*, 5 M. & W. 414; cited and approved by the Court in *Biccard v. Shepherd*, 14 Moo. P. C. 494; *Bouillon v. Lupton*, 15 C. B., N. S. 113; 33 L. J., C. P. 37, cited *ante*, p. 429; *Davidson v. Burnand*, L. R., 4 C. P. 117; *Hedley v. Pinkney & Sons SS. Co.*, (1894) A. C. 222, D. P.; and *Quebec Marine Insur. Co. v. Commercial Bank of Canada*, L. R., 3 P. C. 234. An exception from loss from "rotteness, inherent defects, and other unseaworthiness" does not restrict the implied warranty; to have this effect, the exception must be plainly expressed. S. C. Where the ship is not seaworthy when she sails on her voyage, this is not remedied by her becoming so afterwards and before loss. S. C. Now see sect. 34 (2), *ante*, p. 428. Where, from its length, the voyage of a steamship is divided into stages for coaling purposes, the ship must be seaworthy at the commencement of each stage by then having enough coal on board for that stage. *Greenock S.S. Co. v. Maritime Insur. Co.*, (1903) 2 K. B. 657, following *The Vortigern*, (1899) P. 140, C. A. See sect. 39 (3), *ante*, p. 431.

By sect. 40. "(2.) In a voyage policy on goods or other moveables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other moveables to the destination contemplated by the policy." See *Biccard v. Shepherd*, *supra*; *Sleigh v. Tyser*, (1900) 2 Q. B. 333. In a policy on deck cargo, it is insufficient that the ship is fit safely to encounter weather, only because the deck cargo can be readily jettisoned. *Daniels v. Harris*, L. R., 10 C. P. 1. In *Biccard v. Shepherd*, *supra*, there was an insurance on copper ore "at and from the anchorages of H. and N. to S., to commence from the loading at and from the above ports;" the ship was seaworthy at H., but became unseaworthy at N. by reason of overloading, and was lost after sailing from N.; and it was held that the insured could recover for the ore shipped at H. but not for that shipped at N. See also *Bouillon v. Lupton*, *supra*. On an insurance of goods until safely landed, including all risk to and from the ship, there is no warranty that the lighters employed to land the cargo shall be seaworthy. *Lane v. Nixon*, L. R., 1 C. P. 412.

By sect. 40. "(1.) In a policy on goods or other moveables there is no implied warranty that the goods or moveables are seaworthy.

*Primâ facie* a ship is presumed to be seaworthy; *Parker v. Potts*, 3 Dow, 23; and the onus of proving she is not seaworthy lies on the defendants; *Davidson v. Burnand*, *supra*; but where the inability of the ship to

perform the voyage becomes evident in a short time after sailing, the presumption is that it arises from causes existing before her setting sail on the voyage, and that the ship was not then seaworthy; and the *onus probandi* in such cases rests with the assured, to show that the inability arose from causes subsequent to the commencement of the voyage. *Per* Ld. Eldon, in *Watson v. Clark*, 1 Dow, 344; explained by the C. A. in *Pickup v. Thames & Mersey Marine Insur. Co.*, 3 Q. B. D. 594, C. A.; *Douglas v. Scougall*, 4 Dow, 269. A ship is not fit for a voyage unless she sails with a crew competent for the voyage, considering its length and the circumstances under which it is undertaken. Therefore, where, on a voyage from Mauritius to London, there was no one on board competent to supply the captain's place in case of illness, Lord Tenterden, C.J., left it to the jury whether the vessel was seaworthy, and the jury found in the negative. *Clifford v. Hunter*, M. & M. 103. Kent (3 Com. 287, n.) observes that this ruling will hardly apply to short coasting voyages, and cites an American case to that effect. But where the assured has once provided a sufficient crew, the negligence of the crew at the time of the loss is no breach of the implied warranty. *Busk v. R. Exch. Assur. Co.*, 2 B. & A. 73; *Dixon v. Sudler*, *ante*, p. 431.

There is an implied warranty of seaworthiness in a voyage policy, though the insurance be on an abandoned ship and cargo in the interest of the salvor's lien. *Knill v. Hooper*, 2 H. & N. 277; 26 L. J., Ex. 377. But "seaworthiness" is a relative term; and it is for the jury to say whether the ship was reasonably able to perform the voyage: S. C.; as it depends on the nature of the ship as well as of the voyage insured for; and in an action on a policy (in the usual form), evidence of these facts is admissible to show the amount of seaworthiness implied. Therefore, on a policy "on the Ganges steamer from the Clyde to Calcutta," a vessel constructed for river navigation (as was disclosed when the policy was effected), and which, although unfit for ocean navigation, had been made as seaworthy as her size and construction would admit; it was held the underwriters were liable. *Burges v. Wickham*, 3 B. & S. 669; 33 L. J., Q. B. 17; *accord. Clapham v. Langton*, 5 B. & S. 729; 34 L. J., Q. B. 46, Ex. Ch. See also *Bouillon v. Lupton*, *ante*, p. 429. As to evidence of unseaworthiness, see *Merchants' Trading Co. v. Universal Marine Co.*, cited L. R., 9 Q. B. 596; *Anderson v. Morice*, L. R., 10 C. P. 58, 609, Ex. Ch.; *affirm.* on this point, 1 Ap. Ca. 713, D. P. *Hossen & Co. v. Union Marine Insur. Co.*, (1901) A. C. 362, J. C. It is not a statutory unseaworthiness if a ship sail with a deck cargo in contravention of 57 & 58 V. c. 60, s. 451. See *Wilson v. Rankin*, L. R., 1 Q. B. 162, Ex. Ch.

By sect. 39. "(5.) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness." A "time policy" is defined by sect. 25 (1), *ante*, p. 419.

Where a question arises as to the seaworthiness of a ship, ship-builders, though they have never seen the ship, may state their opinion on examining a survey taken by others, it being a matter of skill and science. *Beckwith v. Sydebotham*, 1 Camp. 117; *Thornton v. R. Exch. Assur. Co.*, Peake, 25, *vide ante*, p. 176.

Where the policy expressly admits seaworthiness, the underwriter cannot dispute it, even where the loss was by reason of unseaworthiness. *Parfitt v. Thompson*, 13 M. & W. 392.

*Deviation and delay.*] Sect. 46. "(1.) Where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer



is discharged from liability as from the time of deviation, and it is immaterial that the ship may have regained her route before any loss occurs.

“(2.) There is a deviation from the voyage contemplated by the policy—

“(a.) Where the course of the voyage is specifically designated by the policy, and that course is departed from; or

“(b.) Where the course of the voyage is not specifically designated by the policy, but the usual and customary course is departed from.

“(3.) The intention to deviate is immaterial; there must be a deviation in fact to discharge the insurer from his liability under the contract.”

Sect. 47. “(1.) Where several ports of discharge are specified by the policy, the ship may proceed to all or any of them, but, in the absence of any usage or sufficient cause to the contrary, she must proceed to them, or such of them as she goes to, in the order designated by the policy. If she does not there is a deviation.

“(2.) Where the policy is to ‘ports of discharge,’ within a given area, which are not named, the ship must, in the absence of any usage or sufficient cause to the contrary, proceed to them, or such of them as she goes to, in their geographical order. If she does not there is a deviation.”

By Sched. I. r. 6, “In the absence of any further licence or usage, the liberty to touch and stay ‘at any port or place whatsoever’ does not authorize the ship to depart from the course of her voyage from the port of departure to the port of destination.”

Sect. 48. “In the case of a voyage policy, the adventure insured must be prosecuted throughout its course with reasonable dispatch, and, if without lawful excuse it is not so prosecuted the insurer is discharged from liability as from the time when the delay became unreasonable.”

Sect. 49. “(1.) Deviation or delay in prosecuting the voyage contemplated by the policy is excused—

“(a.) Where authorized by any special term in the policy; or

“(b.) Where caused by circumstances beyond the control of the master and his employer; or

“(c.) Where reasonably necessary in order to comply with an express or implied warranty; or

“(d.) Where reasonably necessary for the safety of the ship or subject-matter insured; or

“(e.) For the purpose of saving human life, or aiding a ship in distress where human life may be in danger; or

“(f.) Where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship; or

“(g.) Where caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against.

“(2.) When the cause excusing the deviation or delay ceases to operate, the ship must resume her course, and prosecute her voyage, with reasonable dispatch.”

By sect. 88, *ante*, p. 418, what is “reasonable dispatch” is a question of fact.

It is a deviation avoiding the policy to slacken sail for the purpose of acting as convoy to a prize; *Lawrence v. Sydebotham*, 6 East, 45; or, to take a vessel in tow for the mere purpose of saving property. *Scaramanga v. Stamp*, 5 C. P. D. 295, C. A. All deviations by reason of inevitable accident or stress of weather, to obtain needful provisions, or do needful repairs, or avoid capture, are implied exceptions to the warranty. 3 Kent, Com. 316, 317; *per cur.*, in *Urquhart v. Barnard*, 1 Taunt. 456; *O'Reilly v. Gonne*, 4 Camp. 249. See further, *Phelps v. Hill*, (1891) 1 Q. B. 605, C. A. A deviation does not discharge the insurer from liability for previous loss, but only from loss accruing after the deviation. *Green v. Young*, 2

Ld. Raym. 840; 2 Salk. 444. Where the policy was "at and from B. A. and port or ports of loading in the province of B. A.," and the vessel went to L. in the province to load, and not getting a cargo there, returned to B. A. to complete her cargo, and on the voyage there was lost; it was held that there had been no deviation; though it would have been otherwise had the vessel once started from L. on her way home. *Harrower v. Hutchinson*, L. R., 4 Q. B. 523. The judgment was reversed on other grounds; L. R., 5 Q. B. 584, Ex. Ch. In case of a *seeking* ship, much greater latitude for the seeking adventure must be allowed. *Phillips v. Irving*, 7 M. & Gr. 325. See further as to deviation, *Hyderabad (Deccan) Co. v. Willoughby*, (1899) 2 Q. B. 530.

Sect. 45, *ante*, p. 426, defines and declares the effect of a "change of voyage."

See also sects. 43, 44, *ante*, p. 426, as to the alteration of the place of departure or of destination.

*Full disclosure.*] See *post*, pp. 449g *et seq.*, *Non-disclosure*.

*Other implied warranties.*] There is no implied warranty on the part of the owner of goods insured, that the ship shall be in all respects properly documented; therefore, where the captain neglected to mention the goods in the ship's manifest, as required by 13 & 14 C. 2, c. 11, &c., this was held no defence by the underwriter against the owner of the goods. *Carruthers v. Gray*, 3 Camp. 142. Nor does the owner of goods warrant that the ship shall not change her nationality, although the loss is occasioned by such change. *Dent v. Smith*, L. R., 4 Q. B. 414. See sect. 37, *ante*, p. 430. Goods must be properly stowed; but lading them on deck is not necessarily improper. *Milward v. Hibbert*, 3 Q. B. 120; *Apollinaris Co. v. Nord Deutsche Insur. Co.*, (1904) 1 K. B. 252. As to the implied warranty as to legality of the adventure, see sect. 41, *post*, p. 449i.

*Licence.*] Where the voyage has been legalized by a licence, such licence must be produced unless lost, when oral evidence of its contents is admissible. *Kensington v. Inglis*, 8 East, 288. But, where a licence was granted by the Secretary of State in this country pursuant to 48 G. 3, c. 126, oral evidence was excluded on the ground that there must have been some register of it preserved in the office of the Secretary of State, which would be better than oral evidence. *Rhind v. Wilkinson*, 2 Taunt. 237. By the above-mentioned statute a duplicate of the Order in Council, authorizing the grant of the licence, is to be annexed to it; where, therefore, the licence was lost, examined copies of the Order in Council from the Council books and of the licence in the office of the Secretary of State were held to be the only proper evidence. *Eyre v. Palsgrave*, 2 Camp. 605. Proof that a vessel warranted to carry a French licence remained at Bordeaux a month after the inspection of a document purporting to be a French licence, and of other documents, by the officers of the French Government, is *primâ facie* evidence that the document is genuine. *Everth v. Twmo*, 1 Stark. 508. Where the licence is general, some evidence must be given to apply it to the voyage in question. *Barlow v. McIntosh*, 12 East, 311. On proof that goods, which cannot be exported without a licence, were duly entered for exportation at the custom-house, it was presumed, in action against the shipowner, that there was a licence to export them. *Van Omeron v. Dowick*, 2 Camp. 44.

*Proof of loss.*] Sect. 55. "(1.) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not

liable for any loss which is not proximately caused by a peril insured against.

- “(2.) In particular—(a.) The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew;
- “(b.) Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against;
- “(c.) Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils.”

Sect. 3, *ante* p. 417, defines “maritime perils.”

As to insurance “lost or not lost,” see sect. 6 (1), *ante*, p. 423.

[Proof of loss by perils of the seas.] By sect. 30 (2) & Sched. I. (*vide ante*, p. 419), rule 7, “The term ‘perils of the seas’ refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves.”

“Every accidental circumstance not the result of ordinary wear and tear, delay, or the act of the assured, happening in the course of the navigation of the ship and incidental to the navigation and causing loss to the subject-matter of insurance,” is a peril of the sea. *Hamilton v. Thames & Mersey Marine Insur. Co.*, 12 Ap. Ca. 484, 492, *per* Ld. Bramwell, approving also the definition of Lopes, L.J., in *Pandorf v. Hamilton*, 16 Q. B. D. 629, 633, that “in a seaworthy ship damage to goods caused by the action of the sea during transit, not attributable to the fault of anybody,” is damage from perils of the sea. *Accord. The Bedouin*, (1894) P. 1, 7, C. A. See also *Blackburn v. Liverpool Brazil, &c., S. Nav. Co.*, *post*, p. 474.

The proximate and not the remote cause of loss is to be regarded, and any loss caused immediately by the perils of the sea is within the policy, though it would not have occurred but for the concurrent actions of some other cause which is not within it. *Dudgeon v. Pembroke*, 2 Ap. Ca. 284, D. P.; see also *Hamilton v. Pandorf*, 12 Ap. Ca. 518, D. P. cited, *post*, p. 473. But, where the insurance is against perils of the sea, and mischief is occasioned by the sea, the natural and unavoidable consequence of which is to cause a further mischief, this consequential injury is also a peril of the sea; as, where the sea-water damages part of a cargo, which thereby becomes putrid, so as to injure another part of the cargo in contact with it. *Montoya v. London Assur. Co.*, 6 Exch. 451; 20 L. J., Ex. 254. Where, however, the goods were not actually damaged, but sold for less because they had formed part of a cargo of goods which were damaged: this loss was held not to be within the policy. *Cator v. Gt. W. Insur. Co. of New York*, L. R., 8 C. P. 552.

There is a loss by perils of the sea where the ship was damaged by negligent loading, and became leaky, and was run ashore to prevent sinking. *Redman v. Wilson*, 14 M. & W. 476. See also *Reischer v. Borwick*, (1894) 2 Q. B. 548, C. A. A loss, occasioned by running foul of another vessel by misfortune, is a loss by the perils of the seas. *Buller v. Fisher*, 3 Esp. 67. So, if the ship were run down by another ship, though through gross negligence on the part of the other ship. *Smith v. Scott*, 4 Taunt. 126; see also *The Xantho*, 12 Ap. Ca. 503, D. P., cited *post*, p. 473. So, even where the master is part owner and the loss is caused

by his negligent navigation, not being wilful. *Trinder v. Thames, &c., Insur. Co.*, (1898) 2 Q. B. 114, C. A. Where a portion of the goods was saved from the wreck and got on shore, but they were plundered by the natives and never came to the hands of the owners, this is a loss by perils of the sea. *Boudrett v. Hentigg*, Holt, N. P. 149. So, where the insurance was on gold, and the ship was stranded abroad, and the gold was taken charge of by the foreign authorities; expense was incurred in vainly endeavouring to get the ship off, and the authorities having apportioned the expense between the parties, refused to give up the gold until the share of expense due from the plaintiffs had been paid; it was held that the amount so paid by them was a loss by perils of the seas, for whether the charge was legal or not, a *vis major* prevented the plaintiffs obtaining the gold without paying the sum, and this was the immediate consequence of the wreck. *Dent v. Smith*, L. R., 4 Q. B. 414. So, on an insurance on goods, where the ship was stranded and utterly disabled from proceeding, and while she lay in the sand was seized and confiscated by the foreign authorities. *Hahn v. Corbett*, 2 Bing. 205.

Where, however, the ship is merely temporarily disabled, and afterwards seized, this is a total loss by capture, and if this be an excepted risk, the insured cannot recover for the previous partial loss by perils of the sea. *Livic v. Janson*, 12 East, 648. Several thousand bags of coffee were insured against perils of the sea, with warranty against capture, and all the consequences of hostilities; the captain, misled by the extinction of a light, owing to hostilities between two neighbouring states, ran the ship ashore, and she was lost; 120 bags of the coffee were saved by salvors, and 1000 bags more would have been saved but for the interference of one of the hostile parties, after which the ship went to pieces: it was held that the underwriters were liable for a partial loss; for that the cause of the wreck was perils of the sea, and that the putting out the light, though an act of hostility within the exception, was too remotely connected with the loss to be taken as the cause; but that the loss of the 1000 bags was within the exception. *Ionides v. Universal Marine Ass.*, 14 C. B., N. S. 259; 32 L. J., C. P. 170. Where the insurance was on cattle warranted free from mortality, and they in the course of the voyage were killed by the rolling of the ship in a storm; this was held a loss by the perils of the seas. *Lawrence v. Aberdeen*, 5 B. & A. 107. So, under a similar policy, where the horses, owing to a storm, broke down the partitions, &c., between them, and so kicked and injured each other that they died. *Gabay v. Lloyd*, 3 B. & C. 793.

By sect. 55 (2b.), *ante*, p. 435, any loss proximately caused by delay is not recoverable although the delay be caused by a peril insured against. Thus, where the voyage is retarded by tempestuous weather, and the delay so occasioned causes the insured cargo to become putrid, so that it is necessarily thrown overboard, this is not a loss occasioned by "perils of the sea," or by "other perils." *Taylor v. Dunbar*, L. R., 4 C. P. 206. *Accord. Pink v. Fleming*, 25 Q. B. D. 396, C. A. See also *Tatham v. Hodgson*, 6 T. R. 656. So damages for delay occasioned by repairs, necessary owing to injury from perils insured against, are not recoverable. *Shelbourne v. Law Investment, &c., Cor.*, (1898) 2 Q. B. 626, 629.

A transport was insured for 12 months, during which she was ordered into a dry harbour, the bed of which was uneven, where, the tide having left her, she received damage from an unusual sea swell; this was held a loss by perils of the sea. *Fletcher v. Inglis*, 2 B. & A. 315. But, if the damage be occasioned merely by the ship taking the ground on the ordinary reflux of the tide, this is not a peril of the sea. *Magnus v. Buttner*, 11 C. B. 876; 21 L. J., C. P. 119. So, where a ship was hove down upon a beach within the

tideway to repair, and the tide rising, she was bilged and damaged; it was held not to be a loss by the perils of the seas. *Thompson v. Whitmore*, 3 Taunt. 227; *Phillips v. Barber*, 5 B. & A. 161.

The following decisions illustrate the cases in which the insurer is not liable under sect. 55 (2c.), *ante*, p. 435, by reason of the nature of the subject-matter of insurance. Thus where a ship sinks from her own inherent weakness, and not from any external violence, this is not a loss by perils of the sea. *Merchants' Trading Co. v. Universal Marine Co.*, cited L. R., 9 Q. B. 596. See also *Anderson v. Morice*, *ante*, p. 432, and *Dudgeon v. Pembroke*, 2 Ap. Ca. 284, D. P. So, where a ship became so injured by worms during her voyage as to be unable to proceed, and was condemned as irreparable, this is not a loss by perils of the seas. *Rohl v. Parr*, 1 Esp. 445.

An insurance against "perils of the sea" does not cover an injury resulting from the ordinary chemical action of the sea-water upon an article exposed to the action in such a state as inevitably to receive injury from it; *Paterson v. Harris*, 1 B. & S. 336; 30 L. J., Q. B. 354; nor from damage arising from the nature and collocation of the cargo; *The Freedom*, L. R., 3 P. C. 594. But where owing to tempestuous weather it was necessary to close the ventilators of a steamship, and the cargo thereby sustained damage, this was held to have been caused by "accidents of the sea." *The Thrunsoe*, (1897) P. 301. As to the words "all risks by land or water," see *Schloss v. Stevens*, (1906) 2 K. B. 665.

Where two ships were injured by collision, and the owners of one were in consequence compelled by a Court of Admiralty to pay damages, this was held not a loss by perils of the seas; nor could they recover the extra expense of maintaining the crew whilst the ship was under repair owing to damage by the sea. *De Vaux v. Salvador*, 4 Ad. & E. 420. It has, in consequence, become the frequent practice to add what is called a collision clause in modern policies, making the underwriters liable for any damages that the shipowner may have to pay, owing to the ship having come into collision with another ship. See *The N. Britain*, (1894) P. 77, C. A., approved in *The Engineer*, (1898) A. C. 382, D. P. This clause does not, however, extend to the costs the shipowners incur in successfully defending a collision suit brought against them; *Xenos v. Fox*, L. R., 3 C. P. 630; in Ex. Ch., L. R., 4 C. P. 665; nor, to liability for personal injury, occasioned on board the other ship, unless expressly so extended; *Taylor v. Dewar*, 5 B. & S. 58; 33 L. J., Q. B. 141; see further *Burger v. Indemnity, &c., Assur. Co.*, (1900) 2 Q. B. 348, C. A. And where both vessels are to blame for the collision, and, in accordance with the rule in the Admiralty Court, the damages are adjusted on the basis that each receives from the other half the damage she sustained; there is only one liability, and the owner of the vessel who receives a balance on this adjustment can recover nothing under the collision clause. *L. SS. Insur. Co. v. Grampian SS. Co.*, 24 Q. B. D. 32, 663, C. A. Where a ship, N., insured, is in tow, the collision clause covers damages recovered against the N. by the owners of the V. in respect of a collision of the tug with the V. *McCowan v. Baine*, (1891) A. C. 401. Where goods are lost through a collision occasioned by negligence of the crew, this is not a loss by perils of the sea, or by barratry of masters or mariners, accident, or damage of the seas. *Grill v. General Iron Screw Colliery Co.*, L. R., 3 C. P. 476, Ex. Ch. See further, *post*, p. 473.

The cost of disposing of a cargo rendered worthless by sea peril is not recoverable on a policy on the ship. *Field SS. Co. v. Burr*, (1898) 1 Q. B. 821; (1899) 1 Q. B. 579, C. A.

Where a ship was disabled by perils of the seas from pursuing her voyage, and the master, having no other means of defraying the expense of repair,

sold part of the goods insured, and applied the proceeds towards the expense, it was held that this was not a loss of the goods by perils of the seas. *Powell v. Gudgeon*, 5 M. & S. 431; *Sarquy v. Hobson*, 2 B. & C. 7; S. C. in Ex. Ch. 4 Bing. 131; 1 Y. & J. 347. So, when in a like case the master, in order to repair, raised money on a bottomry bond, which the owner of the goods was forced to pay in order to avoid their being sold. *Greer v. Poole*, 5 Q. B. D. 272; see also *Philpot v. Swann*, 11 C. B., N. S. 270; 30 L. J., C. P. 358, cited *post*, p. 445. A ship was wrecked, sunk, and sold by the owner and master after a survey by captains approved by the agent of Lloyd's: two days afterwards she was got clear off by the purchaser and repaired, but at great expense, and she might then have returned to England in ballast, or with certain kinds of cargo. *Ld. Tenterden* held, that not only must the owner act honestly, but that the underwriters were not liable unless he formed the best and soundest judgment that could be formed under the circumstances, and, that if the ship could have been brought to England, even in ballast, so as to have repaid the money expended in repairs, they ought to have been made by the captain; and he left it to the jury to say, whether the captain exercised a sound judgment, as well for the benefit of the underwriters, as for the owners. *Doyle v. Dallas*, 1 M. & Rob. 48. See *Gardner v. Salvador*, *Id.* 116, and *Cobequid Marine Insur. Co. v. Barteaux*, L. R., 6 P. C. 319. The question is, whether he actually exercised a sound judgment; and proof of his inability to do so by reason of habits of drunkenness or otherwise, is legitimate evidence. *Alcock v. R. Exch. Assur. Co.*, 13 Q. B. 292. If a ship, agreed to be seaworthy, is damaged by a storm, so that the expense of repair will exceed the value of the ship when repaired, it is a total loss by perils of the seas, though the ship was an old and partially decayed one, and the expense would, on that account, be increased. *Phillips v. Nairne*, 4 C. B. 343. See *Grainger v. Martin*, and other cases, *post*, p. 445.

By sect. 58. "Where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed." What time is reasonable is a question of fact; sect. 88, *ante*, p. 418.

It is sufficient to prove that the ship has not been heard of in the country from which she sailed, without calling witnesses from the port of destination to prove that she never arrived there. *Twemlow v. Oswin*, 2 Camp. 85. The time within which a missing ship will be presumed lost must depend on the circumstances of the case. In *Houstman v. Thornton*, Holt, N. P. 242, a ship which had sailed on a seven weeks' voyage, and had not been heard of for eight or nine months, was presumed to be lost. Where it was proved that the vessel (a foreign one, and trading between foreign ports) sailed on the voyage insured with the goods on board, but had never arrived at her port of destination, and that a report prevailed at the place whence she sailed that she had foundered at sea, but that the crew were saved—this was held sufficient *prima facie* evidence of a loss by the perils of the seas, and the plaintiff was held not bound to call any of the crew, or to show that he was unable to procure their attendance. *Koster v. Reed*, 6 B. & C. 19.

Where a power to the charterer, for certain causes at his discretion, to retain freight due, is lawfully exercised by him on account of the happening of a sea peril, the freight is not thereby lost by perils of the sea. *Inman Steamship Co. v. Bischoff*, 7 Ap. Ca. 670, D. P. Where, however, the payment of hire of a ship is to cease during detention caused by want of repair, the damage having been caused to the ship by perils insured against, the payment ceased for a certain period, it was held that on a policy on freight in the usual terms, this loss of hire was recoverable. *The Alps*, (1893) P. 109; *Accord. The Bedouin*, (1894) P. 1, C. A. See further as to the loss of charter

freight, *Brankelow SS. Co. v. Canton Insur. Office*, (1899) 2 Q. B. 178, C. A.; affirm *sub nom. Williams & Co. v. Id.*, (1901) A. C. 462, D. P.

*Proof of loss by fire.*] Proof that the ship was burned by the captain to prevent her falling into the hands of the enemy, is evidence of a loss by fire. *Gordon v. Rimmington*, 1 Camp. 123. So, though the ship was burned by the negligence of the master and mariners, this is a loss by fire. *Busk v. R. Exch. Assur. Co.*, 2 B. & A. 73. But, on an insurance on goods, if the goods are burnt in consequence of being put on board in bad condition, this, being occasioned by the insurer's own act, would not be a loss by fire within the policy. *Boyd v. Dubois*, 3 Camp. 133. Where a fire insurance was on a ship described as "lying in the V. Docks, with liberty to go into a dry dock and light the boilers once or twice during the currency of the policy;" it was held that the ship was not covered while she was in the river for any other purpose than to pass from the V. Docks to a dry dock, and *vice versa*. *Pearson v. Commercial Union Assur. Co.*, 1 Ap. Ca. 498, D. P. See also *Australian Agricultural Co. v. Saunders*, L. R., 10 C. P. 668, Ex. Ch.; *Wingate v. Foster*, 3 Q. B. D. 582, C. A. Where a ship is "warranted free from average under 3 per cent. unless general or the ship be . . . burnt," the exception from the warranty applies only where the injury by fire constitutes a substantial burning of the ship as a whole. *The Glenlivet*, (1894) P. 48, C. A.

*Proof of loss by capture.*] Where a vessel is driven by a gale of wind on an enemy's coast without damage, and there captured, it is a loss by capture; *Green v. Elmslie, Peake*, 212; see *Ionides v. Universal Marine Ass.*, *ante*, p. 436; *aliter*, if lost by stranding before the capture; *Hahn v. Corbett*, *ante*, p. 436. The books at Lloyd's have in some cases been received as evidence of a capture, but not of notice of the loss to the underwriter. *Abel v. Potts*, 3 Esp. 242; *Fowler v. English, &c., Insur. Co.*, *infra*. A foreign sentence of condemnation is not evidence of a capture; but, after other proof of a capture, it is evidence to show the grounds of condemnation. *Marshall v. Parker*, 2 Camp. 69. If a ship after capture, without abandonment, is restored so as to be in a condition to pursue the voyage insured, and is afterwards lost on another voyage, the plaintiff cannot recover for a total loss by capture. *Kulen Kemp v. Vigne*, 1 T. R. 304. A re-capture may convert a total into a partial loss; *Thellusson v. Shedden*, 2 N. R. 228, 230; unless after notice of abandonment and after action. *Ruys v. R. Exchange Assur. Cor.*, (1897) 2 Q. B. 135. See also *Fowler v. English, &c., Insur. Co.*, 18 C. B., N. S. 919; 34 L. J., C. P. 253. Proof of a capture by collusion with the captain will support an averment of loss by capture. *Arcangelo v. Thompson*, 2 Camp. 620. Insurance of a French ship in England during peace will not avail against British capture after war declared with France. *Purtado v. Rodgers*, 3 B. & P. 191. Whether the words "capture or seizure" occur in the policy or in a warranty excepting them, capture by a foreign force under error is within the words; and the fact that the ship is sunk by the captor's guns does not make it less a capture. *Powell v. Hyde*, 5 E. & B. 607; 25 L. J., Q. B. 65. So, where a ship is seized and detained for smuggling, amounting to a barratrous act of the master. *Cory v. Burr*, 9 Q. B. D. 463, C. A.; 8 Ap. Ca. 393. So, a warranty "free from capture and seizure, and the consequences of any attempt thereat," includes a piratical carrying away of the ship by passengers. *Kleinwort v. Shepard*, 1 E. & E. 447; 28 L. J., Q. B. 147. So, a seizure of the ship by savages for the purposes of plunder. *Johnston v. Hogg*, 10 Q. B. D. 432. A warranty against capture, seizure, or detention protects the insurer on a policy otherwise similar to that in *Janson v. Driefontein, &c., Mines*, *post*, p. 440, against seizure under circumstances like those in that case. *Robinson Gold Mining Co. v. Alliance Assur. Co.*, (1902)

2 K. B. 489, C. A.; (1904) A. C. 359, D. P. So against delay caused by the ordinary municipal law. *Miller v. Law Accident Insur. Co.*, *infra*. Loss is total, if the assured can only avert a sale ordered by a prize court, pending an appeal, by giving bail which a prudent uninsured owner would not have given. *Stringer v. English Insur. Co.*, L. R., 5 Q. B. 584, Ex. Ch.

As to a breach of neutrality and the evidence thereof, see *Hobbs v. Henning*, 17 C. B., N. S. 791; 34 L. J., C. P. 117.

*Proof of loss by restraint of princes, &c.*] By Sched. I., r. 10, "The term 'arrests, &c., of kings, princes, and people' refers to political or executive acts, and does not include a loss caused by riot or by ordinary judicial process." The effect of these words in the body of the policy is annulled by a warranty against "capture, seizure, and detention." *Miller v. Law Accident Insur. Co.*, *ubi infra*.

In an insurance in the usual form against the restraint of all princes, &c., is included a loss consequent on a seizure, under an embargo for a temporary purpose by the government of the country of the assured, that country and the country of the assurer being at peace, and the embargo being unconnected with any hostility existing or expected between the two countries; for the assured is not so identified with the acts of the government of his country as to make their acts his own; *Aubert v. Gray*, 3 B. & S. 163; 32 L. J., Q. B. 50; Ex. Ch., overruling *Conway v. Gray*, 10 East, 536; *sed quære*, whether if the act of seizure were a lawful act under the municipal law of the country of the assured, the seizure would as against him be within the insurance. The operation of the ordinary municipal law of a country affecting the delivery of the insured goods is within this clause. *Miller v. Law Accident Insur. Co.*, (1903) 1 K. B. 712, C. A. Where an insurance had been effected by a subject of a foreign government, on treasure which was seized by that government in contemplation of war, afterwards declared by it against this country, and for the prosecution thereof, the insurance may be enforced after the restoration of peace. *Janson v. Driefontein, &c., Mines*, (1902) A. C. 484, D. P. A wrongful seizure, as a slaver, comes within this clause, and notice of abandonment makes the loss total; and though after long litigation and judgment of restitution, the goods still remain in specie, a reasonable man could not be expected to be willing to retain possession, and therefore the loss remains total. *Lozano v. Janson*, 2 E. & E. 160; 28 L. J., Q. B. 337.

A ship was to be loaded with corn at I., under a charter-party, with usual exception of the restraint of princes, &c.; it was proved that no corn had been exported from I. during the vessel's stay, and evidence was given to show that W., where I. was situate, was invaded by the Russians, and their general, G., had refused to allow grain to be exported, and had referred the applicant elsewhere; evidence was also tendered of copies of placards in the name of G., posted on the walls of I., at the period of the ship's arrival, prohibiting the exportation of grain; it was held that such evidence was admissible, and proved a plea of the exception. *Bruce v. Nicolopulo*, 11 Exch. 129; 24 L. J., Ex. 321. This exception in a bill of lading for goods shipped in a Russian port, on board a Mecklenburg ship, for a port in this country, meant at least the enemies of the Duke of Mecklenburg, the sovereign of the carrier. *Russell v. Niemann*, 17 C. B., N. S. 163; 34 L. J., C. P. 10; *The Heinrich*, L. R., 3 Adm. 424. The act of closing the ports by an enemy is "a prohibition of export preventing loading." *Adamson v. Newcastle, &c., Insur. Assoc.*, 4 Q. B. D. 462.

The hostile detention of goods within a besieged town is a restraint of princes. *Rodocanachi v. Elliott*, L. R., 8 C. P. 649; L. R., 9 C. P. 518, Ex. Ch. Siege and blockade are within the same principle in this respect. S. C.; *Geipel v. Smith*, L. R., 7 Q. B. 404. The exception includes a



reasonable fear of seizure of the goods as contraband of war. *Nobel's Explosives Co. v. Jenkins*, (1896) 2 Q. B. 326. As to delay by civil disturbance, see *Smith v. Rosario Nitrate Co.*, (1894) 1 Q. B. 174, C. A.

*Proof of loss by barratry.*] By Sched. I., r. 11, "The term 'barratry' includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer." Therefore, the act of the owner is not barratry. Evidence that the person who was described in the policy and acted as master of the ship, carried her out of her course for fraudulent purposes of his own, is *primâ facie* evidence of barratry without negative proof that he was not the owner. *Ross v. Hunter*, 4 T. R. 33. Where, however, the whole ship is let, the freighter is owner *pro hac vice*, and barratry may then be committed, even with the consent of the general owner. *Vallejo v. Wheeler*, Cowp. 143; *Scares v. Thornton*, 7 Taunt. 627. Smuggling by the captain on his own account, will be evidence of barratry. *Lockyer v. Ojley*, 1 T. R. 252; *Cory v. Burr*, ante, p. 439. But if by the gross negligence of the owner, the mariners barratrously carry smuggled goods on board, the underwriters are not liable. *Pipon v. Cope*, 1 Camp. 434. Proof that prisoners of war rose and confined all the crew and put them on shore except one, who was heard on the deck in conversation with them, is evidence of barratry. *Hucks v. Thornton*, Holt, N. P. 30. Where a ship is lost through the negligent steering of the master, whereby she was run into and sunk, this is not barratry. *Grill v. General Iron Screw Colliery Co.*, L. R., 3 C. P. 476, Ex. Ch.

*Proof of loss by "other perils."*] By Sched. I., r. 12, "The term 'all other perils' includes only perils similar in kind to the perils specifically mentioned in the policy."

Thus the case of a vessel sunk by an English ship of war firing into her by mistake, was held to be a loss within the general words. *Cullen v. Butler*, 5 M & S. 461, 465.

The general words do not, however, cover cases of ordinary wear and tear, or damage resulting from ordinary occurrences of a sea voyage, such as loss of anchors, friction of rocks, leakage, worms, rats, &c., for these are not the extraordinary and fortuitous perils of the sea. 3 Kent, Com. 300; *Kay v. Wheeler*, L. R., 2 C. P. 302. Of this kind is the damage done to a ship in harbour by the ordinary flux or reflux of the tide; *Magnus v. Buttmer*, 11 C. B. 876; 21 L. J., C. P. 119; unless occasioned by an unusual swell or other accident. *Phillips v. Barber*, 5 B. & A. 161; see ante, pp. 436, 437. Nor do the general words extend to damage to the machinery of a steamer occasioned by the accidental or negligent displacement of some part thereof, not occasioned by perils of the sea; *Hamilton v. Thames and Mersey Marine Insur. Co.*, 12 Ap. Ca. 484, D. P.; nor to damage caused to her by the explosion of her boiler; S. C., overruling *W. India & Panama Telegraph Co. v. Home, &c.*, *Marine Insur. Co.*, 6 Q. B. D. 58, C. A. But, injury occasioned to the cargo by seawater which flowed down the discharge pipe of the vessel, and through some valves which had been negligently left open, while the cargo was being loaded in harbour, was held to be covered by the clause in the policy against "other perils," if not a loss occasioned by "perils of the sea." *Davidson v. Burnand*, L. R., 4 C. P. 117. So a loss occasioned by the heating of a cargo of coals, endangering a fire and loss of the ship, falls within "other perils." *The Knight of St. Michael*, (1898) P. 30.

*Proof of loss by collision.*] A policy of insurance on a tug against damage sustained by collision between her and "any vessel" covers loss occasioned by collision with the anchor of a vessel, by which that vessel was

held. *In re Margetts and Ocean Accident, &c., Co.*, (1901) 2 K. B. 792. And where a tug S. has caused damage by collision for which she and the tow N. were held liable, N.'s liability is covered by N.'s policy against damages she might have to pay for collision with any other ship, S. and N. being legally one ship for their joint navigation to avoid collision. *The Niobe*, (1901) A. C. 401, D. P.

*Proof of loss by improper navigation.*] "Improper navigation" includes every case where something is omitted to be done which ought to be done to enable the ship safely to carry her cargo, and the omission leads to loss, and whether the omission be before the navigation commences; *Carmichael v. Liverpool, &c., Mutual Indemnity Association*, 19 Q. B. D. 242, C. A.; or during its continuance; *Good v. London Steamship, &c., Protecting Association*, L. R., 6 C. P. 563. It does not include damage caused to a cargo from the boards of the ship having been insufficiently cleaned from a previous offensive cargo which had saturated them. *Canada Shipping Co. v. British Shipowners' Association*, 22 Q. B. D. 727; 23 *Id.* 342, C. A. See also *The Ferro*, (1893) P. 38.

*Proof of loss by pirates or thieves.*] By Sched. I., r. 8, "The term 'pirates' includes passengers who mutiny and rioters who attack the ship from the shore."

R. 9. "The term 'thieves' does not cover clandestine theft or a theft committed by any one of the ship's company, whether crew or passengers."

*Proof of stranding.*] The memorandum, usual in policies on goods, to protect the insurers from claim for loss on certain articles, or from liability to particular average, "unless the ship be stranded," raises the question as to what is "stranding" within the memorandum. By Sched. I., r. 14, "Where the ship has stranded, the insurer is liable for the excepted losses, although the loss is not attributable to the stranding, provided that when the stranding takes place the risk has attached and, if the policy be on goods, that the damaged goods are on board."

In the case of memorandum goods before the plaintiff can recover for a partial loss, the *stranding* must be proved. A *striking* is not sufficient, if it is merely temporary, as for a minute and a half; in order to constitute a stranding, the ship must be stationary for some time. *M'Dougle v. R. Exch. Assur. Co.*, 4 Camp. 283; 4 M. & S. 503. But where the ship was fixed from 15 to 20 minutes, it was held a stranding. *Baker v. Towry*, 1 Stark. 436. If a ship be forced ashore, or be driven on a bank and remain for any length of time on the ground, as for two hours, this is stranding without reference to the degree of damage she sustains. *Harman v. Vaux*, 3 Camp. 431. "A stranding," says Bailey, J., "may be said to take place where a ship takes the ground not in the ordinary course of the navigation, but by reason of some unforeseen accident." *Bishop v. Pentland*, 7 B. & C. 224; accord. *Wells v. Hopwood*, 3 B. & Ad. 20, *post*, p. 443. "If a ship touches and goes, she is not 'stranded,' if she touches and sticks she is, that is in places which she in the ordinary course of her navigation is not suffered to touch" as to which *vide post*, p. 443. *The Glenlivet*, (1894) P. 48, 54, *per* A. L. Smith, L.J.

Where a ship, under the conduct of a pilot, in her course up the river to L. was, against the advice of the master, fastened at the pier of the dock basin by a rope to the shore, and left there, and took the ground, and when the tide left her fell over on her side and bilged; this was held to be a stranding. *Carruthers v. Sydebotham*, 4 M. & S. 77. So, where in the course of a voyage upon an inland navigation, it became necessary, in order to repair the navigation, to draw off the water, and the ship in consequence,

although she had been placed in the most secure situation that could be found, when the water was drawn off, went by accident upon some piles, which were not previously known to be there—it was held a stranding. *Raynor v. Godmond*, 5 B. & A. 225. So, where in the course of the voyage, the ship was by tempestuous weather forced to take shelter in a harbour, and upon entering it struck upon an anchor, and being brought upon her moorings was found leaky and in danger of sinking, and on that account was hauled with warps higher up the harbour, where she took the ground, and remained fast for half an hour—the stranding was held to be proved. *Barrow v. Bell*, 4 B. & C. 736. A ship was compelled in the course of her voyage to put into a tidal harbour, and was there moored alongside a quay in the usual place for such ships. The rope with which she was fastened, not being of sufficient length, broke when the tide left the vessel, and she fell over upon her side, and was thereby greatly injured;—held to be a stranding, though occasioned remotely by the negligence of the crew; the falling over was not in the ordinary course of the voyage, but in consequence of an unforeseen accident out of the ordinary course of the voyage, viz., the breaking of the rope. *Bishop v. Pentland*, 7 B. & C. 219.

But, where the taking the ground is in the ordinary course of navigation, and no more than is usual with the vessel on the same voyage, it is not a stranding, though the vessel or goods are injured by it. *Hearne v. Edmunds*, B. & B. 388. “Where a vessel takes the ground, in the ordinary and usual course of navigation and management in a tide river or harbour, upon the ebbing of the tide or from natural deficiency of water, so that she may float again upon the flow of tide or increase of water, such an event shall not be considered as stranding within the sense of the memorandum. But, where the ground is taken under any extraordinary circumstances of time or place by reason of some unusual or accidental occurrence, such an event shall be considered as a *stranding* within the meaning of the memorandum.” *Wells v. Hopwood*, 3 B. & Ad. 34, per Ld. Tenterden. Where the vessel, in the course of discharging her cargo in a tidal harbour, on one occasion grounded, not on the mud as was intended, but on a heap of stones, owing to one of her mooring ropes breaking, and the wind blowing at the time from a particular quarter: this was held to be “a stranding.” S. C. So, where intentional grounding causes the ship injury, owing to the bottom of the harbour being in an unusual condition. *Letchford v. Oldham*, 5 Q. B. D. 538, C. A. But where, upon the ebbing of the tide, the vessel took the ground in a tidal harbour in the place where it was intended she should, but in so doing struck against some hard substance, by which two holes were made in her bottom; this was held to be no stranding. *Kingsford v. Marshall*, 8 Bing. 458. In *Corcoran v. Gurney*, 1 E. & B. 454; 22 L. J., Q. B. 113, the ship was forced by stress of weather to take a tidal harbour, where, it being low water, she took the ground, and only floated about eight days in a month at the top of the spring tides, being unable to leave the harbour for two months, owing to contrary winds: this was held a stranding, the court adopting the above definition in *Wells v. Hopwood*, *supra*. See also *De Mattos v. Saunders*, L. R., 7 C. P. 570.

In order to bring the case within the *stranding*, mentioned in the memorandum as to partial loss, it must appear that the goods were on board at the time. Sched. I., r. 14, *ante*, p. 442. The stranding must be of the ship itself, and although the insurance includes risk of craft, &c., the stranding of a lighter conveying the goods from the ship will not make the insurers liable. *Hoffman v. Marshall*, 2 N. C. 383.

[*Proof of loss; total or partial.*] Sect. 56. “(1.) A loss may be either total or partial. Any loss other than a total loss, as hereinafter defined, is a partial loss.

“(2.) A total loss may be either an actual total loss, or a constructive total loss.

“(3.) Unless a different intention appears from the terms of the policy, an insurance against total loss includes a constructive, as well as an actual, total loss.

“(4.) Where the assured brings an action for a total loss and the evidence proves only a partial loss, he may, unless the policy otherwise provides, recover for a partial loss.

“(5.) Where goods reach their destination in specie, but by reason of obliteration of marks, or otherwise, they are incapable of identification, the loss, if any, is partial, and not total.” As to this case, see *Spence v. Union Marine Insur. Co.*, *post*, p. 449*b*.

Sect. 57. “(1.) Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.

“(2.) In the case of an actual total loss no notice of abandonment need be given.”

Sect. 59. “Where, by a peril insured against, the voyage is interrupted at an intermediate port or place, under such circumstances as, apart from any special stipulation in the contract of affreightment, to justify the master in landing and re-shipping the goods or other moveables, or in transhipping them, and sending them on to their destination, the liability of the insurer continues, notwithstanding the landing or transhipment.”

Sect. 60. “(1.) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

“(2.) In particular, there is a constructive total loss—

“(i.) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or

“(ii.) In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired.

“In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired; or

“(iii.) In the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival.”

Sect. 61. “Where there is a constructive total loss the assured may either treat the loss as a partial loss, or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss.”

By sect. 27 (4), “unless the policy otherwise provides, the value fixed by the policy is not conclusive for the purpose of determining whether there has been a constructive total loss.”

The case of stranding may be taken as an illustration of constructive total loss. Thus stranding is not a total loss, and may not be the foundation of any claim at all; but, if the ship become thereby unnavigable, by reason of the impossibility of getting her afloat, or the great expense of doing so, the loss may be converted into a total one by abandonment. 3 Kent, Com. 323.

If a ship and cargo be sunk in deep water, so that the cargo could only be saved by raising the ship, in calculating the expense of raising the ship in order to ascertain whether there is a constructive total loss, the general average contribution to be made by the cargo must be deducted from such expense. *Kemp v. Halliday*, L. R., 2 Q. B. 520; 6 B. & S. 757, Ex. Ch. See also *Marine Insurance Co. v. China, &c., Steamship Co.*, 11 Ap. Ca. 573, D. P. In some cases of damage by sea the owners may be justified in selling the ship and claiming for total loss; in such cases the question for the jury will be, whether the sale was justified by necessity, and was for the benefit of all parties, and the net amount of the sale becomes money received for the insurer. S. CC.; *Doyle v. Dallas*, 1 M. & Rob. 48; *Gardner v. Salvador*, *Id.* 116; *vide ante*, p. 438. Where the ship is of an exceptional size, the price she would fetch in the market when repaired is not the test of her real value, in order to make out a constructive total loss. *Grainger v. Martin*, 2 B. & S. 456; 31 L. J., Q. B. 186; S. C., in Ex. Ch., 4 B. & S. 9. See also *Young v. Turing*, 2 M. & Gr. 593. And where a wreck is repaired the cost of repairs alone must exceed the insured value, taken by the policy to be the "repaired value," in ascertaining whether the vessel was a constructive total loss; and the value of the wreck is not to be added to such cost. *Angel v. Merchants' Marine Insur. Co.*, (1903) 1 K. B. 871, C. A., correcting *dictum* of Ld. Abinger, C.B., at 2 M. & Gr. 601. In the case of insurance on freight, where the ship was disabled before she had completed her lading, and the master went to a distant place for repairs, and finding he could not get them done there, sailed on to the port of destination without returning for the rest of the cargo, acting throughout as a prudent owner, uninsured, would have done,—it was held that the freight was not lost by perils of the seas. *Philpot v. Swann*, 11 C. B., N. S. 270; 30 L. J., C. P. 358, citing and approving *Mordy v. Jones*, 4 B. & C. 394, and *Moss v. Smith*, 9 C. B. 94; 19 L. J., C. P. 225. In case of sale by the master of a ship or goods in specie, there must be a clear case of extreme necessity to constitute an actual loss without abandonment. Where the thing insured exists in specie, the loss is constructive only, and the assured can only found a claim for total loss by abandonment. *Knight v. Faith*, 15 Q. B. 649; 19 L. J., Q. B. 509. There is no total loss of freight, merely because there was an injury to the ship by perils of the sea, which cost more to repair than the amount of freight, if the ship itself was worth repairing. *Moss v. Smith*, *supra*. See also *Assicurazioni Generali v. SS. Bessie Morris Co.*, (1892) 2 Q. B. 652, C. A., cited *post*, p. 474. See further as to what amounts to a total loss of freight, *Potter v. Rankin*, L. R., 6 H. L. 83; *Allison v. Bristol Marine Insur. Co.*, 1 Ap. Ca. 209, D. P.; *Asfar v. Blundell*, (1896) 1 Q. B. 123, C. A. Where a cargo was partially lost by sea perils insured against, and the residue sold, by order of the Court of Admiralty, in course of proceedings instituted by the salvors, the whole proceeds being absorbed in payment of costs, it was held that there was no total loss, the sale being too remote a consequence of the sea perils. *De Mattos v. Saunders*, L. R., 7 C. P. 570. But where a sinking derelict vessel has been towed into port by salvors, and sold by order of the Admiralty Court for less than the actual cost of the salvage services, the sale was held to constitute an actual total loss. *Cossmann v. West*, 13 Ap. Ca. 160, J. C. Where freight is eventually earned, although paid to the obligees of a bottomry bond (by a decree of the Admiralty), which the master has been obliged to enter into in order to get money necessary for repairs, the shipowner cannot claim either for total or partial loss of freight. *Benson v. Chapman*, 8 C. B. 950; 2 H. L. C. 696. A loss, which by abandonment might become total, may become a partial loss only by subsequent events, as by recapture, release from detention, &c., before action. 2 Wms. Saund. 203 *i(f)*.

The W. Co. insured a ship and re-insured part of the risk with the E. Co., "subject to the same terms and conditions as the original policy, and to pay as may be paid thereon;" the ship sustained a loss for which the W. Co. was liable; it was held they could recover against the E. Co. before they had paid the amount. *Ex pte. W. Insurance Co.*, (1892) 2 Ch. 423. As to loss, where the insurance is effected on special adventures, e.g., the successful laying of a submarine telegraph cable, see *Wilson v. Jones*, L. R., 2 Ex. 139, Ex. Ch.; or the transmission of stock certificates abroad to be returned with new sheets of dividend coupons, see *Baring Bros. v. Marine Insur. Co.*, 10 Times L. R. 276, C. A., reversing S. C. (1893) W. N. 164.

An insurance "against total loss only" does not exclude a constructive total loss. *Adams v. Mackenzie*, 13 C. B., N. S. 442; 32 L. J., C. P. 92. But the doctrine of constructive total loss does not apply to a bottomry bond; *Broomsfield v. S. Insur. Co.*, L. R., 5 Ex. 192; for the doctrine does not apply so as to avoid the bond. *The Great Pacific*, L. R., 2 P. C. 516.

In the case of loss to goods, not in its inception total, the claim to indemnity does not arise until it can be ascertained what is the amount of the injury sustained. *Browning v. Provincial Insur. Co. of Canada*, L. R., 5 P. C. 263.

*Proof of loss.—Abandonment.*] Sect. 62. "(1.) Subject to the provisions of this section, where the assured elects to abandon the subject-matter insured to the insurer, he must give notice of abandonment. If he fails to do so the loss can only be treated as a partial loss.

"(2.) Notice of abandonment may be given in writing, or by word of mouth, or partly in writing and partly by word of mouth, and may be given in any terms which indicate the intention of the assured to abandon his insured interest in the subject-matter insured unconditionally to the insurer.

"(3.) Notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss, but where the information is of a doubtful character the assured is entitled to a reasonable time to make inquiry.

"(4.) Where notice of abandonment is properly given, the rights of the assured are not prejudiced by the fact that the insurer refuses to accept the abandonment.

"(5.) The acceptance of an abandonment may be either express or implied from the conduct of the insurer. The mere silence of the insurer after notice is not an acceptance.

"(6.) Where notice of abandonment is accepted the abandonment is irrevocable. The acceptance of the notice conclusively admits liability for the loss and the sufficiency of the notice.

"(7.) Notice of abandonment is unnecessary where, at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him.

"(8.) Notice of abandonment may be waived by the insurer.

"(9.) Where an insurer has re-insured his risk, no notice of abandonment need be given by him."

Sect. 63. "(1.) Where there is a valid abandonment the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto.

"(2.) Upon the abandonment of a ship, the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty; and, where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss."

Sect. 60, *ante*, p. 444, defines constructive total loss. This, in general, requires notice of abandonment, sect. 62, *ante*, p. 446. The cases in which abandonment is necessary have been thus described:—There may be a capture which, though *primâ facie* a total loss, may be followed by re-capture. There may be a forcible detention, which may speedily terminate, or may last so long as to end in the impossibility of bringing ship or goods to their destination. There may be some other peril which renders the ship un-navigable, without reasonable hope of repair, or by which goods are partly lost, or so damaged as not to be worth the expense of bringing them to their destination. In these or similar cases, if a prudent man, not insured, would decline any further expense in prosecuting the adventure, a party insured may, for his own benefit, as well as that of the underwriter, treat the case as one of total loss. But, if he elects to do so, the principle of indemnity requires that he should make a cession of all his right to the recovery of it, and that, too, within a reasonable time after he receives intelligence of the accident. . . . In all these cases the thing assured, or part of it, is supposed to exist in specie, and there is a possibility, however remote, of its arriving at its destination, or of its value being in some way affected by the measures that may be adopted for the recovery or preservation of it. *Roux v. Salvador*, 3 N. C. 286, Ex. Ch. *per cur.* See also *Sailing Ship Blairmore Co. v. Macredie*, *infra*. “A mere loss of the adventure by retardation of the voyage, without loss of the thing insured, either by its being actually taken from the ship or spoiled, does not constitute a total loss under a policy of insurance, unless by the aid and effect of an abandonment.” *Naylor v. Taylor*, 9 B. & C. 723, *per cur.* In order to justify an abandonment, there must have been *that* in the course of the voyage which, at the time, constituted a total loss; thus, the desertion of a ship, necessitated at the time by stress of weather, coupled with a notice of abandonment, constitutes a total loss, though the ship be afterwards saved. *Holdsworth v. Wise*, 7 B. & Co. 794. Where a cargo of hides, in consequence of a leak, began to putrify, and was sold at an intermediate port for less than a fourth of their value, and it appeared that, if not sold, they could not have arrived at the end of the voyage *as hides*, it was held to be a total loss without an abandonment. *Roux v. Salvador*, 3 N. C. 266, Ex. Ch. See also *Cossmán v. West*, cited *ante*, p. 445; *Farnworth v. Hyde*, L. R., 2 C. P. 204, Ex. Ch.; *Potter v. Rankin*, L. R., 6 H. L. 83. In this last case, the policy was on freight to be earned on a subsequent voyage, and the decision is explained by the C. A. in *Kaltenbach v. Mackenzie*, 3 C. P. D. 467. See further *Trinder v. Thames, &c., Insur. Co.*, (1898) 2 Q. B. 114, C. A. The mere loss of the *voyage*, by delay or otherwise, will not warrant the abandonment of *ship or cargo*, if either remain in specie. *Anderson v. Wallis*, 2 M. & S. 240; *Falkner v. Ritchie*, *Id.* 290; *Hunt v. R. Exch. Assur. Co.*, 5 M. & S. 47. But, where goods are hostilely detained in a besieged town, they may be abandoned. *Rodocanachi v. Elliott*, *ante*, p. 440. Matter arising after action will not defeat an abandonment made before action, but must be dealt with according to the rights of the parties under the abandonment. *Ruys v. R. Exch. Assur. Cor.*, (1897) 2 Q. B. 135, 141, citing S. C. And where a ship has been sunk in deep water, the underwriters cannot after notice of abandonment convert the loss into a partial one by raising her. *Sailing Ship Blairmore Co. v. Macredie*, (1898) A. C. 593, D. P.

The express terms of sect. 62(2), *ante*, p. 446, render unnecessary reference to the numerous cases decided on the sufficiency of particular notices of abandonment. By sect. 88, *ante*, p. 418, what is “reasonable time” or “reasonable diligence,” is a question of fact. An informality or inaccurate statement in the notice will not vitiate it. *Dean v. Hornby*, 3 E. & B. 180. It must apply to the entire subject of insurance, and not to part only. 2 Wm. Saund.

203 *g* (19); 3 Kent, Com. 329. Where the insurer has, upon receiving the notice, taken possession of the subject-matter insured, he is bound thereby, and cannot afterwards rely on a breach of warranty of which he had notice. *Provincial Insur. Co. of Canada v. Leduc*, L. R., 6 P. C. 224, *per cur.*

A party, jointly interested in the subject-matter of the insurance, and who has effected the insurance, may give notice of abandonment for all. *Hunt v. R. Exch. Assur. Co.*, 5 M. & S. 47. But the person with whom a policy on a ship has been simply deposited as a security for a loan to the shipowner has no implied authority to give notice of abandonment to the underwriters; and, a notice given by such persons cannot enure for the benefit of the shipowner, so as to enable him to recover upon a constructive total loss. *Jardine v. Leathley*, 3 B. & S. 700; 32 L. J., Q. B. 132. Where the assured has elected, see sect. 61, *ante*, p. 444, to treat a seizure as a partial loss, he loses the right of abandoning on the same state of facts, relative to the extent and degree of the operation and effects of the perils insured against. *Stringer v. English Insur. Co.*, L. R. 4 Q. B. 676, 689; L. R. 5 Q. B. 599, Ex. Ch.

*Proof of amount of loss.—Adjustment.*] If the liability be not disputed, and the policy be an open one, the parties usually proceed to adjust the amount, and this adjustment is an admission of the facts on which the claims are founded, and is evidence against the underwriter of the amount due. It is proved by evidence of his signature, or that of his agent, with proof of the authority of the latter; and it seems that an agent, who has authority to subscribe a policy, has also authority to sign an adjustment of the loss. *Richardson v. Anderson*, 1 Camp. 43, n. But, an adjustment is only *primâ facie* evidence against the underwriter, and does not bind him, unless there was a full disclosure of the circumstances of the case; *Shepherd v. Chewter*, *Id.* 274; and fraud opens an adjustment; *Christian v. Coombe*, 2 Esp. 489. A clause may be inserted in the policy, requiring the loss to be adjusted before an action can be maintained on the policy. *Tredwen v. Holman*, 1 H. & C. 72; 31 L. J., Ex. 398. Where the policy provides for payment of losses "as *per* foreign statement," the parties are bound by the statement made up according to the foreign law. *Harris v. Scaramunga*, L. R., 7 C. P. 481; *Mavro v. Ocean Marine Insur. Co.*, *Id.* 595; L. R. 10 C. P. 414, Ex. Ch.; *De Hart v. Compania, &c., "Aurora,"* (1903) 2 K. B. 503, C. A. See also *Stewart v. W. India, &c., Steamship Co.*, L. R. 8 Q. B. 88, 362. An adjustment does not require a stamp. *Wiebe v. Simpson*, 2 Selw. N. P., 13th ed., 921.

*Loss, how to be calculated.*] Sect. 64. "(1.) A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss.

"(2.) Expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. Particular charges are not included in particular average."

By Sched. I., r. 13, "the term 'average unless general' means a partial loss of the subject-matter insured other than a general average loss, and does not include 'particular charges.'"

Sect. 65. "(1.) Subject to any express provision in the policy, salvage charges incurred in preventing a loss by perils insured against may be recovered as a loss by those perils.

"(2.) 'Salvage charges' means the charges recoverable under maritime law by a salvor independently of contract. They do not include the expenses of services in the nature of salvage rendered by the assured or his agents, or any person employed for hire by them, for the purpose of averting a peril insured against. Such expenses, where properly incurred, may be recovered



as particular charges or as a general average loss, according to the circumstances under which they were incurred.”

Sect. 66. “(1.) A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice.

“(2.) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure.

“(3.) Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested, and such contribution is called a general average contribution.

“(4.) Subject to any express provision in the policy, where the assured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him; and, in the case of a general average sacrifice, he may recover from the insurer in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute.

“(5.) Subject to any express provision in the policy, where the assured has paid, or is liable to pay, a general average contribution in respect of the subject insured, he may recover therefor from the insurer.

“(6.) In the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connexion with the avoidance of, a peril insured against.

“(7.) Where ship, freight, and cargo, or any two of those interests, are owned by the same assured, the liability of the insurer in respect of general average losses or contributions is to be determined as if those subjects were owned by different persons.”

Sect. 67. “(1.) The sum which the assured can recover in respect of a loss on a policy by which he is insured, in the case of an unvalued policy to the full extent of the insurable value, or, in the case of a valued policy to the full extent of the value fixed by the policy, is called the measure of indemnity.

“(2.) Where there is a loss recoverable under the policy, the insurer, or each insurer if there be more than one, is liable for such proportion of the measure of indemnity as the amount of his subscription bears to the value fixed by the policy in the case of a valued policy, or to the insurable value in the case of an unvalued policy.”

Sect. 68. “Subject to the provisions of this Act and to any express provision in the policy, where there is a total loss of the subject-matter insured—

“(1.) If the policy be a valued policy, the measure of indemnity is the sum fixed by the policy :

“(2.) If the policy be an unvalued policy, the measure of indemnity is the insurable value of the subject-matter insured.”

Sect. 16, *ante*, p. 424, defines insurable value. The rule on an open policy is to estimate the actual value of the subject insured at its actual market value at the commencement of the risk. The object of insurance is merely to put the party *in statu quo*, and not to indemnify him for the loss of prospective profits. 3 Kent, Com. 335.

Sect. 69. “Where a ship is damaged, but is not totally lost, the measure of indemnity, subject to any express provision in the policy, is as follows:—

“(1) Where the ship has been repaired, the assured is entitled to the reasonable cost of the repairs, less the customary deductions, but not exceeding the sum insured in respect of any one casualty :

“(2) Where the ship has been only partially repaired, the assured is entitled to the reasonable cost of such repairs, computed as above, and

also to be indemnified for the reasonable depreciation, if any, arising from the unrepaired damage, provided that the aggregate amount shall not exceed the cost of repairing the whole damage, computed as above :

- “(3) Where the ship has not been repaired, and has not been sold in her damaged state during the risk, the assured is entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage, computed as above.”

If the claim be on repairs of a ship, the full costs of repair will not be allowed, because the owner substitutes new for old materials. *Poingdestre v. R. Exch. Assur. Co.*, Ry. & M. 378. The usage is, in such case to deduct a third from the cost of repair; S. C.; *Aitchison v. Lohre*, 4 Ap. Ca. 755, 762, D. P.; unless the ship be on her first voyage; *Pirie v. Steele*, 3. M. & Rob. 49, see *Byrne v. Mercantile Insur. Co.*, 4 H. & C. 506. The assured may recover this proportion of the cost of repair, although such cost amount to more than total loss with benefit of salvage. *Aitchison v. Lohre, supra*. In the case of iron vessels there is a different scale as to deductions. See Chalmers and Owen on Marine Insurance Act, 1906, (1907) p. 154. Expenses common to repairs necessary from a risk insured against, and to other repairs are to be apportioned. *Marine Insur. Cor. v. China, &c., Steamship Co. (The Vancouver)*, 11 Ap. Ca. 573, D. P.; distinguished in *Ruabon SS. Co. v. L. Assur.*, (1900) A. C. 6, D. P.; see further *The Haversham Grange*, (1905) P. 307, C. A.

Sect. 70. “Subject to any express provision in the policy, where there is a partial loss of freight, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the proportion of freight lost by the assured bears to the whole freight at the risk of the assured under the policy.”

On a policy on freight, the ship having actually earned full freight, though not that intended for her, the assured cannot recover for the delay and expense as a partial loss. *Brocklebank v. Sugrue*, 1 M. & Rob. 102.

Sect. 71. “Where there is a partial loss of goods, merchandise, or other moveables, the measure of indemnity, subject to any express provision in the policy, is as follows :

- “(1) Where part of the goods, merchandise or other moveables insured by a valued policy is totally lost, the measure of indemnity is such proportion of the sum fixed by the policy as the insurable value of the part lost bears to the insurable value of the whole, ascertained as in the case of an unvalued policy :

- “(2) Where part of the goods, merchandise, or other moveables insured by an unvalued policy is totally lost, the measure of indemnity is the insurable value of the part lost, ascertained as in case of total loss :

- “(3) Where the whole or any part of the goods or merchandise insured has been delivered damaged at its destination, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value :

- “(4) ‘Gross value’ means the wholesale price or, if there be no such price, the estimated value, with, in either case, freight, landing charges, and duty paid beforehand; provided that, in the case of goods or merchandise customarily sold in bond, the bonded price is deemed to be the gross value. ‘Gross proceeds’ means the actual price obtained at a sale where all charges on sale are paid by the sellers.”

Sect. 72. “(1) Where different species of property are insured under a

single valuation, the valuation must be apportioned over the different species in proportion to their respective insurable values, as in the case of an unvalued policy. The insured value of any part of a species is such proportion of the total insured value of the same as the insurable value of the part bears to the insurable value of the whole, ascertained in both cases as provided by this Act.

“(2) Where a valuation has to be apportioned, and particulars of the prime cost of each separate species, quality, or description of goods cannot be ascertained, the division of the valuation may be made over the net arrived sound values of the different species, qualities, or descriptions of goods.”

Where the plaintiff's goods, by the perils insured against, are damaged, and get so mixed with the similar goods of other persons that they cannot be identified, the owners become tenants in common of the goods in the proportion of the respective quantities they each had, and there is no actual or constructive total loss. *Spence v. Union Marine Insur. Co.*, L. R., 3 C. P. 427.

Sect. 73. “(1) Subject to any express provision in the policy, where the assured has paid, or is liable for, any general average contribution, the measure of indemnity is the full amount of such contribution, if the subject-matter liable to contribution is insured for its full contributory value; but, if such subject-matter be not insured for its full contributory value, or if only part of it be insured, the indemnity payable by the insurer must be reduced in proportion to the under-insurance, and where there has been a particular average loss which constitutes a deduction from the contributory value, and for which the insurer is liable, that amount must be deducted from the insured value in order to ascertain what the insurer is liable to contribute.

“(2) Where the insurer is liable for salvage charges the extent of his liability must be determined on the like principle.”

Sect. 74. “Where the assured has effected an insurance in express terms against any liability to a third party, the measure of indemnity, subject to any express provision in the policy, is the amount paid or payable by him to such third party in respect of such liability.”

Sect. 75. “(1) Where there has been a loss in respect of any subject-matter not expressly provided for in the foregoing provisions of this Act, the measure of indemnity shall be ascertained, as nearly as may be, in accordance with those provisions, in so far as applicable to the particular case.

“(2) Nothing in the provisions of this Act relating to the measure of indemnity shall affect the rules relating to double insurance, or prohibit the insurer from disproving interest wholly or in part, or from showing that at the time of the loss the whole or any part of the subject-matter insured was not at risk under the policy.”

As to double insurance, see sect. 32, *post*, p. 449c.

In open policies the assured must prove the extent of his loss; but in valued policies, if the loss be a total one, he is only bound to prove *some* interest in the ship or goods, in order to take the case out of sect. 4, *ante*, p. 422; for, the valuation fixed in the policy stands, unless the defendant can show that the plaintiff had a colourable interest only, or, that he has greatly overvalued the goods. But, where the loss is partial, it opens a valued policy; and the plaintiff is as much bound to prove the value of the goods that have been lost, and to ascertain the damage he has sustained by the loss, as in the case of an open policy. 2 Wms. Saund. 201 *l.* (8); *Irving v. Manning*, 1 H. L. C. 287; see further *SS. Balmoral Co. v. Marten*, (1902) A. C. 511, D. P. A ship was insured on a valued time policy: she had, when the policy was made, but unknown to the parties, been so injured by a storm that the expense of repairs would have exceeded the value when repaired; during the continuance of the risk, the vessel was lost; it was held that the underwriters were bound to pay the full amount. *Barker v. Janson*, L. R., 3 C. P. 701. So, where two valued policies were effected with the

same underwriters on a ship, one (A.) on an outward, and the other (B.) on the homeward voyage; and, on the outward voyage, the ship sustained damage, which was not entirely repaired, and, after the expiration of the policy A., and while the policy B. was running, was totally destroyed by fire, it was held that the assured might recover, under policy A., the partial loss as it would have been estimated at the expiration of policy A.; and also, under policy B., the value as a total loss. *Lidgett v. Secretan*, L. R., 6 C. P. 616. See also *Woodside v. Globe Marine Insur. Co.*, (1896) 1 Q. B. 105.

Sect. 77. "(1.) Unless the policy otherwise provides, and subject to the provisions of this Act, the insurer is liable for successive losses, even though the total amount of such losses may exceed the sum insured.

"(2.) Where, under the same policy, a partial loss, which has not been repaired or otherwise made good, is followed by a total loss, the assured can only recover in respect of the total loss: Provided that nothing in this section shall affect the liability of the insurer under the suing and labouring clause." See sect. 78, *post*, p. 449c.

Where a policy contained a clause, "the said ship, &c., goods, merchandise, &c., for so much as concerns the assured by agreement between the assured and assurers in the policy, are and shall be valued as under," the two last words being added in writing; and, some way further down in the policy was written 1300*l.*, and in the body, "on freight free from capture, seizure, &c.;" it was held this was not a valued policy. *Wilson v. Nelson*, 5 B. & S. 354; 33 L. J., Q. B. 220.

In a valued policy, the risk on the goods was to commence on the loading thereof 24 hours after ship's arrival at the coast of Africa; a considerable part of the cargo was not shipped at the time of a total loss, and the part shipped was not equal to the value put upon the goods in the policy—it was held that the valuation was opened, and that the assured was only entitled to recover a proportion calculated on the part of the cargo shipped at the time of the loss. *Rickman v. Carstairs*, 5 B. & Ad. 651. A similar principle was adopted in *Tobin v. Harford*, 18 C. B., N. S. 528; 34 L. J., C. P. 37, Ex. Ch.; and *Denoon v. Home and Colonial Assur. Co.*, L. R., 7 C. P. 341; and applied to a valued policy on freight in *The Main*, (1894) P. 320. A certificate of an agent of Lloyd's is not admissible to prove the amount of damage sustained by goods, though the defendant is a subscriber to Lloyd's. *Drake v. Marryat*, 1 B. & C. 473.

Sect. 32. "(1.) Where two or more policies are effected by or on behalf of the assured on the same adventure and interest or any part thereof, and the sums insured exceed the indemnity allowed by this Act, the assured is said to be over-insured by double insurance.

"(2.) Where the assured is over-insured by double insurance—

"(a.) The assured, unless the policy otherwise provides, may claim payment from the insurers in such order as he may think fit, provided that he is not entitled to receive any sum in excess of the indemnity allowed by this Act;

"(b.) Where the policy under which the assured claims is a valued policy the assured must give credit as against the valuation for any sum received by him under any other policy without regard to the actual value of the subject-matter insured;

"(c.) Where the policy under which the assured claims is an unvalued policy he must give credit, as against the full insurable value, for any sum received by him under any other policy;

"(d.) Where the assured receives any sum in excess of the indemnity allowed by this Act, he is deemed to hold such sum in trust for the insurers, according to their right of contribution among themselves." See *Bruce v. Jones*, 1 H. & C. 769; 32 L. J. Ex. 132.

Where by one policy a ship was insured from B. to C., and for 30 days after mooring at C.; and the owners, on hearing the ship had arrived at C., effected another insurance at and from C. to B.; and the ship was during the currency of both policies totally lost at C.; it was held that the second policy was in substitution of the first. *Union Marine Insur. Co. v. Martin*, 35 L. J., C. P. 181.

Where there is an insurance of cargo against jettison, and goods are jettisoned, the underwriters must pay the whole amount insured, without deducting the general average contributions the insured is entitled to receive from the owners of the ship and the rest of the cargo. *Dickenson v. Jardine*, L. R., 3 C. P. 639.

Sect. 79. "(1.) Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss.

"(2.) Subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss."

Sect. 80. "(1.) Where the assured is over-insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract.

"(2.) If any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt."

Sect. 81. "Where the assured is insured for an amount less than the insurable value or, in the case of a valued policy, for an amount less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance."

Where the assured is owner of both ship and cargo, see sect. 66 (7) *ante*, p. 449, and *Montgomery v. Indemnity Mutual Marine Insur. Co.*, (1902) 1 K. B. 744, C. A. Where a ship A. has been lost by a collision with a ship B., and the underwriters have paid the full amount of a valued policy on A., they are entitled to receive the damages recovered in the Court of Admiralty against the owners of B. for the loss of the ship; *N. of England Assur. Assoc. v. Armstrong*, L. R., 5 Q. B. 244; see also *Commercial Union Assur. Co. v. Lister*, L. R. 9 Ch. 483; *Simpson v. Thomson*, 3 Ap. Ca. 279, D. P., and cases cited *post*, p. 458; but not the damages recovered for the loss of freight; *Sea Insur. Co. v. Hadden*, 13 Q. B. D. 706, C. A.; though it is otherwise where the insurance is on the freight. *Dufourcet v. Bishop*, 18 Q. B. D. 373. Where a sum is given to the shipowner for the damage he has sustained, as a mere gift, the underwriter cannot claim it. *Burman v. Rodocanachi*, 6 Q. B. D. 633, C. A.; 7 Ap. Ca. 333, D. P.

Under a policy, effected by the plaintiffs, on their lighters in the Thames, to include all losses, damages, and accidents amounting to 20*l.* and upwards in each craft to goods carried by the plaintiffs as lightermen, and from which losses, &c., the plaintiffs might be liable to the owners thereof; the underwriter is liable to pay the whole loss, without regard to the value of the property at risk. *Joyce v. Kennard*, L. R., 7 Q. B. 78.

Life salvage payable under the Merchant Shipping Act, 1894, s. 521, is

not recoverable on an ordinary Lloyd's Policy. *Nourse v. Liverpool &c. Assoc.*, (1896) 2 Q. B. 16.

*Suing and labouring Clause.*] Sect. 78. "(1.) Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss, or that the subject-matter may have been warranted free from particular average, either wholly or under a certain percentage." *Vide infra*.

"(2.) General average losses and contributions and salvage charges, as defined by this Act, are not recoverable under the suing and labouring clause.

"(3.) Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause.

"(4.) It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss."

Under this clause the whole expense is recoverable from the insurers in proportion to the several amounts insured. *Dixon v. Whitworth*, 4 C. P. D. 371; reversed in C. A. on another point, *W. N.*, 1880, p. 43, *E. S.* But not the expense of a refit to enable the ship to complete the voyage. *S. C.*

The freight of goods was insured, and the goods were necessarily removed from the ship to allow of repairs being made to her, and they were then forwarded to their destination by rail; the goods might have been transhipped at a much less cost; it was held, that the probable expense of such transhipment was recoverable under the suing and labouring clause. *Lee v. S. Insur. Co.*, *L. R.*, 5 C. P. 397.

As to effect of suing and labouring clause in the case of a re-insurance, see *Uzielli v. Boston Marine Insur. Co.*, 15 Q. B. D. 11, *C. A.*; see further as to the applicability of this clause. *W. Assur. Co. of Toronto v. Poole*, (1903) 1 K. B. 376; *Cunard S.S. Co. v. Marten*, (1903) 2 K. B. 511, *C. A.*

*Excepted risks "free from average," &c.*] We have incidentally seen that there are often clauses excepting certain risks. Thus, there is ordinarily a memorandum by which certain goods are "warranted free from average," (*i.e.*, partial loss), "unless general," (*vide* Sched. I. r. 13, *ante*, p. 448), "or the ship be stranded," (*ante*, p. 442), or burnt (*ante*, p. 439).

Sect. 76. "(1.) Where the subject-matter insured is warranted free from particular average, the assured cannot recover for a loss of part, other than a loss incurred by a general average sacrifice, unless the contract contained in the policy be apportionable; but, if the contract be apportionable, the assured may recover for a total loss of any apportionable part.

"(2.) Where the subject-matter insured is warranted free from particular average, either wholly or under a certain percentage, the insurer is nevertheless liable for salvage charges, and for particular charges and other expenses properly incurred pursuant to the provisions of the suing and labouring clause," *vide supra*, "in order to avert a loss insured against.

"(3.) Unless the policy otherwise provides, where the subject-matter insured is warranted free from particular average under a specified percentage, a general average loss cannot be added to a particular average loss to make up the specified percentage.

"(4.) For the purpose of ascertaining whether the specified percentage has been reached, regard shall be had only to the actual loss suffered by the subject-matter insured. Particular charges and the expenses of and incidental to ascertaining and proving the loss must be excluded."

“Particular average,” and “particular charges” are defined by sect. 64, *ante*, p. 448, and “general average” by sect. 66, *ante*, p. 449.

An insurance with a warranty, “free from particular average,” is equivalent to an insurance against total loss and general average, only; and in such a case, if a ship be disabled from continuing her voyage owing to a peril insured against, and the subject of insurance be forced to be landed, and expense is properly incurred in sending it on by another ship; that is particular average, and the insured cannot recover. *Gt. Indian Peninsula Ry. Co. v. Saunders*, 1 B. & S. 41; 30 L. J., Q. B., 218; 2 B. & S. 266; 31 L. J., Q. B. 206, Ex. Ch.; *Booth v. Gair*, 15 C. B., N. S. 291; 33 L. J., C. P. 99. But the warranty does not prevent a recovery, under the suing and labouring clause, of expenses incurred in preserving the subject-matter of insurance, and averting a loss; sects. 78 (1), 76 (2), *ante*, p. 449e. See *Kidston v. Empire Marine Insur. Co.*, L. R., 1 C. P. 535; L. R., 2 C. P. 375, Ex. Ch.

Where the insurance was on a ship and cargo, with a warranty “free from average or claim from jettison or leakage, unless consequent on stranding, sinking, or fire,” and the ship, during the voyage, by bad weather, became leaky, and having put into port was unable to proceed, and the ship and goods were sold, the assured was held entitled to recover as an average loss. *Carr v. R. Exch. Assur. Co.*, 5 B. & S. 433; 33 L. J., Q. B. 63.

There is not a total loss of part, but only particular average, where some bales of insured silk were so damaged as to make it prudent to sell them, if a portion of each bale might have been saved and sent home at a moderate expense, retaining its saleable character as silk. *Navone v. Haddon*, 9 C. B. 30; 19 L. J., C. P. 161. And where memorandum goods of the same species are shipped, whether in bulk, or in packages, not expressed by distinct valuation, or otherwise, in the policy to be separately insured, and there is no general average nor stranding, the ordinary memorandum exempts the underwriters from liability for a total loss or destruction of part only, though one or more entire packages be entirely destroyed. *Ralli v. Janson*, 6 E. & B. 422; 25 L. J., Q. B. 300, Ex. Ch., in which case the earlier decisions were reviewed. See *Spence v. Union Marine Insur. Co.*, L. R., 3 C. P. 427; cited *ante*, p. 449b. Where, however, goods essentially different in nature and kind are insured under a general description as “masters’ effects,” the warranty is divisible, and means that the insurers will be liable for a total loss only of any of the specific articles insured under that description. *Duff v. Muckenzie*, 3 C. B., N. S. 16; 26 L. J., C. P. 313; *Wilkinson v. Hyde*, 3 C. B., N. S. 30; 27 L. J., C. P. 116. And, where the policy was on a ship and machinery in it, which were separately valued, and there was the clause “average payable on the whole or upon each as if separately insured,” with the usual memorandum, and the ship caught fire and was damaged, but not the machinery, it was held that the expense of putting out the fire was not a particular average of the hull, but ought to be apportioned between the hull and the machinery, being an expenditure for the benefit of both equally. *Oppenheim v. Fry*, 5 B. & S. 348; 33 L. J., Q. B. 267, Ex. Ch.

Where the warranty is “free from average under 3 per cent. unless general, &c.,” distinct successive losses, each less, but in the aggregate more than 3 per cent., are not within the exception, provided they occur during the same voyage; *Blackett v. R. Exch. Ass. Co.*, 2 C. & J. 244; *Stewart v. Merchants’ Marine Insur. Co.*, 16 Q. B. D. 619, C. A.; but not otherwise. S. C. But by sect. 76 (3), *ante*, p. 449e, where a particular average loss P. is under 3 per cent., and a general average loss G. has also risen, then, although P. and G. together exceed 3 per cent., P. is not recoverable. See *Price v. All Ships Small Damage Insur. Ass.*, 22 Q. B. D. 580, C. A. As to apportionment of expenses in calculating the average, see *Marine Insur. Co. v. China, &c., SS. Co.*, and *Ruabon SS. Co. v. L. Assur. Cor.*, cited *ante*, p. 449a.

A usage that underwriters are not liable, under the ordinary form of policy, to general average on account of the jettison of timber stowed on the deck, is a valid custom, and not inconsistent with the terms of such policy. *Miller v. Tetherington*, 6 H. & N. 278; 30 L. J., Ex. 217; 7 H. & N. 954; 31 L. J., Ex. 363, Ex. Ch.

As to exception of "claim consequent on loss of time," see *Bensaule v. Thames, &c., Insur. Co.*, (1897) A. C. 609, D. P.; *Turnbull &c. v. Hull Underwriters' Assoc.*, (1900) 2 Q. B. 402.

*Damages.*] By 3 & 4 W. 4, c. 42, s. 29, the jury may, if they think fit, give damages in the nature of interest, over and above the money recoverable in all actions on policies of assurance; but this does not apply in respect of a delay in payment, occasioned only by there being no person entitled to give a discharge for the amount. *Webster v. British Empire &c. Assur. Co.*, 15 Ch. D. 169, C. A.

*Mutual Insurance.*] Sect. 85. "(1.) Where two or more persons mutually agree to insure each other against marine losses there is said to be a mutual insurance.

"(2.) The provisions of this Act relating to the premium do not apply to mutual insurance, but a guarantee, or such other arrangement as may be agreed upon, may be substituted for the premium.

"(3.) The provisions of this Act, in so far as they may be modified by the agreement of the parties, may in the case of mutual insurance be modified by the terms of the policies issued by the association, or by the rules and regulations of the association.

"(4.) Subject to the exceptions mentioned in this section, the provisions of this Act apply to a mutual insurance."

A contract of marine insurance must be expressed in a policy specifying certain particulars. *In re Arthur Average Assoc.*, *ante*, p. 267; sects. 22, 23, *ante*, p. 418. See further as to mutual policies, *Ocean Iron SS. Insur. Assoc. v. Leslie*, 22 Q. B. D. 722, n.

### Defence.

Under Rules, 1883, O. xix. rr. 17, 20, *ante*, p. 310, a denial of the contract operates as a denial of the making thereof in point of fact only, and not its sufficiency in point of law. Hence, an insufficient subscription of the policy by the defendant, within the Stamp Act, 1891, s. 93, *ante*, p. 267, which avoids the policy, must now be specially pleaded.

As to defences arising from want of stamp or alterations avoiding the policy under that Act, *vide ante*, pp. 266 *et seq.*

The two companies incorporated by 6 G. 1, c. 18, viz., the London Assurance and the R. Exchange Assurance, are empowered by 11 G. 1, c. 30, s. 43, to plead in a general form, and this privilege is not taken away by 5 & 6 V. c. 97, s. 3. *Carr v. R. Exch. Assur. Co.*, 1 B. & S. 956; 31 L. J., Q. B. 93. Nor, it would seem, is it affected by the J. Acts. See *Garnett v. Bradley*, 3 Ap. Ca. 970, *per* Ld. Blackburn, cited *ante*, p. 296. See also Rules, 1883, O. xix. r. 12, *ante*, p. 309, which, however, reserves the right to plead "not guilty by statute," only.

In an action brought under sect. 50 (2), *ante*, p. 421, by the assignee of a policy, the defendant cannot set off or counter-claim a debt or claim accruing to him from the assured prior to his assignment of the policy. See *Pellas v. Neptune Marine Insur. Co.*, 5 C. P. D. 34, C. A., decided on 31 & 32 V. c. 86, s. 1.

*Non-disclosure; misrepresentation; fraud.*] Sect. 17. "A contract of



marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party."

Sect. 18. "(1.) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

"(2.) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

"(3.) In the absence of inquiry the following circumstances need not be disclosed, namely :—

"(a.) Any circumstance which diminishes the risk ;

"(b.) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know ;

"(c.) Any circumstance as to which information is waived by the insurer ;

"(d.) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty.

"(4.) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.

"(5.) The term 'circumstance' includes any communication made to, or information received by, the assured."

Sect. 19. "Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer—

"(a.) Every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to him ; and

"(b.) Every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent."

Sect. 20. "(1.) Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract.

"(2.) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

"(3.) A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief.

"(4.) A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.

"(5.) A representation as to a matter of expectation or belief is true if it be made in good faith.

"(6.) A representation may be withdrawn or corrected before the contract is concluded.

"(7.) Whether a particular representation be material or not is, in each case, a question of fact."

Sect. 21, *ante*, p. 418, defines when the contract is to be deemed to be concluded.

By sect. 18 (1, 2), *ante*, p. 449*h*, if the assured do not disclose any material fact which relates to the risk insured the policy may be avoided by the insurer; and this even though the fact was once known to the latter, if it were not present to his mind at the time of effecting the insurance. *Bates v. Hewitt*, L. R., 2 Q. B. 595. If a principal effect an insurance in ignorance of a material fact which ought to have been communicated to him by an agent having charge of the subject-matter of insurance; *Fitzherbert v. Mather*, 1 T. R. 12; *Proudfoot v. Montefiore*, L. R., 2 Q. B. 511; or by an agent employed to effect an insurance, although he commence only, but do not conclude the negotiation; *Blackburn v. Huslam*, 21 Q. B. D. 144; the insurance is voidable by the insurer. See sect. 19, *ante*, p. 449*h*. But when the negotiation by the agent was in such a case broken off, and fresh negotiations opened by the principal, leading to the insurance, the policy was held valid. *Blackburn v. Vigors*, 12 Ap. Ca. 531, D. P. Where the agent without fraud neglects to communicate to the owner damage done to the vessel, this damage is expected out of the policy. *Gladstone v. King*, 1 M. & S. 35. To prove the defence of concealment of a material fact, it lies on the defendant to prove, not only the fact, and the plaintiff's knowledge, but also the non-communication of it to the defendant; but slight evidence is enough, and the mere subscribing of the policy may be evidence of it, where the suppressed fact is one which would have prevented a reasonable man from subscribing; as that the ship had been so long abroad, on her voyage, as to be a missing ship. *Elkin v. Janson*, 13 M. & W. 663. It is sufficient to communicate facts, without the opinion or conclusion founded upon those facts. *Bell v. Bell*, 2 Camp. 479. It has been said that loose rumours or general news in the newspapers open to all need not be stated. 3 Kent, Com. § 285; see *Durrell v. Bederley*, Holt, N. P. 283, 285, *per* Gibbs, C.J. By sect. 18 (3*b*), *ante*, p. 449*h*, facts which the underwriter is presumed to know need not be communicated, *e.g.* that a ship, classed A1 at Lloyd's, will be struck off the list unless re-surveyed, in the fourth year from the registration; *Gandy v. Adelaide Marine Assur. Co.*, L. R., 6 Q. B. 746; or that a charterparty which is a time charter as to freight, has a "24 hours' clause." *The Bedouin*, *infra*. But in cases not with sect. 18 (3*b*), the effect of sect. 18 (4 & 5), *ante*, p. 449*h*, must be carefully considered. Thus the peculiar danger of a new port at which the ship is insured by the policy, and the existence of which was unknown to the underwriter, must be disclosed. *Harrower v. Hutchinson*, L. R., 5 Q. B. 584, Ex. Ch. As to the admissibility of the evidence of an underwriter or other witness, as to his opinion of the materiality of a fact concealed, or of whether the fact, if known, would have altered the terms of insurance, *vide ante*, p. 176.

By sect. 19 (1), *ante*, p. 449*h*, there must be no misrepresentation of any material fact. Such misrepresentation will avoid the policy, though the actual loss is unconnected with the fact misrepresented or concealed, and though there is no fraud intended by the insurer. *Seaman v. Foweraker*, Str. 1183. The question, as stated by Kent (3 Com. 283), is "Whether there was, under all circumstances, a fair representation or a concealment; if the misrepresentation or concealment was designed, whether it was fraudulent; and, if not designed, whether it varied materially the object of the policy, and changed the risk understood to be run. If the representation was by fraudulent design, it avoids the policy, without staying to inquire into its materiality; and if it was caused by a mistake or oversight, it does not affect the policy, unless material, and not true in substance." See *The Bedouin*, (1894) P. 1, 12, *per* Ld. Esher, M.R. So a mis-statement as to the name or age of the ship avoids the policy. *Ionides v. Pacific Insur. Co.*, L. R., 6 Q. B. 674; L. R., 7 Q. B. 517, Ex. Ch. But

in the case of an open policy on goods, in ships to be afterwards declared, a mistake as to the description of the ship made in the declaration is not material. S. C. In *Anderson v. Thornton*, 8 Exch. 425, it was held that a plea alleging a material mis-statement as to the time of sailing, fraudulently made, may be supported by proof of material mis-statement, but without fraud. It is sufficient, however, if a representation be substantially correct, and it need not, like a warranty, be strictly and literally complied with. *Pawson v. Watson*, Cowp. 785. See as to life policies, and the distinction between marine and life policies, *Wheelton v. Hardisty*, 8 E. & B. 232; 26 L. J., Q. B. 265; cited *post*, p. 452. In the case of insurance of chartered freight, the non-disclosure of a power in the charterer to cancel the charter-party is fatal. *Mercantile S.S. Co. v. Tyser*, 7 Q. B. D. 73. By sect. 20 (5), *ante*, p. 449h, “a representation as to a matter of expectation, or belief, is true if made in good faith.” See *Barber v. Fletcher*, 1 Doug. 305; *Bowden v. Vaughan*, 10 East, 415; *Anderson v. Pacific, &c., Insur. Co.*, 21 L. T. 408, J. C.; see *Ionides v. Pacific Insur. Co.*, *ante*, p. 449i.

By sect. 21, *ante*, p. 418, the contract of insurance is concluded when the proposal of the assured is accepted by the insurer, and for this purpose reference may be made to the unstamped slip. See also sect. 89, *ante*, p. 418.

The slip, though not admissible in evidence as a contract, by reason of Stamp Act, 1891, s. 93, is, by mercantile usage, treated as the contract for insurance, *vide ante*, p. 268. Hence, under sect. 18 (1), *ante*, p. 449h, facts coming to the knowledge of the assured after the slip is signed, but before the policy is delivered out, need not be disclosed to the underwriter. See *Lishman v. N. Maritime Insur. Co.*, L. R., 8 C. P. 216; L. R., 10 C. P. 179, Ex. Ch.; and *Cory v. Patton*, L. R., 7 Q. B. 304; and L. R., 9 Q. B. 577. So, where the assured conceals from the underwriter a material fact, when the slip is signed, and the underwriter delivers out the policy in conformity with the slip after the fact has come to his knowledge, it is a question for the jury whether the underwriter elected to go on with the policy; if not, the policy does not bind him; *Morrison v. Universal Marine Insur. Co.*, L. R., 8 Ex. 197, Ex. Ch.; and where the underwriter stated, when he issued the policy, that he should rely on the concealment, it was held that he might do so; *Nicholson v. Power*, 20 L. T. 580, Ex. Ch., E. T. 1869.

In an action against a second or subsequent underwriter, it has been the practice to admit evidence of representations to the first underwriter, on a presumption that the subsequent underwriter gave credit to them. *Pawson v. Watson*, *Barber v. Fletcher*, *supra*; *Marsden v. Reid*, 3 East, 572. This rule is confined to representations made to the first underwriter, that is, the first on the policy. S. C.; *Bell v. Carstairs*, 2 Camp. 543. The principle of the rule was questioned by Ld. Ellenborough, C.J., in the last case, and in *Forrester v. Pignon*, 1 M. & S. 13.

If goods insured are over-valued with intent to defraud the underwriters, the contract is void, and the assured cannot recover, even for the value actually on board; *Haigh v. De la Cour*, 3 Camp. 319; and, even without fraud, an excessive over-insurance may be a material fact, and, if concealed from the underwriter, the policy be void; *Ionides v. Pender*, L. R., 9 Q. B. 531. So where there were successive open policies, on goods to be declared, and the assured fraudulently declared the goods at risk at an under-value on the earlier policies, the policies effected subsequently to such false declarations were held void, and were ordered to be cancelled. *Rivaz v. Gerussi*, 6 Q. B. D. 222, C. A.

*Illegality.*] Sect. 41. “There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.”

A contravention of law by the assured, having direct relation to the subject of the risk, will vitiate the policy. Thus, where a ship was loaded in contravention of the 16 & 17 V. c. 107, forbidding a ship to sail from certain ports at certain times in the year with any of the cargo on deck, and the plaintiff insured the cargo with the express knowledge of the mode of loading, it was held that the plaintiff could not recover for any part of the cargo; *Cunard v. Hyde*, 2 E. & E. 1; 29 L. J., Q. B. 6; *aliter*, if the assured had no knowledge of the mode of loading; S. C., E. B. & E. 670; 27 L. J., Q. B. 408. If the master so loaded, without the knowledge of his owner, the owner may recover on an insurance of freight. *Wilson v. Rankin*, L. R., 1 Q. B. 162, Ex. Ch. So the owner may recover where the master has, without his knowledge, in contravention of the Merchant Shipping Act, 1894, s. 271 (1*b*), taken passengers on board without a certificate. See *Dudgcon v. Pembroke*, L. R., 9 Q. B. 581, decided on 17 & 18 V. c. 104, s. 318. As to insurance of the property of an alien enemy. See *Janson v. Driefontein, &c., Mines*, cited *ante*, p. 440, and authorities collected in that case. As to insurance on British goods in the enemy's country seized by the enemy after declaration of war, see *Nigel Gold Mining Co. v. Hoade*, (1901) 2 K. B. 849.

*Payment.*] By sect. 53 (1), *ante*, p. 420, where the policy is effected on behalf of the assured by a broker, the insurer is, unless otherwise agreed, directly responsible to the assured for the amount of losses payable. It is, however, a good defence to show a custom that credit taken between the insurance broker and underwriter should be taken as payment to the assured by the underwriter, after the amount has been adjusted between him and such broker. *Stewart v. Aberdeen*, 4 M. & W. 211. But the assured is not bound by such a custom, if he had no knowledge of it. *Sweeting v. Pearce*, 9 C. B., N. S. 534; 30 L. J., C. P. 109, Ex. Ch. As to payment to the assignee of the policy, see *Swan and Clelands &c. Co. v. Maritime Insur. Co.*, (1907) 1 K. B. 116. An adjustment indorsed on the policy produced by the assured, with the defendant's name struck out of it, is not evidence for the defendant that the amount so adjusted has been paid. *Adams v. Sanders*, M. & M. 373.

#### Return of Premium.

A claim for a return of premium is often added to a claim on a policy; and the question of the right to recover arises on the failure of the plaintiff to establish his case on the policy.

*When plaintiff entitled to a return.*] Sect. 82. "Where the premium, or a proportionate part thereof is, by this Act, declared to be returnable—

"(a.) If already paid, it may be recovered by the assured from the insurer; and

"(b.) If unpaid, it may be retained by the assured or his agent."

Sect. 83. "Where the policy contains a stipulation for the return of the premium, or a proportionate part thereof, on the happening of a certain event, and that event happens, the premium, or, as the case may be, the proportionate part thereof, is thereupon returnable to the assured."

Sect. 84. "(1.) Where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured.

"(2.) Where the consideration for the payment of the premium is apportionable and there is a total failure of any apportionable part of the consideration, a proportionate part of the premium is, under the like conditions, thereupon returnable to the assured.

"(3.) In particular—(a.) Where the policy is void, or is avoided by the insurer as from the commencement of the risk, the premium is returnable, provided that there has been no fraud or illegality on the part of

the assured; but if the risk is not apportionable, and has once attached, the premium is not returnable:

- “(b.) Where the subject-matter insured, or part thereof, has never been imperilled, the premium, or, as the case may be, a proportionate part thereof, is returnable: Provided that where the subject-matter has been insured ‘lost or not lost’ and has arrived in safety at the time when the contract is concluded, the premium is not returnable unless, at such time, the insurer knew of the safe arrival”; see *Bradford v. Symondson*, 7 Q. B. D. 456, C. A.
- “(c.) Where the assured has no insurable interest throughout the currency of the risk, the premium is returnable, provided that this rule does not apply to a policy effected by way of gaming or wagering;
- “(d.) Where the assured has a defeasible interest which is terminated during the currency of the risk, the premium is not returnable;
- “(e.) Where the assured has over-insured under an unvalued policy, a proportionate part of the premium is returnable;
- “(f.) Subject to the foregoing provisions, where the assured has over-insured by double insurance, a proportionate part of the several premiums is returnable:

Provided that, if the policies are effected at different times, and any earlier policy has at any time borne the entire risk, or if a claim has been paid on the policy in respect of the full sum insured thereby, no premium is returnable in respect of that policy, and when the double insurance is effected knowingly by the assured no premium is returnable.”

If the risk has never commenced there must be a return; as if the ship never sailed, or, the policy is avoided by failure of warranty without fraud. 3 Kent, Com. 341. But if the risk has once commenced, or the policy be void for illegality, or for any fraud of the assured, there is no return. *Id.*; *Allkins v. Jupe*, 2 C. P. D. 375; and see *Stone v. Marine Assur. Co., &c.*, 1 Ex. D. 81. As to double insurance, see sect. 32, *ante*, p. 449c.

By sect. 53 (1.), *ante*, p. 420, where the policy is effected by a broker on behalf of the assured, the insurer is, unless otherwise agreed, directly responsible to the assured for returnable premium.

Proof must be given of the payment of the premium, unless this is admitted.

By sect. 54, “Where a marine policy effected on behalf of the assured by a broker acknowledges the receipt of the premium, such acknowledgment is, in the absence of fraud, conclusive as between the insurer and the assured, but not as between the insurer and broker.”

The defendant having paid the amount of premium into court, the plaintiff afterwards obtained a verdict on the policy for a sum less than the sum assured; the Court directed that judgment should be entered only for the amount of the verdict, less the sum taken out of Court. *Curr v. Montefiore*, 5 B. & S. 941; 34 L. J., Q. B. 21.

#### LIFE INSURANCE.

Many of the cases and authorities on marine policies apply equally to policies on lives and against fire; but the contract of life assurance is, in consideration of a lump sum or of periodical payments, to pay a sum certain upon the death of a given life, and is not a contract of indemnity, like that of marine and fire policies. The pleadings sufficiently point out the nature of the required evidence. As to the necessity for English probate to the assured's estate, see 52 & 53 V. c. 42, s. 19, *ante*, p. 118.

*Form of policy.*] It does not appear ever to have been decided that an agreement for life insurance need be expressed in a policy or reduced to writing. The stat. 14 G. 3, c. 48, s. 2, enacts that it shall not be lawful

to make any policy on the life of any person or other event, without inserting in such policy the person's name interested therein, or for whose use, benefit, or on whose account such policy is so made or underwrote. But this applies only to a written document. *Carlill v. Carbolic Smoke Ball Co.*, (1892) 2 Q. B. 484, 493, *per Hawkins, J.* The Stamp Act, 1891, s. 100, requires every person receiving or taking credit for any premium or consideration for any contract of insurance, to make out and execute a stamped policy of such insurance, within one calendar month from the receipt of the premium, under a penalty of 50*l.* This section was passed for the better securing the payment of the stamp duty, and rather negatives the idea that 14 G. 3, c. 48, s. 2, *supra*, was intended to avoid agreements for life insurance not in writing.

By the Married Women's Property Act, 1882 (45 & 46 V. c. 75), s. 11, a married woman may effect a policy on her own life, or the life of her husband for her separate use, and a policy effected by any man on his own life, and expressed to be for the benefit of his wife or of his children, or any of them, or by any woman on her own life, for the benefit of her husband or of her children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts. The insured may appoint a trustee or new trustees of the policy by a memorandum in writing and the receipt of a trustee duly appointed, or in default of notice to the office, the receipt of the legal personal representative of the insured, shall be a discharge to the office. See *Holt v. Everall*, 2 Ch. D. 266, C. A.; *In re Seyton*, 34 Ch. D. 511. *In re Browne's Policy*, (1903) 1 Ch. 188; *In re Griffith's Policy*, *Id.* 739; *In re Parker's Policies*, (1906) 1 Ch. 526. The policy forms part of the assured's estate, where the objects of the trust have been performed, or have become impossible, as where the wife in whose sole favour the policy was effected murdered her husband. *Cleaver v. Mutual, &c., Life Ass.*, (1892) 1 Q. B. 147, C. A., *vide post*, p. 454.

Where, after the proposal for insurance has been accepted by the insurance office, on the terms that no insurance shall take effect until the premium is paid, and before it is tendered there has been a material alteration in the health of the proposer, the office is not bound to issue a policy. *Canning v. Farquhar*, 16 Q. B. D. 727.

As to the payment of the premiums after the death of the assured, see *Stuart v. Freeman*, (1903) 1 K. B. 47, C. A., and cases there cited.

As to stamp duties, *vide ante*, p. 268.

*Assignment of policy.* The Policies of Assurance Act, 1867 (30 & 31 V. c. 144), s. 1, enacts that "any person or corporation now being or hereafter," *vide infra*, "becoming entitled by assignment or other derivative title to a policy of life assurance, and possessing, at the time of action brought, the right in equity to receive and the right to give an effectual discharge to the assurance company liable under such policy for moneys thereby assured or secured, shall be at liberty to sue at law in the name of such person or corporation to recover such moneys."

By sect. 3, "no assignment made after the 20th August, 1867, of a policy of life assurance shall confer on the assignee therein named, his executors, administrators, or assigns, any right to sue for the amount of such policy, or the moneys assured or secured thereby, until a written notice of the date and purport of such assignment shall have been given to the assurance company liable under such policy at their principal place of business for the time being, or, in case they have two or more principal places of business, then at some one of such principal places of business, either in England

or Scotland or Ireland, and the date on which such notice shall be received shall regulate the priority of all claims under any assignment; and a payment *bonâ fide* made in respect of any policy by any assurance company, before the date on which such notice shall have been received, shall be as valid against the assignee giving such notice as if this act had not been passed."

By sect. 4, assurance companies are, in policies issued after 30th September, 1867, to specify the principal place or places of business at which notices of assignment may be given.

By sect. 6, every assurance company to whom notice of the assignment of any policy shall have been duly given shall deliver an acknowledgment in writing, under the hand of the manager, secretary, treasurer, or other principal officer of the assurance company, of their receipt of such notice; and every such written acknowledgment, if signed by a person being *de jure* or *de facto* the manager, &c., of the assurance company whose acknowledgment it purports to be, shall be conclusive evidence, as against such assurance company, of their having duly received the notice to which such acknowledgment relates.

An agreement for assignment is not an assignment within this act. *Spencer v. Clarke*, 9 Ch. D. 137.

Sect. 3 regulates the priority of claims as between the company and persons interested in the policy, and does not affect the rights of those persons *inter se*. *Newman v. Newman*, 28 Ch. D. 674.

Where there is a condition against assignment in the policy, it is still assignable in equity as before the statute. *In re Turcan*, 40 Ch. D. 5, C. A.

The J. Act, 1873, s. 25 (6), *ante*, p. 307, contains a general provision with reference to the assignment of choses in action.

*Interest.*] By stat. 14 G. 3, c. 48, ss. 1, 2, a policy on lives or other events is unlawful and void, unless the person on whose account the insurance is made has an interest, and the name of the person interested, or for whose use or benefit, or on whose account, it is made, be inserted therein. If A., having no interest in B.'s life, cause him to effect an insurance in his own name, but at A.'s expense, and for A.'s benefit, this is a fraudulent evasion, and the policy is void under sect. 1. *Wainewright v. Bland*, 1 M. & Rob. 481; *Shilling v. Accidental Death Insur. Co.*, 2 H. & N. 42; 26 L. J., Ex. 266. See also S. C., 27 L. J., Ex. 16. Everyone is presumed to have an insurable interest in his own life, and if he insures, whether for life or a limited time, his executor is not bound to show any interest beyond this. *Wainewright v. Bland*, *supra*. So, it is said, where a wife insures her husband's life. *Reed v. R. Exch. Assur. Co.*, Peake, Add. Ca. 70; and now see 45 & 46 V. c. 75, s. 11, *ante*, p. 450. But where a wife was entitled to a legacy on attaining 21, and her husband insured her life in her name, to secure the amount of the legacy, which was then advanced to him, it was held that the policy was void, as it did not state that the husband was the person having the present interest therein, although the ultimate benefit might be for the wife. *Evans v. Bignold*, L. R., 4 Q. B. 622. A creditor has an insurable interest in his debtor's life. *Anderson v. Edie, Park, Ins.*, 8th ed. 914-15. And, in general the interest which the insurer is required to have in the life of the assured, under 14 G. 3, c. 48, s. 1, must be a pecuniary interest; and, therefore, the insurance by a father in his own name on the life of his son, without any pecuniary interest in it, is void. *Halford v. Kymer*, 10 B. & C. 724. But where B. maintained her half-sister, A., a child 10 years old, B. was held to have an insurable interest in A.'s life. *Barnes v. L. Edinburgh, &c., Insur.*

Co., (1892) 1 Q. B. 864. See further as to what is sufficient pecuniary interest, *Hebden v. West*, *infra*. If a father, being engaged in a hazardous employment, agree with his son that the father will insure his own life and the son pay the premiums, and that the father shall leave the sum insured to his son by will, *semble*, *per* Martin and Bramwell, BB., that the insurance would be the father's and valid. *Shilling v. Accidental Death Insur. Co.*, 2 H. & N. 42; 26 L. J., Ex. 266. As to the recovery back of premiums paid under a policy void under the Statute, *vide post*, p. 619.

By sect. 3 a person who insures the life of another, or any other event, can recover from the insurer or insurers no greater sum than the amount or value of his interest in such life or event. The interest referred to is the interest at the time of making the policy, and this amount is recoverable whether the interest ceased or not before the death, or, has been satisfied *aliunde*. *Dalby v. India and L. Assur. Co.*, 15 C. B. 365; 24 L. J., C. P. 2, Ex. Ch.; *Law v. L. Indisputable Policy Co.*, 1 K. & J. 223; 24 L. J., Ch. 196, is to the same effect. But, by this section, the assured can in no case recover more than this insurable interest, whether upon one policy or many; and if he has already received that amount on other policies, this is an answer to an action. *Hebden v. West*, 3 B. & S. 579; 32 L. J., Q. B. 85.

The assignee of a life policy is not within the act, and need not show any interest other than the original one on which the policy is founded. *Ashley v. Ashley*, 3 Sim. 149.

*Damages.*] As to damages in the nature of interest under 3 & 4 W. 4, c. 42, s. 29, *vide ante*, p. 449g.

#### *Defence.*

The general observations made, *ante*, p. 449g, with respect to defences to actions on policies of marine insurance, will apply here.

*Misrepresentation.*] The assured usually subscribes a declaration answering facts inquired of by the insurers, and it is made a condition that if any be untrue the policy is to be void; in such case the policy is avoided though there be no intentional untruth; *Duckett v. Williams*, 2 Cr. & M. 348; *Macdonald v. Law, &c., Insur. Co.*, L. R., 9 Q. B. 228; *Thomson v. Weems*, 9 Ap. Ca. 761, D. P.; see also *A.-G. v. Ray*, L. R., 9 Ch. 397; and though the mis-statement be found by the jury to be immaterial: for as the basis of the contract is the truth of the representation, its materiality is not in question, and ought not to be left to the jury. *Anderson v. Fitzgerald*, 4 H. L. C. 484; *Cazenove v. British Equitable Assur. Co.*, 6 C. B., N. S. 437; 28 L. J., C. P. 259. See *British Equitable Assur. Co. v. Gt. W. Ry. Co.*, 17 W. R. 43, M. T. 1868, Malins, V.-C. If there be such express condition on the policy, yet material and fraudulent concealment or misrepresentation, though the inquiry and statement be oral, will also avoid it. *Wainwright v. Bland*, 1 M. & W. 32; 1 M. & Rob. 481. But mere representations or statements which turn out untrue, will not avoid a life policy (as in some cases they do a marine policy), unless the policy purports to be based upon their truth or there be fraud. *Wheelton v. Hardisty*, 8 E. & B. 232; 26 L. J., Q. B. 265; 8 E. & B. 285; 27 L. J., Q. B. 241, Ex. Ch. And the declaration and policy are to be construed together. See *Fowkes v. Manchester, &c., Assur. Assoc.*, 3 B. & S. 917; 32 L. J., Q. B. 153; *Hewnings v. Sceptre Life Assoc.*, (1905) 1 Ch. 365. Where after the discovery by the insurance company of an innocent mis-statement of the assured's age they continue to receive the premiums, they elect to adhere to the policy. S. C. If there be an untrue statement without fraud, and the policies of a company are expressed to be "indisputable except in case of fraud," the company will,



in equity, be estopped from relying on the mis-statement; and this may be specially replied to the defence. *Wood v. Dwarries*, 11 Exch. 493; 25 L. J., Ex. 129. But, where the policy is issued by a company, which circulates a prospectus purporting that their policies are indisputable, a reply, relying on this fact, must be supported by proof, that the prospectus had been seen, or acted upon by the insured; and, the mere proof of the public circulation of the prospectus, before the policy was effected, is not sufficient. *Wheelton v. Hardisty*, *ante*, p. 452. The omission to state that the deceased had any occupation, in answer to questions in the proposal, any mis-statement or concealment in which was to vitiate the policy, is not such an untrue statement as to vitiate the policy. *Perrins v. Marine & General Insur. Society*, 2 E. & E. 317, 324; 29 L. J., Q. B. 17, 242. But, the omission to state that proposals for insurance were made to, and declined by, other insurance offices was held to vitiate a contract for insurance. *London Assur. v. Mansel*, 11 Ch. D. 363. The person whose life is the subject of insurance by another has been held to be so far an agent for the assured that his false answers will vitiate the policy. *Rawlins v. Desborough*, 2 M. & Rob. 328, and note, *Id.* 334. But this case turned on the form of the particular policy; and, the false and fraudulent statements of the person whose life is insured, and of the medical referee, will not vitiate the policy, as against an innocent person, who effected the insurance, there being no condition that the untruth of the statement, contained in the proposal, should avoid the policy. *Wheelton v. Hardisty*, Ex. Ch., *ante*, p. 452. As to the insurance company being affected by knowledge of their agent who sent them the proposal for the insurance, see *Burden v. L. Edinburgh & Glasgow Assur. Co.*, and *Biggar v. Rock Life Assur. Co.*, *post*, p. 455. As to effect of change in the health of the proposer, between the acceptance of proposal for insurance and payment of premium, see *Canning v. Farquhar*, 16 Q. B. D. 727, cited *ante*, p. 450.

[*Suicide, Murder, &c.*] Clauses avoiding a policy if the person, whose life is insured, “commits suicide,” or “dies by his own hands,” are construed to include all voluntary self-destruction, though not felonious; and consequently the unsoundness of the person’s mind is not material. *Clift v. Schwabe*, 3 C. B. 437; *Dormay v. Borradaile*, 5 C. B. 380. Where the policy was conditioned to be valid, notwithstanding suicide, to the extent of any *bonâ fide* interest acquired by any person, by virtue of an equitable lien or security on it, on proof of such interest, to the satisfaction of the directors of the company: proof of the policy being held by the trustees of the wife of the assured, by way of marriage settlement, was held to support the alleged lien. *Moore v. Woolsey*, 4 E. & B. 243; 24 L. J., Q. B. 40. Proof of the above facts was reasonable evidence for the directors, by which they were bound to be satisfied. S. C.; see also *Braunstein v. Accidental Death Insur. Co.*, *post*, p. 454. The clause is, in the absence of fraud, for the benefit of the assured. *Solicitors’ & General Life Assur. Soc. v. Lamb*, 1 H. & M. 716; 33 L. J., Ch. 426; *Accord. City Bank v. Sovereign Life Assur. Co.*, 50 L. T. 565, H. S., 1884, Ch. D. So, where the policy is mortgaged to the society, they are in the same position as if it had been mortgaged to a third party. *White v. British Empire, &c., Assur. Co.*, L. R., 7 Eq. 394. But the assignees of the assured under a foreign bankruptcy, are not within the condition in a policy that it should be valid, notwithstanding suicide, if any third party had acquired a *bonâ fide* interest therein by assignment, or by legal or equitable lien for a valuable consideration, or as a security for money. *Jackson v. Forster*, 1 E. & E. 463; 28 L. J., Q. B. 166; 1 E. & E. 470; 29 L. J., Q. B. 8, Ex. Ch. On the application by F. for a policy on his own life for the benefit of his creditor E., F. warranted that he would not commit suicide, whether sane or insane, within one year: the policy was granted thereon,

and F. committed suicide within the year, it was held that the policy was thereby avoided even as against E. *Ellinger v. Mutual Life Insur. Co. of New York*, (1905) 1 K. B. 31 C. A.

Where F., having insured his life, assigned the policy to B., and was executed for forgery, it was held that B. could not recover on the policy, F.'s death being the result of his own criminal act. *Amicable Assur. Soc. v. Bolland (Fauntleroy's Case)*, 2 Dow. & C. 1; 4 Bli. N. S. 194. On a similar principle, if B., being interested in a policy on A.'s life, murders A., neither B. nor his assignees can take any benefit under the policy. *Cleaver v. Mutual, &c., Life Assur.*, (1892) 1 Q. B. 147.

#### INSURANCE AGAINST PERSONAL ACCIDENTS.

In a policy of insurance effected against injury caused by accident or violence, provided the same should be caused by some outward and visible means, of which satisfactory proof should be furnished to the insurers, is meant such proof as the insurers may reasonably require, and not such as they may capriciously demand. *Braunstein v. Accidental Death Insur. Co.*, 1 B. & S. 782; 31 L. J., Q. B. 17. See *Moore v. Woolsey*, *supra*, and *Trew v. Ry. Passengers' Assur. Co.*, 6 H. & N. 839; 30 L. J., Ex. 317, Ex. Ch. Where there was an exception in the policy, of death from certain specified diseases, or any other disease or cause within the system of the assured before or at the time or following such accidental injury; it was held that one of the specified diseases, brought on solely by the accident, was not within the exception. *Fitton v. Accidental Death Insur. Co.*, 17 C. B., N. S. 122; 34 L. J., C. P. 28; *Mardorf v. Accident Insur. Co.*, 1903, 1 K. B. 584, C. A. Where, however, the exception extends to secondary causes, the insurers are not liable. *Smith v. Accident Insur. Co.*, L. R., 5 Ex. 302. Where the policy excepted injury caused by natural disease or weakness, or exhaustion consequent on disease, and the assured while fording a stream was seized with an epileptic fit, and fell into the stream and was drowned, this was held not to be within the exception. *Winspear v. Accident Insur. Co.*, 6 Q. B. D. 42, C. A.; see also *Laurence v. Accidental Insur. Co.*, 7 Q. B. D. 216. A policy against "death from the effects of injury caused by accident," includes death from a disease which was the natural consequence of an injury caused by accident. *Isitt v. Railway Passengers' Assur. Co.*, 22 Q. B. D. 504. See *Dunham v. Clare*, (1902) 2 K. B. 292, C. A.; *Fenton v. J. Thorley & Co.*, (1903) A. C. 443, D. P.; and *Brintons v. Turvey*, (1905) A. C. 231, decided under stat. 60 & 61 V. c. 37, *post*, p. 808. In a policy of insurance against "any bodily injury caused by violent accidental external and visible means," with a proviso excepting injuries arising from "natural disease or weakness or exhaustion consequent on disease," the word "external" must be taken in contradistinction to internal causes of injury such as diseases. *Hamlyn v. Crown Accidental Insur. Co.*, (1893) 1 Q. B. 750. Death from heart failure induced by intentional physical exertion is not a death from the effects of an injury by accident. *In re Scarr v. General Accident Assur. Cor.*, (1905) 1 K. B. 382. Nor is death by sunstroke. *Sinclair v. Maritime Passengers' Assur. Co.*, 3 E. & E. 478; 30 L. J., Q. B. 77. As to a nervous shock produced by fright and excitement, see *Pugh v. L. Brighton, &c., Ry.*, (1896) 2 Q. B. 248, C. A. Where death occurs from a risk which was either obvious to the assured, or would have been obvious to him if he had been paying reasonable attention to what he was doing, it falls within an exception in the policy, of accident caused by "exposure of the deceased to obvious risk." *Cornish v. Accident Insur. Co.*, 23 Q. B. D. 453, C. A.

The insurance company is affected by the knowledge of its agent, Q., who sent to them the proposal for insurance, of special facts relating to the

assured, B., whereby the risk was increased. *Bawden v. L. Edinburgh & Glasgow Assur. Co.*, (1892) 2 Q. B. 534, C. A. Thus, where Q., knowing that B. was a one-eyed man, made no note thereof on the proposal on which the policy was issued, the company were held liable on the loss of B.'s remaining eye to pay compensation as for total loss of sight. S. C. But where Q. filled up the proposal form which B. signed without reading or knowing that several of the answers were false, its truthfulness being the basis of the proposal, the policy was held void, because B. must be taken to have read and approved of the answers, and that in filling in the answer, Q. was acting as B.'s agent and not that of the insurance office. *Biggar v. Rock Life Assur. Co.*, (1902) 1 K. B. 516.

A policy for 12 months, from Nov. 24th, 1888, covers an accident on Nov. 24th, 1889. *South Staffordshire Tramways Co. v. Sickness, &c., Assur. Co.*, (1891) 1 Q. B. 402. As to whether injury caused to several persons by the same negligence, is one accident or more, *vide* S. C., in C. A., *Id.* Whether a term of the policy requiring notice of death within 7 days is a condition precedent depends on the construction of the whole policy. *Stoneham v. Ocean, &c., Accident Insur. Co.*, 19 Q. B. D. 237. As to stamp duties, *vide ante*, p. 269.

## FIRE INSURANCE.

The fundamental principle of fire insurance is that, like an open marine policy, it is a contract of indemnity. *Castellian v. Preston*, 11 Q. B. D. 380, C. A. A policy which has lapsed becomes renewed by the payment of the premium. *Kirkpatrick v. S. Australian Insur. Co.*, 11 Ap. Ca. 177, J. C.

Policies of fire insurance are within the stat. 14 G. 3, c. 48, cited *ante*, p. 451. As to their form, *vide ante*, pp. 449m, 450. A fire policy was not generally assignable, at law, except with the consent of the insurer; 3 Kent, Com. 375; Park, Ins., 8th ed. 978; but this is now altered by the J. Act, 1873, s. 25 (6), *ante*, p. 307. Where the policy requires the assured to deliver a certificate of the minister and churchwardens, as to the character of the assured, and the *bonâ fides* of the loss; *Worsley v. Wood*, 6 T. R. 710; or particulars of loss within a certain time of the fire; *Mason v. Harvey*, 8 Exch. 819; 22 L. J., Ex. 336; it is a condition precedent. See *Fearnley v. L. Guarantee Co.*, 5 Ap. Ca. 911, D. P. As to whom the notice of loss may be given under a similar clause, see *Marsden v. City & County Assur. Co.*, L. R., 1 C. P. 232. Fire policies are sometimes so framed as to be covenants to pay only an adjusted loss; in such case before adjustment no action can be maintained on the policy. *Elliott v. R. Exchange Assur. Co.*, L. R., 2 Ex. 237; *Viney v. Bignold*, 20 Q. B. D. 172; *Caledonian Insur. Co. v. Gilmour*, (1893) A. C. 85, D. P. Policies sometimes contain a clause entitling the insurers to determine the policy on notice, refunding a proportionate part of the premium. *Sun Fire Office v. Hart*, 14 Ap. Ca. 98, J. C. A policy from August 14th to November 14th was held to include the latter day, on which a fire took place. *Isaacs v. R. Insur. Co.*, L. R., 5 Ex. 296. See *South Staffordshire Tramways Co. v. Sickness Assur. Co.*, *supra*.

An interim receipt for premiums or slip initialled by the insurer constitutes an agreement to insure. *Parsons v. Queen Insur. Co.*, 7 Ap. Ca. 96, J. C.; *Thompson v. Adams*, 23 Q. B. D. 361. Where issued at Lloyd's, it is not subject to an implied condition that the policy should be put forward within a reasonable time. S. C.

As to stamp duties, *vide ante*, p. 269.

*Interest.*] *Vide ante*, p. 451. It is necessary to show an interest in the subject insured at the time of insuring and of the fire. *Lynch v. Dutzell*.

4 Bro. P. C., 2nd ed. 431; *Saddlers' Co. v. Budcock*, 2 Atk. 554. The unpaid vendor of a house may recover the full value thereof, if it be burnt before the conveyance is executed, though after the contract of sale. *Collingridge v. R. Exchange Assur. Co.*, 3 Q. B. D. 173. This interest need not be the absolute property; thus, an insolvent might insure a house, &c., to which his assignees were entitled, he being in possession and responsible to the real owners. *Marks v. Hamilton*, 7 Exch. 323; 21 L. J., Ex. 109. Warehousemen and wharfingers may insure their customers' goods in their custody, and may recover the whole value under a policy on goods "held in trust or on commission." *Waters v. Monarch Assur. Co.*, 5 E. & B. 870; 25 L. J., Q. B. 102. And, a carrier, who so insures, may recover the whole value of goods lost by fire, although the owner of the goods may be disabled from recovering from the carrier by reason of the value not being declared under the Carriers Act. *L. & N. W. Ry. Co. v. Glyn*, 1 E. & E. 652; 28 L. J., Q. B. 188. See also *Ebsworth v. Alliance Marine Insur. Co.*, L. R., 8 C. P. 596. But it is otherwise where the further words, "for which they" (the assured) "are responsible," are added. *N. British Insur. Co. v. Moffatt*, L. R., 7 C. P. 25. As to the claim of the general owner to the insurance money, when received by the assured, see *Martineau v. Kitching*, L. R., 7 Q. B. 436, and *Ebsworth v. Alliance Marine Insur. Co.*, *supra*. Goods delivered by A. to B., who is to return to A. an equivalent quantity of similar goods, but not necessarily the identical goods delivered to B., are to be insured as the goods of B., and not as the goods held by B. in trust; for the transaction amounts to the sale of the goods to B. *S. Australian Insur. Co. v. Randell*, L. R., 3 P. C. 101.

Premises of sufficient value were mortgaged to A., and then to B., and A. insured them in one office in a sufficient sum to cover his loan, and B. in another office to cover his loan, and they were burnt down; A. recovered enough on his policy to reinstate them, but did not do so, and the premises not reinstated were insufficient to cover B.'s security; it was held that B. was entitled to recover on his policy to the extent of his loss; *Westminster Fire Office v. Glasgow Provident Investment Society*, 10 Ap. Ca. 699, D. P.; but not for loss of rent of the premises. S. C.

*Description of the articles insured; alteration in premises, &c.*] The property intended to be insured must be described; but substantial accuracy is sufficient. See *Forbes' claim*, L. R., 19 Eq. 485. Thus, where the policy required the house or other building, in which the goods are, to be mentioned, the goods of a lodger may be called "goods in his dwelling-house." *Friedlander v. London Assur. Co.*, 1 M. & Rob. 171. The locality of the subject of insurance is material. *Pearson v. Commercial Union Assur. Co.*, 1 Ap. Ca. 498, D. P., *ante*, p. 439. Where the premises are described as being where "no fires are kept, or hazardous goods deposited," this means where no fires are *habitually* kept; and the casual use of fire to repair the premises does not come within the condition. *Dobson v. Sotheby*, M. & M. 90. So, where the condition was against any alteration of the trade without notice, a single instance of drying bark in a kiln, used and insured as a corn kiln, will not avoid the policy. *Shaw v. Robberds*, 6 Ad. & E. 75. When no steam engine, stove, or other description of fire heat was to be introduced, without notice to the insurers, the introduction of a stove, and use of it on one occasion as an experiment, without notice, prevents the insured recovering. *Glen v. Lewis*, 8 Exch. 607; 22 L. J., Ex. 228. But, where there is no condition relating to alterations in the premises after the policy, a subsequent change, as by setting up a more hazardous trade in them, if without fraud, will not avoid the policy. *Pim v. Reid*, 6 M. & G. 1. Policies usually provide for notice of any such change; and where the alteration is

one which makes the subject-matter insured no longer substantially correspond with the property as *particularly* described in the policy, and varies the risk, it will avoid the assurance; for the description in such cases is equivalent to a warranty. *Sillem v. Thornton*, 3 E. & B. 868; 23 L. J., Q. B. 362. In this last case, the house was enlarged so as no longer to agree with a description of it, annexed to the policy, and referred to in it so as to form a part of it. But, such a constructive warranty or condition is restrained by an express condition, requiring notice of any alteration increasing the risk and payment of a higher premium. *Stokes v. Cox*, 1 H. & N. 533; 26 L. J., Ex. 113, Ex. Ch.

If there be a condition in the policy that no more than 20 lbs. of gunpowder be on the premises insured, the policy is avoided if the condition be broken, although the breach of the condition have not occasioned the loss. *Beacon Life Assur. Co. v. Gibb*, 1 Moo. P. C., N. S. 79.

A warranty contained in a clause in the policy "warranted to be on the same rate, terms, and identical interest as U. Insur. Co., 800l.," is a condition precedent, a breach of which disentitles the assured from recovering. *Barnard v. Faber*, (1893) 1 Q. B. 340, C. A.

[Loss.] A fire policy is a contract of indemnity, and the assured can only recover the actual loss or damage sustained by him according to the real quantity and value of the goods at the time of the fire; *Chapman v. Pole*, 22 L. T. 306, Cockburn, C. J.; and, in respect of the interest in the goods covered by the insurance; *Castellain v. Preston*, 11 Q. B. D. 397 *et seq.*, per Bowen, L. J. A valued policy is considered an open one if the loss be not total, and the damage and expenses caused by removing articles insured are also covered by the policy. 3 Kent, Com. 375, and note. By 28 & 29 V. c. 90, s. 12 "any damage occasioned by the" metropolitan "fire brigade" constituted by that act "in the due execution of their duties, shall be deemed to be damage by fire within the meaning of any policy of insurance against fire." This brigade is now under the control of the London County Council, 51 & 52 V. c. 41, s. 40 (8).

A damage sustained by atmospheric concussion, caused by an explosion of gunpowder at a distance, is not a damage insured against in a policy against loss occasioned by fire. *Everett v. London Assur. Co.*, 19 C. B., N. S. 126; 34 L. J., C. P. 299. See *Marsden v. City and County Assur. Co.*, *post*, p. 458. Where a fire policy contained an exception of liability for loss or damage by explosion, except for such loss or damages as should arise from explosion by *gas*, and an inflammable vapour caught fire, exploded, and caused a further fire, it was held that *gas* meant only ordinary coal gas; and that the exception included not only the effects of the explosion, but also the further fire caused thereby. *Stanley v. Western Insur. Co.*, L. R., 3 Ex. 71.

The policy covers a loss by fire owing to the negligence of the assured himself, if there be no fraud. *Shaw v. Robberds*, 6 Ad. & E. 75. Wilful misrepresentations of the value of the property destroyed will, under the usual clause against fraudulent claims, defeat and vitiate the whole claim. *Britton v. R. Insur. Co.*, 4 F. & F. 905; see also *Chapman v. Pole*, *supra*. As to condition to render account of loss, see *Hiddle v. National, &c., Insur. Co. of New Zealand*, (1896) A. C. 372, J. C.

A condition "that if, at the time of any loss happening to any property hereby insured, there be any other subsisting insurances, whether effected by the assured or any other person, covering the same property," the insurer shall not be liable to pay more than his rateable proportion of such loss, applies only where the same property is the subject-matter of insurance, and the interests are the same. *N. British & Mercantile Insur. Co. v. L. Liverpool & Globe Insur. Co.*, 5 Ch. D. 569, C. A. See further as

to double insurance, *Australian Agricultural Co. v. Saunders*, L. R., 10 C. P. 688, Ex. Ch.

Where A. is insured by B., and A. can also recover the loss from C., B. may, when he has made good A.'s loss, recover in A.'s name the amount over from C. *Mason v. Sainsbury*, 3 Dougl. 61; *N. British & Mercantile Insur. Co. v. L. Liverpool & Globe Insur. Co.*, *ante*, p. 457. And, so if, after B. has paid A. the amount of his loss, C., under a legal obligation, also makes it good, B. can recover the amount from A., whether A.'s right of action against C. is founded on tort (*Darrell v. Tibbitts*, 5 Q. B. D. 560, C. A.), or arises out of contract. *Castellain v. Preston*, 11 Q. B. D. 380, C. A. And if A., instead of receiving this sum from C., released his right against him, B. may recover from A. the value of this right to which he was entitled to be subrogated. *W. of England Fire Insur. Co. v. Isaacs*, (1897) 1 Q. B. 226, C. A. See also *Phoenix Assur. Co. v. Spooner*, (1905) 2 K. B. 753, and cases cited *ante*, p. 449*d*.

#### INSURANCE AGAINST ACCIDENTS TO CHATTELS, BURGLARY, &c.

By a policy of insurance, plate glass in the plaintiff's shop front was insured against "loss or damage originating from any cause whatsoever, except fire," &c.; a fire broke out on premises adjoining the plaintiff's, but did not approach his shop front; a mob attracted by the fire tore down the plaintiff's shop shutters, and broke the plate glass for the purpose of plunder; it was held that the proximate cause of the damage was the lawless act of the mob, and not fire. *Marsden v. City and County Assur. Co.*, L. R., 1 C. P. 232. Where after a proposal by the plaintiff to the defendant company for an insurance of his goods against burglary, the defendants sealed the policy which contained a clause that no insurance would be considered in force until the premium had been paid, after, but without notice of a loss by burglary, it was held that though no premium had been paid and the defendants retained the policy they were liable thereon. *Roberts v. Security Co.*, (1897) 1 Q. B. 110, C. A. As to what constitutes a loss under such a policy, see *In re George and Goldsmiths', &c., Insur. Assoc.*, (1899) 1 Q. B. 595, C. A.

As to stamp duties, *vide ante*, p. 269.

#### INSURANCE OF DEBTS AND SOLVENCY.

An insurance company entered into a policy whereby they guaranteed to the assured, the plaintiff, the payment of a sum of money deposited by her in a bank in Australia, if the bank should make default in paying the same; the bank made such default and entered under a colonial statute into a scheme of arrangement with its creditors which was binding on the plaintiff, although she did not assent thereto. The company was held to remain liable to the plaintiff, but on payment was entitled to be subrogated to the plaintiff's rights under the scheme. *Dane v. Mortgage Insur. Co.*, (1894) 1 Q. B. 54, C. A.; *Finlay v. Mexican Investment Co.*, (1897) 1 Q. B. 517. A contract of insurance of the solvency of a surety is avoided by the concealment of material facts. *Seaton v. Heath*, (1899) 1 Q. B. 782, C. A.; reversed in *D. P. sub nom. Seaton v. Burnand*, (1900) A. C. 135, on the ground that the facts concealed were *not* material to the risk.

## ACTION ON CONTRACT OF AFFREIGHTMENT.

This action lies by or against a shipowner, whether the ship be general or chartered. The contract need not be under seal. In the case of a general ship, the bill of lading, or in the case of a chartered ship, the charter-party, is the proof of the contract. As the pleadings and proofs are substantially the same, whether the contract be or be not under seal, the following cases are to be taken as applicable to actions on contracts between shipper and shipowner, whatever the technical form of action may be, unless otherwise specified.

As to the admissibility of oral evidence to explain charter-parties, bills of lading, or other like contracts, see *ante*, pp. 21 *et seq.*

Greater weight is to be given to the words inserted in writing than to the printed form. *Margetsen v. Glynn*, *ante*, p. 420.

A charter-party, or memorandum in the nature of one, commonly contains clauses on the part of the shipowner, for seaworthiness, the reception and delivery of the cargo, and performance of the voyage, with an exception of certain perils. On the part of the charterer or freighter, the clauses are to load in a given time, and to pay freight and demurrage. As to stamp duties thereon, *vide ante*, p. 247.

As to bills of lading, *vide infra*.

The captain or master of a ship is an agent of the owners with larger powers than an ordinary agent. As between him and third persons, he is personally liable on contracts, made in the course of his ordinary employment, in his own name, or as agent of the owner, and he is able to sue on contracts so made. So, where like contracts are made by him, whether he sign expressly as agent or not, the owner may sue or be sued on them. Hence, he may sign a charter-party or bill of lading in his own name, and thereby bind his owners. 3 Kent, Com. §§ 161—164; Story on Agency, §§ 116—123. And, he may sue in his own name for freight; *Shields v. Davis*, 6 Taunt. 65; unless it appear from the charter-party and bill of lading that he signed the latter as agent only. *Repetts v. Millar's Kurri, &c., Forests*, (1901) 2 K. B. 306. The master can bind the owners by his bill of lading only when he is their servant, and not when they have, although without the knowledge of the shipper, parted with the possession and control of the ship to the charterers. *Baumwoll Manufacturing Co. v. Furness*, (1893) A. C. 8, D. P. This rule is not altered by the owner being registered as such, and also as managing owner, under 57 & 58 V. c. 60, s. 59. S. C. The law of the country to which the ship belongs is *primâ facie* that which binds the parties to a contract of affreightment; *Lloyd v. Guibert*, L. R., 1 Q. B. 115, Ex. Ch.; *The Gaetano & Maria*, 7 P. D. 137, C. A.; *The August*, (1891) P. 328; but this rule will be modified where the parties show a different intention. *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.*, 10 Q. B. D. 521, 529, 530; *The Industrie*, (1894) P. 58, C. A. See further as to the master's authority to bind his owners, *post*, pp. 553, 586.

[*Bill of lading.*] A bill of lading contains a receipt for and description of the goods received on board, the names of the shipper and consignee, the place of delivery (certain perils excepted) and the freight; and it is signed (in three parts) by the master, as agent of the shipowners. It is the contract of carriage between the shipowner and merchant; *Leduc v. Ward*, 20 Q. B. D. 475, C. A.; and its terms cannot be varied by oral evidence. S. C. Even where there is a charter-party and a sub-charter, the contract

is with the shipowner, unless there is a demise of the ship, or the shipowner has parted with possession of the ship. *Wehner v. Dene SS. Co.*, (1905) 2 K. B. 92. The shipowner must deliver all the goods described in the bill of lading, unless he can prove that they were not shipped. *Smith v. Bedouin S. Navigation Co.*, (1896) A. C. 70, D. P. The words "or assigns" are usually added to the name of the consignee, and it is questionable whether it be transferable by indorsement, unless the words be subjoined; see *Henderson v. Comptoir d'Escompte de Paris*, L. R., 5 P. C. 253; except, perhaps, in the case of special custom in certain foreign trades; see *Renteria v. Ruding*, M. & M. 511. But the omission of the words "or assigns" does not of itself give notice that the person in whose name the bill is made out is entitled to deal with the goods absolutely. *Henderson v. Comptoir d'Escompte de Paris*, *supra*. Where the terms of the charter-party and bill of lading are inconsistent, those of the former prevail as between shipowner and charterer, and the latter is only a receipt for the goods. *Rodocanachi v. Milburn*, 18 Q. B. D. 67, C. A. But as between the shipowner and the indorsee of the bill of lading, the latter prevails. See *Serraino v. Campbell*, (1891) 1 Q. B. 283, 290, and *Temperley SS. Co. v. Smyth*, (1905) 2 K. B. 791, 802, C. A. A clause in the charter-party giving power to the master to sign bills of lading "without prejudice to this charter" means "that it is a term in the contract between the charterers and the shipowner, that notwithstanding any engagements made by the bills of lading, that contract shall remain unaltered." *Turner v. Haji, &c., Azam*, (1904) A. C. 826, J. C. As to the effect of discrepancy between these documents, see *Moel Tryvan Ship Co. v. Kreuger*, (1907) 1 K. B. 809, C. A.

Although the indorsement of a bill of lading transferred the property in the goods, at common law, it conveyed no right of action to or against the indorsee in his own name as upon the original contract. *Thompson v. Dominy*, 14 M. & W. 403; *Howard v. Shepherd*, 9 C. B. 297; 19 L. J., C. P. 249. And, the receipt of the goods by the indorsee was only evidence for a jury of a new contract to pay freight in consideration of the delivery, on which he might be sued. *Kemp v. Clark*, 12 Q. B. 647. But, by the Bills of Lading Act, 1855 (18 & 19 V. c. 111), s. 1, "every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement shall have transferred to, and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself. But by sect. 2, "nothing herein contained shall prejudice or affect any right of stoppage *in transitu*, or any right to claim freight against the original shipper or owner, or any liability of the consignee or indorsee by reason or in consequence of his being such consignee or indorsee, or of his receipt of the goods by reason or in consequence of such consignment or indorsement."

The consignee or indorsee of a bill of lading may deprive the unpaid vendor of his right to stop the goods *in transitu* by indorsing it for valuable consideration, although the goods are not paid for, provided the indorsee for value has acted *bonâ fide* and without notice. *The Marie Joseph*, L. R., 1 P. C. 219, 227; *The Argentina*, L. R., 1 Adm. 370. A past debt is sufficient consideration. *Leask v. Scott*, 2 Q. B. D. 376, C. A.; overruling *Rodger v. Comptoir d'Escompte de Paris*, L. R., 2 P. C. 393. See further, *Action for conversion of goods—Defence—Stoppage in transitu—how defeated, post*, p. 992. The indorsee has transferred to him the same rights and liabilities in respect of the goods as if the contract in the bill of lading had been made with him. *The Helene*, B. & L. 415. Hence, actions now lie on the original contract by or against the indorsee of the bill of lading, and the shipowner or master may sue him for freight, although he received the goods



under circumstances which negative any intention or undertaking to pay. And the shipowner may also be liable to the indorsee by estoppel on a representation made in the bill of lading. *Compania Naviera, &c. v. Churchill, post*, p. 478. It seems that a person taking a bill of lading by indorsement after a breach, by a wrongful delivery of the goods to a stranger, can maintain an action by virtue of sect. 1. *Short v. Simpson*, L. R., 1 C. P. 248, and at 252, 255, *per* Willes, J. See also *Bristol, &c., Bank v. Midland Ry. Co.*, (1891) 2 Q. B. 653, C. A. The first indorsee of one part of a bill of lading, drawn in a set, "one of which being accomplished the others to stand void," gets the property in the goods, though he take no steps to enforce his rights. *Meyerstein v. Barber*, L. R., 4 H. L. 317. But the master is justified in delivering the goods to the consignee, to whom they are by such a bill of lading made deliverable, on production of one part of the bill, although there has been a prior indorsement for value of another part, provided the master had no notice thereof and the delivery was *bonâ fide*. *Glyn v. E. & W. India Dock Co.*, 7 Ap. Ca. 591, D. P. See further as to bills of lading in sets, *Sanders v. Maclean*, 11 Q. B. D. 327, C. A. The Act does not seem to render any bill of lading negotiable which would not have been so before the Act. See *Henderson Comptoir d'Escompte de Paris, ante*, p. 460. The shipper, A., of goods, does not, by simply indorsing the bill of lading to B., and delivering it to him by way of pledge for a loan, "pass the property in the goods" to B., so as to make B. liable to the shipowner for freight under sect. 1. *Sewell v. Burdick*, 10 Ap. Ca. 74, D. P.

See further sect. 3 (cited *post*, p. 477), as to the effect of a bill of lading.

By the Sale of Goods Act, 1893 (56 & 57 V. c. 71), s. 19 (2), "Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *primâ facie* deemed to reserve the right of disposal." See *Ogg v. Shuter*, 1 C. P. D. 47, C. A.; *Mirabita v. Imperial Ottoman Bank*, 3 Ex. D. 164, 172, C. A.

(3.) "Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him." This is in accordance with the principle laid down in *Shepherd v. Harrison*, L. R., 5 H. L. 116; *Ex parte Banner*, 2 Ch. D. 278, C. A.; *Mirabita v. Imperial Ottoman Bank, supra*. And the rule applies notwithstanding a statement in the invoice, that the goods are shipped on account and at the risk of the consignee. *Shepherd v. Harrison, supra*. The consignee may, however, although he has not accepted the bill of exchange, confer a good title on an innocent buyer. *Cuhn v. Pockett's Bristol, &c., Co.*, (1899) 1 Q. B. 643, C. A. See also *Moakes v. Nicholson*, 19 C. B., N. S. 220; 34 L. J., C. P. 273; *Gabarron v. Kreeft, Kreeft v. Thompson*, L. R., 10 Ex. 274; and *Anderson v. Morice*, 1 Ap. Ca. 713, D. P., as to effect of shipping goods under bill of lading. As to property in goods passing when the bill of lading is posted, see *Banco de Lima v. Anglo-Peruvian Bank*, 8 Ch. D. 160.

It is a breach of contract if the master sail away, with the cargo on board, without signing bills of lading, but it does not amount to a conversion of the cargo, unless the circumstances show an intention by him to deprive the shipper of his cargo. *Janes v. Hough*, 5 Ex. D. 115, C. A.

Where a cargo was shipped under a charter-party which contained the clause, "the freight to be paid as follows:—One-third on signing bills of lading less 3 per cent. for interest, insurance, &c., and the remainder on unloading in cash," and the bills of lading were to be signed within 24 hours after the cargo was on board; it was held that the vessel having sunk, and

the cargo being lost after the commencement of the voyage, and before the bills of lading were presented for signature, did not excuse the charterers from presenting the bills of lading, and the shipowner was entitled to recover damages equal to the advance freight. *Oriental SS. Co. v. Taylor*, (1893) 2 Q. B. 518, C. A., distinguishing *Smith v. Pyman*, cited *post*, p. 468. Cf. *Chandler v. Webster*, cited, *ante*, p. 340.

The right of suing upon a contract under a bill of lading follows the legal title to the goods as against the indorser. *The Freedom*, L. R., 3 P. C. 594; see also *The Figlia Maggiore*, L. R., 2 Ad. 106. So where the consignors indorsed and delivered a bill of lading to A., who indorsed and delivered it to the plaintiff for value; this was held to be evidence of such an indorsement and delivery as to pass the property in the goods to the plaintiff within the meaning of 18 & 19 V. c. 111, s. 1, *ante*, p. 460; *Dracachi v. Anglo-Egyptian Navigation Co.*, L. R., 3 C. P. 190; and if goods are shipped by the seller to order, under circumstances which show that he intended to pass the property in the goods to the buyer, the mere fact of the seller having taken the bill of lading in his name, and its remaining unindorsed, will not prevent the property passing. *Joyce v. Swann*, 17 C. B., N. S. 84. See also *Mirabita v. Imperial Ottoman Bank*, *ante*, p. 461.

An indorsee of a bill of lading, who has indorsed it over before the arrival of the vessel and delivery of the cargo, does not, under sect. 1, remain liable for the freight; *Smurthwaite v. Wilkins*, 11 C. B., N. S. 842; 31 L. J., C. P. 214; and where the consignee of goods, before the arrival of the ship, indorsed over the bill of lading to wharfingers thus: "deliver to W. or order, looking to them for all freight, &c., without recourse to us," and the shipowners accepted the indorsement, and delivered the goods to W.; the shipowners could not sue the consignee for freight. *Lewis v. M<sup>c</sup>Kee*, L. R., 2 Ex. 37. But such acceptance of the indorsement by the shipowners is not proved by showing that it was on the bill when it was presented to the captain, without proving that the captain in fact assented to it. S. C., L. R. 4 Ex. 58, Ex. Ch. The consignee named in the bill of lading is liable thereon, unless he has indorsed it over, even though he has sold the cargo comprised therein. *Fowler v. Knoop*, 4 Q. B. D. 299, C. A.

Where goods are loaded, and the mate's receipt then given, and afterwards exchanged for the bill of lading, in the usual manner, the latter takes effect from the loading. *The Duero*, L. R., 2 A. 393. A bill of lading remains in force until there has been a delivery of goods thereunder to a person having a right to receive them. *Meyerstein v. Barber*, L. R., 4 H. L. 317.

The mere employment, by the shipowner, A., of a broker at a foreign port to find a cargo for a ship, and to adjust the terms of carriage thereof, does not give him implied power to relieve the master, B., when he signs the bill of lading therefor, of the duty of seeing that the dates of shipment are correctly stated in the bill of lading, and B. is liable to A. for any damage A. may sustain by the breach of this duty. *Stumore v. Breen*, 12 Ap. Ca. 698, D. P.

Where the bill of lading provided "average, if any, to be adjusted according to British custom," the admitted custom of average adjusters is made part of the contract, and the custom, though erroneous, is binding. *Stewart v. W. India, &c., Steamship Co.*, L. R., 8 Q. B. 88. See also cases cited *ante*, p. 448.

The mortgagee of a ship is bound by bills of lading given by the mortgagor before the mortgagee took possession of the ship. *Keith v. Burrows*, 2 Ap. Ca. 636, D. P.

As to stamp duties on bills of lading, *vide ante*, p. 246.

## SHIPOWNER AGAINST CHARTERER OR MERCHANT.

Although there is a charter-party by deed, yet if there is a subsequent agreement by parol, for the use of the ship, at a period before the charter-party attaches, but embodying its terms, this may be proved, and the demand recovered as on a simple contract. *White v. Parkin*, 12 East, 578. So for other matters of agreement, express or implied, *extra* the contract. *Fletcher v. Gillespie*, 3 Bing. 635.

The exception of fire in a charter-party enures for the protection of the charterer as well as the shipowner. *In re Neuman & Dale SS. Co., & British, &c., SS. Co.*, (1903) 1 K. B. 262. Where a charter-party contained the clause "in the event of war," &c., "this charter-party is to be cancelled," it was held to be determined on war breaking out without the election of either party. *Adamson v. Newcastle, &c., Insur. Assoc.*, 4 Q. B. D. 462, *diss. Lush, J.*

[*Compliance with warranties or conditions.*] In an action for not loading, plaintiff must prove compliance with warranties or conditions. On the mere contract by the shipowner to carry goods, shipped on board his vessel, there is no implied condition that his vessel shall be seaworthy. *Schloss v. Heriot*, 14 C. B., N. S. 59; 32 L. J., C. P. 211, *post*, p. 464. By undertaking that the vessel shall be seaworthy at the time of receiving the cargo, there is no warranty against "suspicion" of unfitness; therefore, where the master took antimony on board as ballast, so as to fill no more room than ballast, and the jury found it not injurious to a cargo of tea, it was held that the charterers, who were bound to load a "full cargo" of tea, were liable for refusing to put it on board, although this ballast might raise "suspicions" as to the ship's fitness for such a cargo. *Towse v. Henderson*, 4 Exch. 890.

The description of a ship in the charter-party may be a warranty, or condition precedent. Thus, if it be described as of the class called A 1, and it is not so, it would be an answer to an action for not loading; but such a warranty only applies to the classification at the time of the contract. *Hurst v. Osborne*, 18 C. B. 144; 25 L. J., C. P. 209; *Trench v. Newgass*, 3 C. P. D. 163, C. A.; *Routh v. Macmillan*, 2 H. & C. 750; 33 L. L., Ex. 38. So, "now at sea; having sailed *three weeks ago*," is a condition; *Ollive v. Booker*, 1 Exch. 416; though had "or thereabouts" been added, as is wrongly stated in the marginal note in 1 Exch., the decision would probably have been otherwise. *Per Curiam* in *Behn v. Burness, infra*. So, "now sailed or about to sail from a pitchpine port," *Bentsen v. Taylor*, (1893) 2 Q. B. 274, C. A.; or "now in the port of A.," *Behn v. Burness*, 3 B. & S. 751; 32 L. J., Q. B. 204, Ex. Ch., amounts to a warranty; and, in arriving at the true construction of the document, the court must look at the surrounding circumstances (as found by the jury) at the time the contract is made. S. C. So, a stipulation to sail, or be ready for loading, on a particular day, is a condition precedent. *Glaholm v. Hays*, 2 M. & Gr. 257; *Oliver v. Fielden*, 4 Exch. 135; *Crockerwit v. Fletcher*, 1 H. & N. 893; 26 L. J., Ex. 153; *Seeger v. Duthie*, 8 C. B., N. S. 45, 72; 29 L. J., C. P. 253; 30 L. J., C. P. 65. In such case readiness to sail on a particular day is not disproved by the fact that the captain, *bonâ fide*, though wrongly, thinking the ship already sufficiently loaded, refused to receive additional goods on board, and the dispute, decided ultimately against the captain, caused delay in sailing until after the day. S. C. When the charter-party is for a stipulated time, time is the essence of the contract. *Tully v. Howling*, 2 Q. B. D. 182, C. A. Delay, caused by the expected perils, when so great as to put an end

in a commercial sense to the speculation, entered into between the shipowner and charterers, exonerates the charterer from loading; *Jackson v. Union Marine Insur. Co.*, L. R., 8 C. P. 572; L. R., 10 C. P. 125, Ex. Ch.; such delay has not, however, this effect under any other circumstances; *Hurst v. Osborne*, ante, p. 463; *Tarrabochia v. Hickie*, 1 H. & N. 183; 26 L. J., Ex. 26; *Jones v. Holm*, L. R., 2 Ex. 335; but gives only an action for damages. *MacAndrew v. Chapple*, L. R., 1 C. P. 643, 648, per Willes, J. Where the ship was not chartered for any particular cargo, and a small loss of freight was all the loss occasioned by the delay: it was held, that the stipulation that the ship should with all convenient speed proceed to E., and there load a full cargo was not a condition precedent. S. C.

A statement of tonnage is not a warranty, or condition precedent. *Barker v. Windle*, 6 E. & B. 675; 25 L. J., Q. B. 349, Ex. Ch. See *Pust v. Dowie*, 5 B. & S. 20; 32 L. J., Q. B. 179; 5 B. & S. 33; 34 L. J., Q. B. 127, Ex. Ch. To an action by shipowner, A., against skipper, B., for contributions to general average, it is no answer that the ship was not seaworthy, unless it be shown that its unseaworthiness at the commencement of the voyage caused the loss, in which case it is a good defence, in order to avoid circuitry of action. *Schloss v. Heriot*, 14 C. B., N. S. 59; 32 L. J., C. P. 211. So A. cannot claim contribution in respect of jettison rendered necessary by the wrongful acts of himself or his servants. *Strang v. Scott*, 14 Ap. Ca. 601, J. C. If the ship be not fit to carry a reasonable cargo of the kind for which the ship was chartered, the charterer is not bound to load. *Stanton v. Richardson*, L. R., 7 C. P. 421; L. R., 9 C. P. 390, Ex. Ch.

The question as to what representation amounts to a condition precedent, or to a warranty, depends entirely on the intention of parties, as apparent on the contract itself; there is no general rule that representations in a charter-party are equivalent to warranties, or to conditions precedent. *Croockewit v. Fletcher* and *Bentsen v. Taylor*, ante, p. 463; see *MacAndrew v. Chapple*, supra.

*Demurrage.*] It is usual for the merchant to undertake to load and unload within a certain number of days, called *lay days*, with liberty to delay the ship for a longer specified period on payment of a daily sum, which, as well as the delay itself, is called *demurrage*. If the charter-party contains a fixed number of *demurrage* days, as well as *lay days*, and the ship is, by the fault of the merchant, delayed beyond them both, that is a *detention*, and is to be compensated for by damages; but, where no *demurrage* days are mentioned, all detention beyond the *lay days* is *demurrage*. *Sanguinetti v. Pacific Steam Nav. Co.*, 2 Q. B. D. 238, 251, per Brett, L. J.; *Harris v. Jacobs*, 15 Q. B. D. 247, C. A. The days are, at the places of loading and unloading respectively, in the absence of contrary usage, to be taken as consecutive or "running" days; *Brown v. Johnson*, 10 M. & W. 331; but, by the custom of the port of London, the days in the clause of *demurrage* mean working days, which exclude Sundays and holidays at the custom house. *Cochran v. Relberg*, 3 Esp. 121. And, by usage, there may be other breaks in the calculation of running days. *Nielsen v. Wait*, 14 Q. B. D. 516; 16 *Id.* 67, C. A. A running day is a calendar day, from midnight to midnight. *The Katy*, (1895) P. 56, C. A. For the purpose of a *demurrage* or despatch money (*vide infra*), clause, a day is to be taken as of its natural length of 24 hours. *Lang v. Hollway*, 3 Q. B. D. 437, 442, C. A. A fraction of a day counts as a day. *Commercial SS. Co. v. Boulton*, L. R., 10 Q. B. 346; unless, as in *Yeoman v. Rex*, (1904) 2 K. B. 420, C. A., this is controlled by special terms in the charter-party. But the charterer is entitled to whole days for *lay days*. *The Katy*, supra; *Houlder v. Weir*, (1905) 2 K. B. 267. As to the calculation of "weather-working days," see *Branckelov*

*SS. Co. v. Lamport*, (1897) 1 Q. B. 570. Dispatch money is payable on the difference between the time allowed by the charter and that actually occupied by the loading and discharge. *The Glendevon*, (1893) P. 269. The lay days, allowed for loading or discharge, begin to run when the vessel arrives at the usual place of loading or discharge, and not at the port merely. *Breton v. Chapman*, 7 Bing. 559; *Bastifell v. Lloyd*, 1 H. & C. 388; 31 L. J., Ex. 413; *Nelson v. Dahl*, *post*, p. 467; *Leonis SS. Co., v. Rank*, (1907) 1 K. B. 344. Where the place of discharge is a wharf or a berth at a dock, the days run from the time the ship reaches her appointed berth for loading or discharge. *Murphy v. Coffin*, 12 Q. B. D. 87; *Good v. Isaacs*, (1892) 2 Q. B. 555, C. A.; *Tharsis Sulphur, &c., Co. v. Morel*, (1891) 2 Q. B. 647, C. A. Where the vessel was to proceed to "Tyne dock to such ready quay berth as ordered by the charterers," it was held that the charterers must name a berth ready to receive the vessel, and that in default of so doing they were liable under the demurrage clause. *Harris v. Jacobs*, 15 Q. B. D. 247, C. A. See also *Pyman v. Dreyfus*, 24 Q. B. D. 152. And the liability continues, in the absence of default by the shipowner, till the completion of the loading. *Tyne, &c., Shipping Co. v. Leach*, (1900) 2 Q. B. 12. Where, however, the charterer has, in a charter-party containing a strike clause, the choice of several named places of discharge, of which he has selected R., he is not bound to name any other place, on knowing that a strike of porters had arisen at R., which rendered discharge there within the time limited impossible. *Bulman v. Fenwick*, (1894) 1 Q. B. 179, C. A. Where the ship is to unload at S., or "so near thereto as she may safely get at all times of the tide and always afloat," and the charterers are to pay demurrage for delay, and she cannot, on account of the tide, reach S. until 4 days after she had arrived at K. R., the nearest point where she could float; it was held that demurrage was payable from the arrival at K. R. *Horsley v. Price*, 11 Q. B. D. 244. When the ship has reached her place of discharge, the lay days continue to run, unless the unloading was prevented by the act of the master; *Budgett v. Binnington*, (1891) 1 Q. B. 35, C. A.; even although a strike prevented him from carrying out the share of the work of unloading for which he was responsible. S. C. So, although excepted perils caused delay in unloading. *This v. Byers*, 1 Q. B. D. 244. The days run, although the consignee cannot take his goods away, owing to the default of the consignees of other goods in not removing their goods. *Straker v. Kidd*, and *Porteus v. Watney*, 3 Q. B. D. 223; *Id.* 534, C. A. As to damages for detention, see *Jones v. Adamson*, 1 Ex. D. 60. The lay days allowed for loading and unloading are usually to be kept distinct. See *Marshall v. Bolckow*, 6 Q. B. D. 231.

When the charter-party is silent as to the time of loading, reasonable time under the circumstances as they actually exist at the time of loading is implied, and not that which would be a reasonable time under ordinary circumstances. *Carlton SS. Co. v. Castle Mail Packets Co.*, (1898) A. C. 486. See also *Hick v. Raymond*, *post*, p. 466, dissenting from the opinions expressed on this point in *Adams v. R. Mail Co.*, 5 C. B., N. S. 492; 28 L. J., C. P. 33. In the absence of special circumstances, as to which see *Jones v. Green & Co.*, and other cases cited, *post*, p. 466; it is the duty of the freighter to have his cargo in readiness for shipment, and the question of reasonable time for loading applies only to a cargo so ready; *Ardau S.S. Co. v. Weir & Co.*, (1905) A. C. 501, D. P., *vide Adams v. R. Mail Co.*, 5 C. B., N. S. 494, *per Williams and Byles, J.J.* Thus, a strike in the collieries, whence the freighter was to get his cargo, is no excuse for delay. S. C. So, where a cargo was to be loaded with "usual dispatch," this was held not to excuse a merchant, who had been prevented, by frost, from bringing his cargo to the place of loading. *Kearon v. Pearson*, 7 H. & N. 386; 31 L. J., Ex. 1. But the risk of strikes may be thrown on the shipowner

by the terms of the charter-party: see *Dobell v. Green*, (1900) 1 Q. B. 526, C. A. An exception for "strikes, lock-outs, accidents to railway," and "other causes beyond the charterer's control" is confined to cases *ejusdem generis* with the specific exception. *In re Richardson & Samuel*, (1898) 1 Q. B. 261, C. A. With regard to unloading, where no time is expressed, a reasonable time under such circumstances as actually exist at the time and port of unloading and are beyond the control of the consignee, is implied; thus, the merchant is not responsible for delay there caused by the strike of labourers, *Hick v. Raymond*, (1893) A. C. 22, D. P.; or by the crowded state of the docks, *Hulthen v. Stewart*, (1903) A. C. 389, D. P. Both the shipowner and merchant are bound to use reasonable diligence, with regard to all the circumstances. *Ford v. Cotesworth*, L. R., 1 Q. B. 127; L. R., 5 Q. B. 544, Ex. Ch. And neither party can sue the other for delay arising from a cause over which the latter had no control. S. C.; *Cunningham v. Dunn*, 3 C. P. D. 443, C. A. As to the respective duties of the parties where the discharge is a joint act, see *Petersen v. Freebody*, (1895) 2 Q. B. 294, C. A. An option given to the shipowner of landing the goods, in default of their being taken by the consignees from the ship on arrival, does not divest him of any other remedy. *The Arne*, (1904) P. 154.

The parties are bound by the custom of the port or dock, whether this be expressed in the charter-party; *Good v. Isaacs*, *ante*, p. 465; or not; *The Jaederen*, (1892) P. 351, following *Postlethwaite v. Freeland*, 5 Ap. Ca. 613, *per* Ld. Blackburn; see, however, hereon, *Hick v. Raymond*, (1893) A. C. 30, *per* Ld. Herschell, C. Thus, the question as to whether the defendant has loaded or unloaded within a reasonable time where the contract is "to be ready to load or unload in regular turns," is to be governed by the usage of the port as to the turns or order of loading or unloading. *Leidemann v. Schultz*, 14 C. B. 38; 23 L. J., C. P. 17; see *Shadforth v. Cory*, 32 L. J., Q. B. 379, Ex. Ch.; *Bastifell v. Lloyd*, *ante*, p. 465; *Lawson v. Burness*, 1 H. & C. 396; *Cawthorn v. Trickett*, 15 C. B., N. S. 754; 33 L. J., C. P. 182; and *Postlethwaite v. Freeland*, 5 Ap. Ca. 599, D. P., where the earlier cases are collected and reviewed. See also *Barque Quilpué v. Brown*, (1904) 2 K. B. 264, C. A., and other cases, *ante*, pp. 22 *et seq.* The custom may be excluded by the terms of the contract. *Brenda SS. Co. v. Green*, (1900) 1 Q. B. 518, C. A.

When the charter-party is entered into by the shipowner with full knowledge of all the circumstances under which the cargo is to be obtained and loaded, delay in getting the cargo may be an excuse. *Jones v. Green & Co.*, (1904) 2 K. B. 275, C. A., following *Harris v. Dreesman*, 9 Exch. 485; 23 L. J., Ex. 210. So, where the charter-party provided that "detention by ice should not be reckoned as laying days," it was held that this must be construed with reference to the particular nature of the place of export, S., and, as there were no warehouses there, and the cargo had to be brought down to S. in boats for loading, a detention of these boats by ice was within the exception of the charter-party. *Hudson v. Ede*, L. R., 2 Q. B. 566; L. R., 3 Q. B. 412, Ex. Ch. See also *Smith v. Rosario Nitrate Co.*, (1893) 2 Q. B. 323; (1894) 1 Q. B. 174, C. A. So, where time lost by strikes was not to count as part of the time allowed for discharge, a strike of labourers, who would have discharged the lighters which conveyed the cargo from the ship to the place of discharge, was held to be within the clause. *The Alne Holme*, (1893) P. 173. But the exception does not in general apply to delay caused by ice before the cargo has reached the limits of the place of loading. *Kay v. Field*, 10 Q. B. D. 241, C. A.; *Grant v. Coverdale*, 9 Ap. Ca. 470, D. P. As to detention by ice caused by breakdown of steamer, see *In re Traae and Lennard & Sons*, (1904) 2 K. B. 377, C. A.

The defendant, an English subject, chartered the plaintiff's ship to take

on board a cargo at Odessa, a port of Russia, 45 running days being allowed for loading and unloading. When there, the defendant's agent told the master that there was no cargo for him and urged him to sail; the master refused; and continued to demand a cargo until, the running days not having expired, war was declared between England and Russia: held, that no action would lie against the defendant, as the refusal by his agent, not having been accepted by the master as a renunciation of the contract, there had been no breach of contract by the defendant, when the war put an end to it. *Avery v. Bowden*, 5 E. & B. 714; 25 L. J., Q. B. 49; 6 E. & B. 962; 26 L. J., Q. B. 3, Ex. Ch.; *Reid v. Hoskins*, 5 E. & B. 729; 25 L. J., Q. B. 55; 6 E. & B. 953; 26 L. J., Q. B. 5, Ex. Ch.

Where the charter allows lay days for loading and demurrage days, and makes "the charterer's liability to cease when the ship is loaded, the captain having a lien upon the cargo for freight and demurrage," the charterer is discharged from liability incurred for demurrage during the loading; *Francesco v. Massey*, L. R., 8 Ex. 101; *Kish v. Cory*, L. R., 10 Q. B. 553, Ex. Ch.; *Sanguinetti v. Pacific Steam Navigation Co.*, 2 Q. B. D. 238, C. A.; and the term "demurrage" will include damages for detention, not strictly demurrage. S. C., and *Harris v. Jacobs*, cited *ante*, p. 465. The clause extends to all liability under the charter arising after the ship is loaded. *French v. Gerber*, 1 C. P. D. 737; 2 C. P. D. 247, C. A. Where, however, the only provision as to loading is that the ship is to load "in the customary manner" and discharge her cargo in a certain number of days, paying demurrage after that time, the charterer is not released from liability in respect of delay in loading. *Lockhart v. Falk*, L. R., 10 Ex. 132; *Dunlop v. Balfour*, (1892) 1 Q. B. 507, C. A.; *Clink v. Radford*, (1891) 1 Q. B. 625, C. A. The main principle to be deduced from the cases is that the cesser clause is inapplicable to the particular breach complained of if, by construing it otherwise, the shipowner would be left unprotected in respect of that particular breach, unless the cesser clause is expressed in terms that prohibit such a conclusion. S. C.; *Hansen v. Harrold*, (1894) 1 Q. B. 612, C. A. As to when demurrage is chargeable on goods delivered under a bill of lading, on the ground that the bill of lading incorporates the provisions of the charter-party, *vide post*, pp. 476, 477.

*Freight and damages.*] Freight is regulated by the contract, or, if none, by usage, or a *quantum meruit*, or by the course of former dealing between the parties. As a general rule, no freight is due until the goods be carried to the destined port, without alteration of their nature by perils of the sea. *Duthie v. Hilton*, L. R., 4 C. P. 138; *Asfar v. Blundell*, (1896) 1 Q. B. 123, C. A. Where charter-party freight is payable on unloading and right delivery of the cargo the freight is not earned until the unloading and delivery of the whole cargo has been completed. *Brown v. Tanner*, L. R., 3 Ch. 597. The delivery and payment are concurrent acts. *Paynter v. James*, L. R., 2 C. P. 348; W. N. 1868, p. 141, Ex. Ch.

Where a ship is to proceed to certain "docks or as near thereto as she may safely get," it is not sufficient for her to go to the dock gates only; *Nelson v. Dahl*, 12 Ch. D. 568; 6 Ap. Ca. 38, D. P.; if she cannot enter on arrival there, by reason of the docks being full, her obligation to wait to enter depends on the question of fact, whether, under all the circumstances, it is reasonable that she should so wait; if it be not reasonable, the charterer must take delivery as near to the dock as the ship can safely get. S. C. See on the construction of the words in a charter-party "as near thereto as she may safely get," the judgment of Ld. Blackburn in S. C., *Id.* pp. 50, 51, and cases there cited. Where a ship is to go to a safe port, or so near thereto as she may safely get, and "always lie and discharge

afloat," the master is not bound to discharge at a port where she could not so lie without being lightened. *The Alhambra*, 6 P. D. 68, C. A. See also *Horsley v. Price*, 11 Q. B. D. 244, *ante*, p. 465. Where by the charter-party a ship was to proceed with a cargo to a port, "to discharge in a dock as ordered on arriving if sufficient water, or so near thereunto as she may safely get always afloat," it was held she was only bound to discharge in a dock named if there were sufficient water when the order was given. *Allen v. Coltart*, *Id.* 783. See also *The Curfew*, (1891) P. 131.

Where the shipowner carries the cargo to the port of destination, but from the nature of the cargo is unable to land it there, the freight becomes payable; and, if the prudent course for the master to adopt is to bring the cargo home again he is entitled to be paid back-freight as well as the expenses incurred in endeavouring to land the cargo. *Cargo ex Argos*, L. R., 5 P. C. 134, 155. So, freight is payable where the cargo is delivered at a port included in a charter-party, but not at the port named by the charterer, that port having become dangerous for the ship, a foreign one, by reason of war having broken out. *The Teutonia*, L. R., 4 P. C. 171.

The freight is sometimes made wholly or partly payable at the port of loading. If part of it be made payable on the "final sailing" of the ship from the port of loading, or "from her last port in the United Kingdom," it is not payable if the ship be wrecked in an artificial canal within the limits of the port on its way out to sea, with the clearances on board, and all ready for sailing; *Rocklands v. Harrison*, 9 Exch. 444; 23 L. J., Ex. 169; *Sailing Ship Garston Co. v. Hickie*, 15 Q. B. D. 580, C. A.: and where the ship has got out of port and cast anchor some miles off, but was not in a condition to proceed on her voyage, the shipowner was held not entitled to freight payable "on sailing." *Thompson v. Gillespie*, 5 E. & B. 209; 24 L. J., Q. B. 340. But it is otherwise where the ship has once left the port in a state ready for the voyage, and it is immaterial that she has been driven back into the port by stress of weather. *Price v. Livingstone*, 9 Q. B. D. 679, C. A. The term "port" in a charter-party must be understood in its popular or commercial sense. S. C.; *Sailing Ship Garston Co. v. Hickie*, *supra*; *acc. Hunter v. N. Marine Insur. Co.*, 13 Ap. Ca. 717, D. P. See further, *ante*, p. 426. Payments made in advance, on account of freight, cannot be recovered back, though the ship be lost. *Anon.*, 2 Show. 283; *Byrne v. Schiller*, L. R., 6 Ex. 20; *Id.* 319, Ex. Ch.; *Allison v. Bristol Marine Insur. Co.*, 1 Ap. Ca. 209, D. P. But freight agreed to be paid "if required, to be advanced less 3 per cent. for interest and insurance," is not recoverable, unless demanded before the loss of the ship. *Smith v. Pyman*, (1891) 1 Q. B. 742, C. A. See S. C. distinguished in *Oriental S.S. Co. v. Tylor*, *ante*, p. 462. See further as to liability to pay allowance freight after partial loss of cargo. *Weir v. Girvin*, (1900) 1 Q. B. 45, C. A. Where the freighter has contracted to pay a minimum freight, or the highest that the shipowner could "prove to have been paid" for ships on the same voyage, the plaintiff, who claims a higher freight, must prove by evidence that such higher freight was actually paid, or contracted to be paid, on a voyage between the two places; and proof of the highest *current* freight is not enough. *Gether v. Capper*, 15 C. B. 696; 24 L. J., C. P. 69.

Where the merchant agreed to find a full return cargo of various articles, each to pay a stipulated freight from the port, but he finds none, or articles not enumerated, the measure of damage is the average freight of all the articles. *Thomas v. Clarke*, 2 Stark. 450; *Copper v. Forster*, 3 N. C. 938. When the owner stipulates for a full cargo, he is entitled to full freight, as if a full cargo had been put on board, irrespective of the tonnage of the ship mentioned in the charter. *Hunter v. Fry*, 2 B. & A. 421. *Aliter*, when the amount of cargo is mentioned. *Morris v. Levison*, 1 C. P. D. 155. Where



the charter-party stipulated for a "full and complete cargo of sugar and other lawful produce," rates were mentioned for timber and other goods, and the charter-party proceeded, "other goods, if any be shipped, to pay in proportion to the foregoing rates, except what may be shipped for broken stowage, which shall pay as customary"; a full cargo of mahogany logs was shipped; it was held that the shipper was bound to supply broken stowage to fill up the interstices. *Cole v. Meek*, 15 C. B., N. S. 795; 33 L. J., C. P. 183. Where the contract stipulated for a full cargo of wool, tallow, bark, hides, and other legal merchandise, fixing the freight and quantity of each, except of wool and "other merchandise," it was held that the merchant might load entirely with "other" legal merchandise, but must pay freight as if the cargo had consisted of the stipulated quantity of tallow, bark, and hides, and the residue of wool. *Cockburn v. Alexander*, 6 C. B. 791. In this case, the court considered the words "other merchandise" as applying to goods producing the amount of freight contemplated by the contract, and that the difference was the measure of damage. *Warren v. Peabody*, 8 C. B. 800, was decided on the same principle. But where the charterer undertook to load "a full and complete cargo of oats or other lawful merchandise," to be delivered by the shipowner on payment of freight, as follows: "4s. 6d. sterling per 320 lbs. weight delivered for oats, and if other cargo be shipped in full and fair proportion thereto according to London Baltic printed rates," it was held that the charterer fulfilled his contract by loading a full cargo of flax, tow, and codilla, three of the articles mentioned in the Baltic printed rates, and was not liable for additional freight, as on a full cargo of oats, although this obliged the shipowner to carry 120 tons ballast to 168 tons of cargo. *Southampton Steam Colliery Co. v. Clarke*, L. R., 4 Ex. 73; L. R., 6 Ex. 53, Ex. Ch.; following on this point, *Moorsom v. Page*, 4 Camp. 103. See *S.S. Isis Co. v. Bahr*, (1899) 2 Q. B. 364, C. A.; (1900) A. C. 340, D. P. As to a contract to load "a cargo of ore, say about 2,800 tons," see *Miller v. Borner*, (1900) 1 Q. B. 691.

Freight is to be calculated and paid on that amount only, which is put on board, carried throughout the whole voyage and delivered at the end to the merchant. *Gibson v. Sturge*, 10 Exch. 639; 24 L. J., Ex. 121, per Alderson, B., approved in *Buckle v. Knoop*, L. R., 2 Ex. 333, 334, Ex. Ch. See *L. Transport Co. v. Trechmann*, (1904) 1 K. B. 635, C. A. In an action for freight against the indorsee of a bill of lading, the shipowner is not, by 18 & 19 V. c. 111, s. 3, *post*, p. 477, estopped by an innocent mis-statement of quantity in the bill, if all that was shipped is actually delivered. *Blanchet v. Powell's Llantwit Colliery Co.*, L. R., 9 Ex. 74. As to the freight payable where the weight or bulk of the goods when delivered differs from that when shipped, see S. C.C.; *Coulthurst v. Sweet*, L. R., 1 C. P. 649; *Tully v. Terry*, L. R., 8 C. P. 679. Lump freight is a sum payable for the use of the ship, and is payable though part of the cargo is lost by the excepted perils. *Robinson v. Knights*, L. R., 8 C. P. 465; *Merchant Shipping Co. v. Armitage*, L. R., 9 Q. B. 99, Ex. Ch. See also *Blanchet v. Powell's Llantwit Colliery Co.*, *supra*. As to the construction of a clause of cesser of payment of hire of a steamship during the time she was inefficient, see *Hogarth v. Miller*, (1891) A. C. 48, D. P.

Where a ship is, by the charter-party, guaranteed to carry 2,000 tons dead weight as a lump freight, with a *pro rata* deduction if the guarantee were not fulfilled, and by a memorandum on the charter-party, or otherwise, the charterer has represented the nature of the cargo, and the ship cannot carry 2,000 tons of cargo tendered, owing to its not being according to the representation, the charterer cannot claim any deduction from the freight. *Mackill v. Wright*, 14 Ap. Ca. 106, D. P.

The charterer has no right to fill the cabins as well as the carrying part

of the ship, and if permitted by the master to do so, he is liable to pay the current rate for it, and cannot insist on paying only the charter price. *Mitcheson v. Nicol*, 7 Exch. 929; 21 L. J., Ex. 323. So on the other hand, under a voyage charter to load a full and complete cargo of wheat, the shipowner may not carry bunker coal for a subsequent voyage. *Darling v. Raeburn*, (1906) 1 K. B. 573; (1907) 1 K. B. 846, C. A.

If goods of the consignor, and carried at his risk, be delivered to the consignee, and he do not pay the freight, the consignor is liable, even though the bill of lading express that the goods are to be delivered to the consignees "paying freight for the same," this clause being inserted merely for the benefit of the shipowner. *Domett v. Beckford*, 5 B. & Ad. 521; see also *Gt. W. Ry. Co. v. Bagge*, 15 Q. B. D. 625. This right to claim freight from the shipper is expressly reserved by the Bills of Lading Act, 1855 (18 & 19 V. c. 111), s. 2, *ante*, p. 460. The circumstances may, however, rebut the inference of freight being payable, arising merely from the goods having been carried in the plaintiff's ship under bills of lading signed by the master. *Snidt v. Tiden*, L. R., 9 Q. B. 446. Though freight may not be payable in respect of goods shipped by A. in his own ship, yet if by the bills of lading he make the goods deliverable to the order of B., who has advanced him money on the security of the goods, freight becomes payable to C., to whom A. assigned the freight, to be earned by the ship. *Weguelin v. Cellier*, L. R., 6 H. L. 286. As to right of mortgagee, abandonee, or other transferee of the ship to freight, see *Keith v. Burrows*, 2 Ap. Ca. 636, D. P.; *The Red Sea*, (1896) P. 20, C. A.; *Shillito v. Biggart*, (1903) 1 K. B. 683.

The measure of damages for not loading any cargo is the amount of freight which would have been carried, deducting expenses and any profit earned during the time covered by the charter; but *semb.*, the shipowner is not bound to take on board another cargo in order to reduce the damage. *Smith v. McGuire*, 3 H. & N. 554; 27 L. J., Ex. 465; *Morris v. Levison*, 1 C. P. D. 155, 158. The shipowner cannot sue the merchant for not loading, when the loading was prevented by want of notice to him, that the ship was ready to receive the cargo. *Stanton v. Austin*, L. R. 7 C. P. 651.

*Freight pro ratâ.*] If the shipper accept part of the goods, though carried under an entire contract for freight, *Mitchell v. Durthez*, 2 N. C. 555; or accept the goods before the completion of the voyage, *Vlierboom v. Chapman*, 13 M. & W. 238; *The Soblomsten*, L. R. 1 Adm. 293; a new contract to pay *pro ratâ* may be inferred. But, as a general rule, unless the goods be carried to the destined port, no freight is due. S. C.; *Metcalf v. Britannia Iron Works Co.*, 1 Q. B. D. 613; 2 Q. B. D. 423, C. A. Thus, if the master justifiably sell part at an intermediate port, he is not entitled to recover freight, *pro ratâ*, for the goods sold. *Hopper v. Burness*, 1 C. P. D. 137; *Hill v. Wilson*, 4 C. P. D. 329. *A fortiori*, if the master sell the goods unjustifiably. *Acatos v. Burnis*, 3 Ex. D. 282, C. A. If the master be disabled from carrying the goods further, he may tranship them, and upon safe delivery at their destination, he is entitled to the whole freight as on the old contract, without reference to the contract with the new ship. *Shipton v. Thornton*, 9 Ad. & E. 314. The master has a reasonable time for re-shipment, and if he be prevented by default of the owner of the cargo from forwarding the cargo from an intermediate port to its destination, the whole freight is payable. *Clary v. M'Andrew*, 2 Moo. P. C., N. S. 216; *The Soblomsten*, *supra*. The master, while afloat, or in a foreign port where there is no agent of the shipper, becomes, *ex necessitate*, his agent as to the goods, as well of the shipowner as to the ship and freight; and he must do what in the exercise of a sound discretion is best for both parties; and in such a case, and not otherwise, the shipper is bound by his acts, so as to be liable for freight

on a contract made by the master. *Matthews v. Gibbs*, 3 E. & E. 282; 30 L. J., Q. B. 55.

*Lien for freight, &c.*] In addition to his remedy by action, the shipowner has a lien on the goods for freight; and where the charterer puts goods of his own on board under a bill of lading, there is a lien on the goods for the chartered freight, and this lien holds good against any one taking the bill of lading with knowledge of the terms of the charter-party. *Kern v. Deslandes*, 10 C. B., N. S. 205; 30 L. J., C. P. 297. The terms of the bill of lading may, however, be such as to waive the lien for the freight, in whole or part, as when it is payable at the port of lading, or by the shipper at a given time after sailing, ship lost or not lost. *Kirchner v. Venus*, 12 Moo. P. C. 361; following *How v. Kirchner*, 11 Moo. P. C. 21, *accord.* *Tamvaco v. Simpson*, L. R., 1 C. P. 363, Ex. Ch. A lien cannot be exercised on freight in the hands of the ship's agents for charter-party here accruing, but not then due. *Wehner v. Deue S.S. Co.*, (1905) 2 K. B. 92. A lien on sub-freight given to a shipowner by a charter-party can only be exercised before the sub-freight has been paid to the charterer of the ship: the shipowner cannot follow it subsequently. *Tugart Beaton & Co. v. Fisher*, (1903) 1 K. B. 391, C. A.; see further *Turner v. Haji, &c., Azam*, (1904) A. C. 826, J. C. As to lien for demurrage, *vide post*, pp. 476, 477.

Where goods upon which the master of a ship has a lien, are deposited in the king's warehouse in pursuance of the requisition of an Act of Parliament, the lien is not thereby waived. *Per* Ld. Kenyon, C.J., *Ward v. Felton*, 1 East, 512; *Wilson v. Kymer*, 1 M. & S. 157. So, where the consignee refuses to take the goods, the master may, it seems, place them in a warehouse under the exclusive control of himself, or the shipowner, without losing his lien. *Mors-le-Blanch v. Wilson*, L. R., 8 C. P. 227. Under the provisions of many local and personal Acts, general wharves, called "sufferance wharfs," were appointed where goods might be landed and stowed, the shipowner retaining the right of lien for freight; and now, generally, by the Merchant Shipping Act, 1894 (57 & 58 V. c. 60), Part VII., certain powers are given to shipowners to land and enter goods from foreign ports in default of the owner, and to retain the lien for freight by giving notice to the owner of the wharf, &c. See *Berresford v. Montgomerie*, 17 C. B., N. S. 379; 34 L. J., C. P. 41; *Wilson v. London, Italian and Adriatic S. Navigation Co.*, L. R., 1 C. P. 61; *Meyerstein v. Barber*, L. R., 2 C. P. 317, 330, 331; L. R., 4 H. L. 328, 330; *The Energie*, L. R., 6 C. P. 306; *Glyn v. E. & W. India Dock Co.*, 7 Ap. Ca. 591, D. P.; *Furness, Withy & Co. v. W. N. White & Co.*, (1895) A. C. 40, D. P.

A shipowner has no lien on goods shipped for unliquidated damages by reason of the charterer failing to load a full cargo. *Phillips v. Rodie*, 15 East, 547; *Gray v. Carr*, L. R., 6 Q. B. 522, Ex. Ch. Where, however, the rate of freight and ship's tonnage has been agreed to, the claim is then a liquidated one for which the shipowner has a lien. *McLean v. Fleming*, L. R., 2 H. L. Sc. 128; better, L. R., 6 Q. B. 558, n. The shipowner's claim in these cases is known as "dead freight," a term, however, properly applicable only where the claim is liquidated.

*Implied contracts on part of charterer or shipper.*] Where by a charter-party a ship is to proceed to "a safe port," to be named by charterers, they are not entitled to name a port, safe by nature, but closed by the local government, so that a vessel entering it without a permit would be liable to confiscation; and, having named such a port, they are liable for a breach of the contract implied on their part to name a safe port within a reasonable time. *Ogden v. Graham*, 1 B. & S. 773; 31 L. J., Q. B. 26. See also

*The Teutonia*, L. R., 4 P. C. 171, *ante*, p. 468. As to what is a "safe loading place," see *Smith v. Dart*, 14 Q. B. D. 105. The damages recoverable for refusing to name a wharf are the freight that would have become payable on the delivery of the cargo. *Stewart v. Rogerson*, L. R., 6 C. P. 424.

There is an implied contract on the part of shippers not to put on board, without notice, packages of a dangerous or corrosive matter, the nature of which the shipowner or his agents could not be reasonably expected to know. *Brass v. Maitland*, 6 E. & B. 470; 26 L. J., Q. B. 49. But where the shipowner has an opportunity of examining the goods, there is no warranty by their owner that they are fit to be carried. *Acatos v. Burns*, 3 Ex. D. 282, C. A.

*Defence.*] A charterer whose cargo has been damaged by the fault of the master so as to be worth less than the freight, cannot discharge himself from liability to freight by abandoning the cargo to the shipowner. *Dakin v. Oxley*, 16 C. B., N. S. 646; 33 L. J., C. P. 115. Nor can the assignee of a bill of lading deduct from the freight the value of goods which, though mentioned in the bill of lading signed by the plaintiff, were not put on board. *Meyer v. Dresser*, 16 C. B., N. S. 646; 33 L. J., C. P. 289; see *post*, p. 477. But the cross-claim may now be set up by way of set-off or counter-claim under Rules, 1883, Order xix. r. 3, *post*, p. 704, see *Mediterranean, &c., S.S. Co. v. Mackay*, (1903) 1 K. B. 297, C. A. And where the nature of the goods has been changed by perils of the sea, no freight is payable, *vide ante*, p. 467.

Where the shipowner finally abandons the ship during the voyage, the owner of cargo may treat the contract of affreightment as at an end, and resume possession of his cargo without payment of freight. *The Cito*, 7 P. D. 5, C. A.

#### MERCHANT AGAINST SHIPOWNER OR MASTER.

The master, as well as the owner of a general ship, is liable as a common carrier of goods. *Morse v. Slue*, 2 Lev. 69; 1 Vent. 238; *Liver Alkali Co. v. Johnson*, L. R., 7 Ex. 267; L. R., 9 Ex. 338, Ex. Ch.; Story on Agency, § 315. His liability is limited by the same common law exceptions as in the case of land carriers, and by such further exceptions as may be expressed in the charter-party or bill of lading, or sanctioned by Act of Parliament. See further, *Action against carriers*, *post*, pp. 629 *et seq.* The exceptions in the charter-party or bill of lading must be defined by clear and express words, which, without ambiguity relieve the carrier from his common law obligations. *Rathbone & Co. v. D. MacIver & Co.*, (1903) 2 K. B. 378, 384; *Elderslie S.S. Co. v. Borthwick*, (1905) A. C. 93, D. P.; *S.S. City of Lincoln v. Smith*, (1904) A. C. 250, J. C. As to the liability of a shipowner for damage caused to cargo by collision with another of his ships, see *Chartered Mercantile Bank of India v. Netherlands St. Nav. Co.*, 10 Q. B. D. 521, C. A. There is an absolute warranty that the ship is seaworthy when the goods are shipped, but not that it shall so continue. *McFadden v. Blue Star Line*, (1905) 1 K. B. 697. See further, *ante*, p. 431.

Where a stevedore, or special agent, is appointed by the charterer to load and stow a ship, which he puts up as a general ship, the master is exempt from liability for bad stowage, unless done under his particular orders; *Blaikie v. Stenbridge*, 6 C. B., N. S. 894; 28 L. J., C. P. 329; 6 C. B., N. S. 911; 29 L. J., C. P. 212, Ex. Ch.; or, unless the charter-party provides that the charterers are not in any case to be responsible for improper stowage. *Sark v. Ford*, 13 C. B., N. S. 90; 32 L. J., C. P. 12. But an unexercised option, given to the charterer, of appointing a stevedore, does not dispense with the master's ordinary duty to load the ship properly. *Anglo-African Co. v. Lamzed*, L. R., 1 C. P. 226. See further, as to liability of shipowner

to charterer for negligence of master and crew, *Omoa, &c., Coal and Iron Co. v. Huntley*, 2 C. P. D. 464. Where the plaintiff's goods have been injured by being stowed in contact with a deleterious substance, he may sue the person who so stowed them, although there is no contract between them. *Hayn v. Culliford*, 4 C. P. D. 182, C. A. See as to damages for delay in delivery caused by contraband of war having been carried along with the plaintiff's goods, without his consent. *Dunn v. Bucknall Bros.*, (1902) 2 K. B. 614, C. A. As to warranty of ship's capacity, see *Carnegie v. Conner*, 24 Q. B. D. 45. As to the joinder, as plaintiffs in the same action, of the several shippers of goods on the same ship for the same voyage under similar, but distinct bills of lading, for short delivery, *vide ante*, p. 90.

*Exception of perils.*] As to the statement of these exceptions, see the general principles, *supra*. The exception "of dangers and accidents of the sea," protects against damages to cargo by sea water passing into the ship through a hole made by rats. *Hamilton v. Pandorf*, 12 Ap. Ca. 518, D. P. So, where, without fault in the carrying ship, she foundered from collision with another ship which was negligent. *The Xantho*, *Id.* 503. The exception does not, however, exonerate the shipowner from taking due care under his contract of carriage; and loss by perils, occasioned by his negligence, is not protected; thus, a loss through a collision, occasioned by the negligence of the crew, is not within the exception; *Grill v. General Iron Screw Colliery Co.*, L. R., 3 C. P. 476, Ex. Ch.; nor is damage caused to the goods by unseaworthiness of the ship, which existed when she started on her voyage. *Steel v. State Line S. Ship Co.*, 3 Ap. Ca. 72, D. P.; *Gilroy v. Price*, (1893) A. C. 56, D. P. See also *Owners of Cargo on S.S. Maori King v. Hughes*, (1895) 2 Q. B. 550, C. A., and *The Northumbria*, (1906) P. 292. But the warranty of seaworthiness may be limited so as not to extend to latent defects. *Cargo ex Laertes*, 12 P. D. 187.

An exception for "breakage, leakage, or damage," does not protect the shipowners from liability for damage accruing through the negligence of their servants; *Czech v. General Steam Navigation Co.*, L. R., 3 C. P. 14; *Lew v. Dudgeon*, *Id.* 17, n.; nor does an exception "for any loss of or damage to goods which can be covered by insurance;" *Price & Co. v. Union Lighterage Co.*, (1904) 1 K. B. 412, C. A., "if the carrier desires to relieve himself from the duty of using by himself and his servants reasonable skill and care in the carriage of the goods he must do so in plain language and explicitly and not on general words," S. C.; *The Pearlmoor*, (1904) P. 286; see also *Notara v. Henderson*, L. R., 7 Q. B. 225, 235-6, Ex. Ch.; and *Martin v. Gt. Indian Peninsular Ry. Co.*, L. R., 3 Ex. 9, cited *post*, p. 632. But such exceptions shift the onus of proof, and where the loss apparently falls within the exception the plaintiff must prove, affirmatively, the negligence of the defendant's servants. *The Helene*, B. & L. 429; 35 L. J., P. C. 63; *The Glendarrock*, (1894) P. 226, C. A. So in an action for loss of cargo, alleged to have been jettisoned and sold in consequence of the ship's stranding, the plaintiff must prove that the stranding was occasioned by the negligent navigation of the ship. *The Norway*, B. & L. 404. Where the exception is "of thieves," the shipowners must prove that the theft was committed by some one external to the ship. *Taylor v. Liverpool & Gt. W. Steam Co.*, L. R., 9 Q. B. 546. An exception against loss by "pirates, robbers, or thieves of whatever kind, whether on board or not, or by land or sea," does not include thefts by stevedore's men employed in the service of the ship. *Steinman v. Angier Line*, (1891) 1 Q. B. 619, C. A.; see *Dunn v. Bucknall Bros.*, (1902) 2 K. B. 614, C. A. An exception of dangers of the seas does not include barratry. *The Chusca*, L. R., 4 A. 446. An exception against leakage does not include injury done to other goods by such leakage.

*Thrift v. Youle*, 2 C. P. D. 432. An exception of damage caused by navigation or management does not include damage caused by improper stowage. *Hajn v. Culliford*, 4 C. P. D. 182, C. A.; *The Ferro*, (1893) P. 38. An exception in favour of jettison does not extend to goods improperly stowed on deck. *R. Exchange Shipping Co. v. Dixon*, 12 Ap. Ca. 11, D. P. And loss by the jettison of goods so stowed is not too remote. S. C. A condition "no claim whatever for damage will be admitted, unless made before goods are removed," covers all damage whether apparent or latent, which could have been discovered at the place of removal by examination with reasonable care and skill. *Moore v. Harris*, 1 Ap. Ca. 318, J. C.

An exception of "any damage to any goods, which is capable of being covered by insurance," does not extend to a general average loss sustained by the goods; *Crooks v. Allan*, 5 Q. B. D. 38; nor does a clause that "the steamer should be provided with a deck load, if required, at full freight, but at merchant's risk." *Burton v. English*, 12 Q. B. D. 218, C. A.

An exception for perils of the seas or navigation caused by negligence, default, or error in judgment of the master engineers or others of the crew extends to damage to cargo caused by sea water let in by a tap being opened by mistake. *Blackburn v. Liverpool, Brazil, &c., S. Nav. Co.*, (1902) 1 K. B. 290, so to a loss by the stranding of the ship through the negligence, not wilful, of the master, who was also part owner. *Westport Coal Co. v. McPhail*, (1898) 2 Q. B. 130, C. A.; and to negligence during loading. *The Carron Park*, 15 P. D. 203. See also *Baerselman v. Bailey*, (1895) 2 Q. B. 301, C. A. As to negligence during unloading, see *The Accomac*, 15 P. D. 208, C. A.; *The Glenochil*, (1896) P. 10; see also *The Torbryan*, (1903) P. 194, where the exception was "of all other accidents caused by negligence." Deviation from the contemplated voyage (*vide ante*, p. 432), avoids the exception. *Thorley (Joseph) v. Orchis S.S. Co.*, (1907) 1 K. B. 243; affirm. *Id.* 660, C. A. Where the ship has put into a port of refuge for repairs, the shipowner is liable to the charterer for abandoning the voyage at that port, unless, owing to the excepted perils, it was impossible to complete the voyage either from physical causes or in a business sense, as such a course would have been unreasonable. *Assicurazioni Generali v. S.S. Bessie Morris Co.*, (1892), 2 Q. B. 652, C. A.

As to exceptions under the "Harter Act," see *The Rodney*, (1900) P. 112; *Rouson v. Atlantic Transport Co.*, (1903) 2 K. B. 666, C. A., and *McFadden v. Blue Star Line*, (1905) 1 K. B. 697. See further, as to the losses which fall within the perils usually excepted, *Marine Insurance—Proof of Loss, ante*, pp. 434 *et seq.*

[*Statutory exemptions from, or limitation of liability.*] The existing provisions for limiting the liability of shipowners are comprised in the Merchant Shipping Act, 1894 (57 & 58 V. c. 60), Part VIII., which by sect. 509 applies to the whole of her Majesty's dominions. By sect. 502, the owner of a British sea-going ship, or share therein, shall not be liable to make good any loss or damage that may happen, without his actual fault or privity in the following cases, viz.: (1) where any goods, merchandise, or other things whatsoever taken on board, are lost or damaged by reason of fire on board; or (2) where any gold, silver, diamonds, watches, jewels, or precious stones on board, the true nature and value of which have not at the time of shipment been declared by the owner or shipper to the owner or master in the bills of lading or otherwise in writing, are lost or damaged by reason of any robbery, embezzlement, making away with or secreting thereof. As to fire, see *The Diamond*, (1906) P. 282. The shipowner may be liable on an implied warranty that the bullion room in which gold is carried is reasonably fit to resist thieves. *Queensland National Bank v. Peninsular & Oriental, &c.*,

Co., (1898) 1 Q. B. 567, C. A. By sect. 503 (1, 2), the owners of any ship, whether British or foreign, shall not, in cases which occur without their actual fault or privity, be answerable in damages in respect of loss or damage to any goods, merchandise, or other things on board, to an amount exceeding *£*. for each ton of the ship's tonnage—registered tonnage of sailing ships, and, by 6 E. 7, c. 48, s. 69, that, with the addition of any engine-room space deducted, in case of steam ships. The section contains provisions for ascertaining a foreign ship's tonnage. The defendant is also liable to pay interest on the amount from the date of collision. *Smith v. Kirby*, 1 Q. B. D. 131. The section extends to damage caused by delay in delivering goods; see *Millen v. Brasch*, 10 Q. B. D. 142, C. A., *post*, p. 639; and to the loss of passengers' luggage; *The Stella*, (1900) P. 151, 162, n.; *L. & S. W. Ry. Co. v. James*, L. R., 8 Ch. 241; but not to delay caused to passengers. S. C. As to what is a ship within this section, *vide post*, pp. 783, 784. Charterers by demise, are not "owners" within the above sections, see *The Hopper*, No. 56, (1906) P. 34. By sect. 503 (3), the owner of every sea-going ship is liable for every loss or damage arising on distinct occasions as if no other loss had arisen. See *The Rajah*, L. R., 3 A. 539; *The Bernina*, 12 P. D. 36; and *The Schwan*, (1892) P. 419, C. A. As to the measurement of ship, see *The Franconia*, 3 P. D. 164, C. A.; *The Zanzibar*, (1892) P. 233; *The Petrel*, (1893) P. 320; and cases there cited. Evidence may be given of the real tonnage of the ship, although the registered tonnage is less; see sect. 82. *The Receipta*, 14 P. D. 131. By sect. 508, nothing in Part VIII. shall be construed to lessen the liability of any master or seaman, being also owner or part-owner of the ship, to which he is subject as such master or seaman; or to extend to any British ship which is not recognized as a British ship within the meaning of the Act, *i.e.* is not registered [sect 2 (2)], except in the case of certain ships under 15 and 20 tons respectively (sect. 3). See further on the above sections, *post*, p. 787. By sect. 603 (1), neither owner nor master is liable for loss or damage occasioned by the fault or incapacity of a qualified pilot, where the employment of one is compulsory. On the construction of this section, and as to when the employment of a pilot is compulsory, *vide Negligent navigation of ships, post*, p. 785.

The master is not expressly protected in the above provisions, except in relation to loss by employment of a pilot; and this exception seems to be designed. The previous Acts included him in some cases, and omitted him in others. On one of the previous Acts (26 G. 3, c. 86) it was decided that a loss by a fire on board a public lighter, employed by the shipowner to convey the goods on board, was not within the protection of the Act, which was in similar terms to the present Act. *Morewood v. Pollok*, 1 E. & B. 743; 22 L. J., Q. B. 250.

[*Implied contracts on part of shipowner or master.*] The master impliedly contracts that his vessel shall be fit for the purpose of carrying the particular cargo which he has contracted to carry, or as it is usually expressed that she must be "seaworthy" when she starts upon her voyage; *Lyon v. Mells*, 5 East, 428; *Richardson v. Stanton*, L. R., 9 C. P. 390, Ex. Ch.; 45 L. J., C. P. 78, D. P.; *Cohn v. Davidson*, 2 Q. B. D. 455; *Steel v. State Line S. Ship Co.*, 3 Ap. Ca. 72, D. P.; *Owners of Cargo on S.S. Maori King v. Hughes*, (1895) 2 Q. B. 550, C. A.; *Rathbone & Co. v. D. MacIver & Co.*, (1903) 2 K. B. 378; or at the commencement of each stage on the voyage, when in the case of a steamship a long voyage is divided into stages for coaling purposes; *The Vortigern*, (1899) P. 140, C. A., *vide p.* 431; and it is no excuse for the breach of the contract in this case, that the charterer was to provide the coal; *McIver v. Tate Steamers*, (1903) 1 K. B. 32, C. A. The contract is broken if the owner load the ship improperly so that she is

thereby lost. *Kopitoff v. Wilson*, 1 Q. B. D. 377; *S.S. City of Lincoln v. Smith*, (1904) A. C. 250, J. C. Where there is no stipulation as to time, the master must sail in a reasonable time, and proceed, without deviation, to the destined port, otherwise he will be liable for any loss to the plaintiff occasioned by the delay; or, to any loss, whether by perils of the sea, or otherwise, occurring during the deviation; 3 Kent, Com. 209, 210; unless the defendant can prove that the loss *must* have happened had there been no deviation. *Davis v. Garrett*, 6 Bing. 716; *Scuramanga v. Stamp*, 4 C. P. D. 316. Deviation is justifiable to save life, but not merely to save property. S. C. *Id.*, and 5 C. P. D. 295, C. A. See also *Phelps v. Hill*, (1891) 1 Q. B. 605, C. A. See as to what amounts to deviation, *ante*, p. 432. A well-founded fear of capture may justify a master in not leaving a port in performance of his contract; *Pole v. Cetovich*, 9 C. B., N. S. 430; 30 L. J., C. P. 102; even though the ship alone would be in danger of capture. *The Teutonia*, L. R., 4 P. C. 171; *The San Roman*, L. R., 5 P. C. 301. A statement in a charter-party that the ship is "expected to arrive" at a port A. by a given day, is a warranty that she is then in such a position that she may reasonably be expected to arrive there by that day. *Corkling v. Massey*, L. R., 8 C. P. 395. There is an implied contract that the goods shall be stowed under deck. *Royal Exchange Shipping Co. v. Dixon*, 12 Ap. Ca. 11, D. P.

Upon arrival at the port, the master is bound to deliver to the consignee or order of the shipper, on production of the bill of lading, and payment of freight (and other lawful charges) for which the master has a lien on the goods, unless it appear on the bill of lading that freight has been paid, in which case it is an estoppel as against the master or owner. 3 Kent, Com. 214; *Howard v. Tucker*, 1 B. & Ad. 712. Where, by the bill of lading, the goods are to be delivered to S. M. or assigns, the master may not deliver them to S. M. without the production of one of the parts of the bill of lading. *The Stettin*, 14 P. D. 142. Where there is a charter-party, the provisions of which are binding only as between the shipowner and the charterer, and there is a bill of lading given by the master which gets into the hands of a *bonâ fide* assignee for value, he is entitled to have the goods delivered to him upon his fulfilling the terms mentioned in such bill of lading, and is not ordinarily bound to refer to the charter-party. *Chappel v. Comfort*, 10 C. B., N. S. 802; 31 L. J., C. P. 58, *per* Willes, J. A bill of lading in the form "on being paid for freight the sum of £— (according to charter-party)," with the memorandum "there are 8 working days for unloading in London," implies no contract on the part of the indorsee for value of the bill to pay demurrage. S. C. So where the form was "he or they paying freight and all other conditions or demurrage (if any should be incurred), for the said goods, as *per* the aforesaid charter-party," the consignee named in the bill of lading was held liable only for demurrage, at the port of loading, during the 10 days at which the ship might under the charter be kept on demurrage at 8*l.* a day, and not for damages for further delay in loading, nor for dead freight. *Gray v. Carr*, L. R., 6 Q. B. 522. See also *The Norway*, B. & L. 226; *Russell v. Niemann*, 17 C. B., N. S. 163; 34 L. J., C. P. 10; *Fry v. Chartered Mercantile Bank of India, &c.*, L. R., 1 C. P. 689; *Serraino v. Campbell*, *post*, p. 477. As to effect of discrepancy between charter-party and bill of lading, see S. C. and *Rodocnachi v. Milburn*, cited *ante*, p. 460.

Where, however, the bill of lading states the cargo to have been received as against freight, and other conditions as *per* charter-party, the assignee of the bill of lading, who accepts the cargo thereunder, is liable for the demurrage provided for in the charter-party. *Porteus v. Watney*, 3 Q. B. D. 534, C. A.; *Wegener v. Smith*, 15 C. B. 729; 24 L. J., C. P. 25. But it is otherwise where the property in the goods did not pass to the consignee,



whom the shipowner knew to be an agent only, and who repudiated liability for demurrage before the cargo was delivered to him. *S.S. County of Lancaster v. Sharp*, 24 Q. B. D. 158. Where the cargo is deliverable under a similar bill of lading, the shipowner may be bound by the terms of the charter-party, as against an indorsee of the bill. *The Felix*, L. R., 2 A. & E. 273. Such a clause in the bill of lading incorporates those provisions only of the charter-party which are consistent with the contract in the bill of lading; *Gullischen v. Steuart*, 13 Q. B. D. 317, C. A.; *Gardner v. Trechmann*, 15 Q. B. D. 154, C. A., and are to be performed by the consignee of the goods; *Serraino v. Campbell*, (1891) 1 Q. B. 283, C. A.; *Dieterichsen v. Farquharson*, (1898) 1 Q. B. 150, C. A.; see further *Temperley S.S. Co. v. Smyth*, (1905) 2 K. B. 791-802, C. A. Thus it does not incorporate an exception in the charter-party limiting the shipowner's liability; S. CC. A bill of lading, signed only by the master, is no estoppel as between the shipowner and the person who has advanced money on the security of the bill of lading, as to the receipt and shipment of the goods specified in it; *Grant v. Norway*, 10 C. B. 665; 20 L. J., C. P. 93; and the shipowner may show that the goods were not shipped; S. C.; see also *McLean v. Fleming*; *Brown v. Powell, &c., Coal Co.*; and *Cox v. Bruce, infra*; or that the master had given other bills previously for the same goods. *Hubbersty v. Ward*, 8 Exch. 330; 22 L. J., Ex. 113.

Where the charter-party provides that the bill of lading shall be "conclusive evidence against the owners of the quantity of cargo received as stated therein," it is conclusive, except in the case of fraud. *Lishman v. Christie*, 19 Q. B. D. 333, C. A. And by the 18 & 19 V. c. 111, s. 3, "every bill of lading, in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment, as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice, at the time of receiving the same, that the goods had not been in fact laden on board; provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims." This section only makes the bill of lading conclusive against the person by whom; *Jessel v. Bath*, L. R., 2 Ex. 267; or by whose authority; see *Brown v. Powell, &c., Coal Co.*, L. R., 10 C. P. 562; it was signed. In other cases evidence is admissible that the goods were not shipped; S. C.; *McLean v. Fleming*, L. R., 2 H. L. Sc. 128; see also *Meyer v. Dresser*, 16 C. B., N. S. 646; 33 L. J., C. P. 289, *ante*, p. 472; or are not accurately described in the bill of lading; *Cox v. Bruce*, 18 Q. B. D. 147, C. A. The section "does not operate to make the bill of lading conclusive as to the statement of marks upon the goods shipped where those marks do not affect or denote substance, quality, or commercial value, *Parsons v. New Zealand Shipping Co.*, (1900) 1 K. B. 714, 720, *per Kennedy, J.*, affirmed (1901) 1 K. B., 548 C. A. Where by mistake of the mate, a large number of bales were represented as having been shipped than really were, and there was some evidence that this was caused by the fraud of the person putting the goods on board, who was the shipper or his vendor, the court held that there was evidence that the misrepresentation was caused "wholly by the fraud of the shipper, &c." within this section. *Valeri v. Boyland*, L. R., 1 C. P. 382.

When a ship is chartered, and is put up by the master as a general ship, a merchant who ships a cargo on board under bills of lading signed by the master, and in ignorance of the charter-party, is entitled to look to the

owners, whose servant the master is, for the safe delivery of the cargo. *Sandeman v. Scurr*, L. R., 2 Q. B. 86; *The Figlia Maggiore*, L. R., 2 Ad. 106; *Hayn v. Culliford*, 4 C. P. D. 182, C. A.

If the master have hypothecated or sold part of the cargo to raise money for necessary repairs to the ship, he is the agent of the shipowner only, and the shipper is entitled to sue the shipowner on the implied indemnity; *Benson v. Duncan*, 3 Exch. 644, Ex. Ch.; and he may recover either the actual sum for which the goods were sold; *Campbell v. Thompson*, 1 Stark. 490; or the price which they would have fetched at the place of delivery; *Hallett v. Wigram*, 9 C. B. 580; 19 L. J., C. P. 281; but not unless the ship eventually arrived there. *Atkinson v. Stephens*, 7 Exch. 567; 21 L. J., Ex. 329. As to the duty of the master with respect to the cargo, where it has been damaged during the voyage, see *Notara v. Henderson*, L. R., 5 Q. B. 346; L. R., 7 Q. B. 225, Ex. Ch. He must not sell the cargo, unless in a case of necessity, and without an opportunity of consulting the owners thereof. *Australasian St. Nav. Co. v. Morse*, L. R., 4 P. C. 222; *Atlantic Mutual Insur. Co. v. Huth*, 16 Ch. D. 474, C. A.

What is a sufficient delivery of the goods, depends either upon the contract or upon the custom and usage. If there be no particular custom, the master must give the consignee reasonable time and opportunity to receive them. *Bourne v. Gatliffe*, 7 M. & Gr. 850. As to evidence of custom in such cases, see *ante*, pp. 21 *et seq.*, and p. 466. Mere delivery at a wharf, and there leaving them, without notifying the arrival to the consignee, is not sufficient; and the responsibility continues until actual delivery to a person appointed to receive, or something equivalent to it; or, at least, until proper notice to the consignee has been given, and the goods separated and designated for his use. 3 Kent, Com. 215; see also *Petrocochino v. Bott*, L. R., 9 C. P. 355. Where the goods are by the charter-party to be unloaded at S., "at the usual place of discharge, and according to the custom of the port," and there is more than one usual place of discharge, the master is bound to obey the orders of the charterer, as to which of the places the ship is to be taken to unload, although the master has previously taken her to another of those places, and thereby incurred expense. *The Felice*, L. R., 2 Ad. 273. If the goods are sent for by the consignee by lighter, the captain is responsible for the safety of the goods till the lighter is fully laden; such, at least, is the custom in the port of London. *Cutley v. Wintringham*, Peake, 150, and *Id.*, n.

The clause "shipped in good order and condition" affords evidence that externally, so far as meets the eye, the goods were so shipped. *The Peter der Grosse*, 1 P. D. 414. It does not constitute a contract, but it is a representation by which the shipowner V. is estopped, as against a purchaser C., who has altered his position and acted to his prejudice on the faith of it, and V. is liable to him in damages for not delivering to him the goods in good order and condition; the measure of the damages is the difference between the price paid by C. and the value when delivered, with reasonable expenses incurred on delivery by reason of their damaged condition. *Compania Naviera, &c. v. Churchill*, (1906) 1 K. B. 237.

Delivery of goods to the servants of the shipowner alongside the vessel is equivalent to delivery on board. *British Columbia, &c., Co. v. Nettleship*, L. R., 3 C. P. 499. As to lien for freight, *vide ante*, p. 471. As to damages recoverable against the shipowner, *vide Action against carriers—Damages*, *post*, pp. 653 *et seq.*

Where goods carried have sustained a general average loss, the shipowner is bound to take the necessary steps for procuring an adjustment of the general average and securing its payment. *Crooks v. Allan*, 5 Q. B. D. 38. So where loss has been caused by jettison. *Strang v. Scott*, 14 Ap. Ca. 601, J. C.

## ACTION ON GUARANTEE.

Warranties and guarantees have acquired distinct technical meanings, and must be separately treated of. The former relate to things; the latter to persons. A guarantee is a contract to answer for the payment of a debt or performance of a duty by another person.

As to contribution between co-sureties, *vide post*, pp. 594, 595.

*Proof of the contract*—[*Statute of Frauds, &c.*] By the Statute of Frauds (29 C. 2, c. 3), s. 4, no action shall be brought “whereby to charge the defendant upon any special promise to answer for debt, default, or mis-carriages of another person, . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.” It had long been held that, as an “agreement” includes the consideration for the promise, the consideration must also appear, at least by necessary inference, in the writing. *Wain v. Warters*, 5 East, 10. But by the Mercantile Law Amendment Act, 1856 (19 & 20 V. c. 97), s. 3, no such promise “shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.” Whether a “case comes within” the above clause of the Stat. of Frauds “or not, depends not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise.” 1 Wms. Saund. 211, *e* (1); *Fitzgerald v. Dressler*, 7 C. B., N. S. 374; 29 L. J., C. P. 113; *Sutton v. Grey*, *post*, p. 480. *Harburg India Rubber Comb Co. v. Martin*, (1902) 1 K. B. 778, C. A. Where the real object of the contract is not that the debt of a third person should be paid, but such payment is a mere incident therein, the contract is not within the section, and what are known as “the property cases,” “the document cases,” and “the *del credere* cases,” fall within this rule. S. C., *per cur.* See *Couturier v. Hastie*, *post*, p. 480.

Where an order for goods is given by A., for the use of B., and credit given to A., this is not within the statute; for it is the debt of A. and not of B.; *Birkmyr v. Darnell*, 1 Salk. 27; 1 Smith’s L. C.; and, where there is no writing, whether A. or B. was made the debtor by the agreement of the parties, is a question for the jury. *Keate v. Temple*, 1 B. & P. 158; *Mountstephen v. Lakeman*, L. R., 7 Q. B. 196, Ex. Ch.; L. R., 7 H. L. 17. If the person for whose use the goods are furnished is liable at all, or if his liability is made the foundation of a contract between the plaintiff and the defendant, and that liability fails, the defendant’s promise is void if not in writing. S. C., L. R., 7 Q. B. 202, *per Willes, J.* But, until there is some person primarily liable, the section does not apply. S. C., L. R., 7 H. L. 24, *per* Ld. Selbourne. The question is, is it a promise to pay the debt of another, for which the other was, and still remains, liable after the promise is made? If it be, then the statute requires a writing, for it is then a “collateral” and not an original promise. See notes to *Porth v. Stanton*, 1 Wms. Saund. 211 *b*. If the effect of the agreement is to extinguish or satisfy the debt of another—as if A. promise to pay the amount of B.’s debt to C., if C. will discharge B. from arrest under a *ca. sa.*—then, as B.’s debt is discharged, the debt becomes the debt of A. only, and is not within the statute. *Goodman v. Chase*, 1 B. & A. 297. The statute applies to legal debts only. *In re*

*Hoyle*, (1893) 1 Ch. 84, per Lindley and Bowen, L.J.J. Thus it does not apply to a guarantee given by H. to the firm of which he is a member, for the debt of S. to the firm. S. C.

The promise must be made to the original creditor, to be within the statute. *Eastwood v. Kenyon*, 11 Ad. & E. 438; *Reader v. Kingham*, 13 C. B., N. S. 344; 32 L. J., C. P. 108; *Cripps v. Hartnoll*, 4 B. & S. 414; 32 L. J., Q. B. 381, Ex. Ch. A mere promise of indemnity is not within it, e.g., a promise by A. to B. to put B. in funds to meet bills on which C. is liable, irrespectively of C.'s making default. *Wildes v. Dudlow*, L. R., 19 Eq. 198, and *Guild v. Conrad*, (1894) 2 Q. B. 885, C. A.; following *Thomas v. Cook*, 8 B. & C. 728, and *Reader v. Kingham*, *supra*; *Batson v. King*, 4 H. & N. 739; 28 L. J., Ex. 327. As where at defendant's request, and for his accommodation, plaintiff drew a bill on A., which was accepted by A., and indorsed by defendant, defendant promising at the time to indemnify plaintiff; and plaintiff was obliged to pay the bill; held, that he might sue defendant as for money paid, and that no written guarantee was necessary. S. C. In order that a promise should fall within the statute there must be some obligation, implied at least, from the person for whom the surety becomes answerable towards the promisee; S. C.; as the obligation of an arrested debtor towards his bail to pay the debt or surrender, in which case, a promise by a third person to hold the bail harmless was held to be within the statute; *Green v. Cresswell*, 10 Ad. & E. 453; this case, however, has been doubted; see *Wildes v. Dudlow*, *Guild v. Conrad*, *Reader v. Kingham*, and *Cripps v. Hartnoll*, *supra*; and, it is settled that there is no debt or duty in a person bailed on a charge of misdemeanor towards his bail, and hence a similar promise is not in such case within the statute. S. C.

The statute applies only where the person making the promise has no interest in the transaction beyond his promise. *Sutton v. Grey*, (1894) 1 Q. B. 285, C. A. Thus, an agreement between G. and a stockbroker S., that G. should share half the commission earned by S. on transactions with clients introduced by G., and also half the losses incurred on such transactions, is not within the section. S. C. But an "interest to take an agreement out of the statute" must be "some species of interest which the law recognizes," *Harburg India Rubber Comb Co. v. Martin*, (1902) 1 K. B. 778, 791. An agreement by a factor to sell goods on a *del credere* commission is not within the section; for, though it may terminate in a liability to pay the debt of another, that is not the immediate object for which the factor receives the consideration. *Couturier v. Hastie*, 8 Exch. 40; 22 L. J., Ex. 97. *Vide ante*, p. 479. A "forbearing to press for immediate payment" implies giving a "reasonable time," and this, though indefinite, is a sufficient consideration for a guarantee by a stranger to pay the debt; *semble*, *Oldershaw v. King*, 2 H. & N. 517; 27 L. J., Ex. 120, Ex. Ch.; questioning *Semple v. Pink*, 1 Exch. 74, *contra*; see also *Coles v. Pack*, L. R., 5 C. P. 65, and *Fullerton v. Provincial Bank of Ireland*, (1903) A. C. 309, D. P. It is not necessary that there should have been a contract by the plaintiff to abstain from suing; forbearance to sue at the defendant's request is sufficient. *Orcars v. Hunter*, 19 Q. B. D. 341, C. A. If the consideration for guaranteeing, by the defendant, the payment of past and future debts by A., to the plaintiffs, be the future supplying by them to A. of goods, and there be no agreement binding on them to supply the goods, and no goods are in fact supplied, the guarantee fails for want of consideration. *Westhead v. Sproson*, 6 H. & N. 728; 30 L. J., Ex. 265. A guarantee to a bank in consideration of their "lending to A. 1,000*l.*, for seven days, from this date," does not cover an account overdrawn by numerous cheques, together amounting to 1,000*l.*, as the advance of 1,000*l.* is the consideration for the guarantee, and a condition

precedent to its attaching. *Burton v. Gray*, L. R., 8 Ch. 932. An I O U may, since 19 & 20 V. c. 97, s. 3 (*ante*, p. 479), be shown to have been given as a guarantee, and will be good as such. See *R. v. Chambers*, L. R., 1 C. C. 341.

As to the form of memorandum and signature thereto, *vide ante*, p. 314 *et seq.*, and also cases decided on Stat. of Frauds, s. 17, and the Sale of Goods Act, 1893, s. 4, *post*, p. 531 *et seq.*, and *Wallace v. Gibson*, (1895) A. C. 354, D. P. Although the signature only of the party to be charged is sufficient, the names of both the contracting parties must appear upon the guarantee; and therefore a guarantee on which the name of the person to whom it is given does not appear is bad; *Williams v. Lake*, 2 E. & E. 349; 29 L. J., Q. B. 1; *Williams v. Byrnes*, 1 Moo. P. C., N. S. 154; but it was said that if the promise were accepted in writing by any one who would furnish goods under the guarantee, it would bind. S. C., *Id.* 198. A letter of defendant referring to a mortgage not complete, and stating defendant's "willingness to take any responsibility respecting it," is insufficient, there being nothing to explain the transaction referred to, as to amount, interest, or property meant, without oral evidence; and, though since the 19 & 20 V. c. 97, s. 3, oral evidence may supply the consideration, it cannot also explain the promise. *Holmes v. Mitchell*, 7 C. B., N. S. 361; 28 L. J., C. P. 301; and see *Glover v. Halkett*, 2 H. & N. 487; 26 L. J., Ex. 416. The recital of a guarantee given by H. in H.'s will is, after his death, a sufficient memorandum to charge his estate. *In re Hoyle*, (1893) 1 Ch. 84, *per C. A.*

A contract of suretyship arises under the law merchant between the drawer and the indorsee, and between the indorser and subsequent holders of a bill of exchange, *vide ante*, pp. 375, 391; but, the indorser is under no such liability to prior parties to the bill; and to constitute such liability a written memorandum is required. *Jenkins v. Coomber*, (1898) 2 Q. B. 168, distinguishing *Steele v. McKinlay*, 5 Ap. Ca. 754, D. P.; distinguished in *Wilkinson v. Unwin*, 7 Q. B. D. 636, C. A.

On the admissibility of oral evidence to show that the consideration for a guarantee, ambiguously expressed, is not a past consideration, see *ante*, p. 19.

*Continuing guarantee.—Revocation.*] An important point often arises, whether the guarantee is a continuing guarantee—that is, whether the guarantee is confined to one transaction, and is at an end when credit has once been given to the amount guaranteed, or whether it continues in respect of credit given, or debts contracted, from time to time. The answer depends on the language of the instrument, coupled with evidence of the surrounding circumstances, in order to show what was the intention of the parties. *Hesfield v. Meadows*, L. R., 4 C. P. 595; *Laurie v. Scholefield*, *Id.*, 622; *Coles v. Pack*, L. R., 5 C. P. 65; and *ante*, p. 19. Hence it follows that the decision in one case is no certain guide to the construction of the contract in another; but the tendency of the courts is now to construe guarantees as continuing until revoked.

The following are examples of continuing guarantees: "In consideration of the credit given by the C. Co. to my son for coal, supplied by them to him, I hereby hold myself responsible as a guarantee to them for the sum of 100*l.*, and in default of his payment of any accounts due, I bind myself, by this note, to pay to the C. Co. whatever may be owing, to an amount not exceeding the sum of 100*l.*," the son being, at the time the guarantee was given, indebted to the company for coals delivered on credit. *Wood v. Priestner*, L. R., 2 Ex. 66, 282, Ex. Ch. So, where the defendant gave to the plaintiff, a cattle-dealer, this guarantee:—"50*l.* 1*M.*, will be answerable

for 50*l.* that Y., butcher, may buy of H.”; and it appeared, from the circumstances under which the guarantee was given, that the parties contemplated a continuing supply of stock to Y., in his trade of a butcher. *Hesfield v. Meadows*, *ante*, p. 481. See also *Laurie v. Scholefield*, cited *ante*, p. 481, and *Nottingham Hide, &c., Co. v. Bottrill*, L. R., 8 C. P. 694.

A guarantee given to secure the dealings of a single member, A., of a partnership, does not in general cover transactions of the partnership; but it will be otherwise, where it appears, from the surrounding circumstances, that the guarantee was intended to include contracts entered into by A. on behalf of his firm. *Leathley v. Spyer*, L. R., 5 C. P. 595; see also *Montefiore v. Lloyd*, 15 C. B., N. S. 203; 33 L. J., C. P. 49. By the Partnership Act, 1890 (53 & 54 V. c. 39), s. 18: “A continuing guaranty or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty or obligation was given.” This section appears to be identical in effect with the Mercantile Law Amendment Act, 1856 (19 & 20 V. c. 97), s. 4; which was held to be only declaratory of the existing law. *Backhouse v. Hall*, 6 B. & S. 507; 34 L. J., Q. B. 141. Three persons carried on the business of shipbuilders, under the names of G. & W. Hall. No person of that name had been in the partnership for some time, and the plaintiff and defendant being both aware of the constitution of the partnership, the defendant gave the plaintiff the following guarantee: “In consideration that you have, at my request, consented to open an account with the firm of G. & W. Hall, shipbuilders, I hereby guarantee the payment to you of the moneys that at any time may become due, not exceeding 5,000*l.* :” held, that the guarantee ceased on the death of one of the partners. S. C.

The power of a guarantor to withdraw from liability under a guarantee depends on whether the consideration is entire or “fragmentary, supplied from time to time, and therefore divisible.” In the latter case, where it is given to secure the balance of a running account at a banker’s or for goods supplied, he may, unless the guarantee provide otherwise, give notice to stop further money or goods being advanced on the guarantee. *Lloyds v. Harper*, 16 Ch. D. 319, 320, *per* Lush, L. J. Thus a guarantee by writing, under hand only, for 12 months for the payment of all bills the plaintiff might discount for D., to the extent of 600*l.*, was held revocable by a notice given during the 12 months, although some discount had been made and repaid before notice. *Offord v. Davies*, 12 C. B., N. S. 748; 31 L. J., C. P. 319. And the same principle applied in equity, although the guarantee is under seal. *In re Crace*, (1902) 1 Ch. 733, 738, *per* Joyce, J. See further as to withdrawal from a guarantee. *Burgess v. Eve*, L. R., 13 Eq. 450; and *Phillips v. Foxall*, L. R., 7 Q. B. 666. But a guarantee, the consideration for which is given once for all, cannot be determined by the guarantor, and does not cease on his death. *Lloyds v. Harper*, 16 Ch. D. 290, C. A.; *In re Crace*, *supra*, in the absence of a special provision to that effect. S. C. The death alone of the guarantor does not revoke an engagement to guarantee the balance of a running account until notice. *Bradbury v. Morgan*, 1 H. & C. 249; 31 L. J., Ex. 462. Whether in the absence of express provision, it is revoked as to subsequent advances by notice of the guarantor’s death alone, is not yet settled, for in *Coulthart v. Clementson*, 5 Q. B. D. 42, and *In re Whelan*, (1897) 1 Ir. R. 575, it was held to be so revoked; *sees*, *In re Silvester*, (1895) 1 Ch. 573, 577, *per* Romer, J.; and *In re Crace*, (1902) 1 Ch. 733, 739, *per* Joyce, J. A guarantee is not, however, revoked as against the survivor of two joint and several co-sureties. *Beckett v. Addyman*, Q. B. D. 783, C. A. See also *Harriss v. Fawcett*, L. R., 8 Ch. 866.

See further Rowlatt's Law of Principal and Surety, (1899), pp. 73, *et seq.*

*Default of principal debtor.*] The plaintiff must prove the default of the principal debtor, against which he has been guaranteed by the surety. Admissions made by the principal debtor, or a judgment or award obtained against him by the plaintiff, are not evidence against the surety. *Ex pte. Young*, 17 Ch. D. 668, C. A.

*Damages.*] A guarantee for payment by the acceptor of a bill of exchange includes interest. *Ackerman v. Ehrensperger*, 16 M. & W. 99. "We guarantee that 400*l.* shall be duly paid, in the proportion of 200*l.* each," signed by two persons, does not make them jointly liable to 400*l.*, but is a separate contract as to 200*l.* by each. *Fell v. Goslin*, 7 Exch. 185; 21 L. J., Ex. 145. An agreement to be answerable for all the costs of, and incidental to, an action to be brought by the plaintiff, entitles him to recover the costs of his own solicitor, though not actually paid at the time of suing on the guarantee. *Spark v. Heslop*, 1 E. & E. 563; 28 L. J., Q. B. 197. The defendant promised to pay the plaintiffs "300*l.* to secure an advance now or hereafter on a banking account with A." They advanced more than 300*l.* to A., who paid his creditors 16*s.* in the £ only; it was held that the defendant's promise was only to repay an advance of 300*l.*, and that he was therefore entitled to the benefit of the dividend thereon. *Geer v. Pack*, 33 L. J., Q. B. 49; following *Burdwell v. Lydall*, 7 Bing. 489; *Thornton v. McKewan*, 1 H. & M. 525; 32 L. J., Ch. 69; *Hobson v. Bass*, L. R., 6 Ch. 792; *Gray v. Seckham*, L. R., 7 Ch. 680. The surety may, however, waive his right to the share of the composition by the terms of the contract of suretyship; *Ex pte. National Provincial Bank of England*, 17 Ch. D. 98, C. A.; *Ellis v. Emmanuel*, 1 Ex. D. 157, C. A.; as where the guarantee is given for a limited amount, and is less than the debt, the amount of which is then ascertained. S. C. Where a guarantee given to A. appears to have been so given to him as trustee for B., A. can recover thereon the same damages B. could have recovered if it had been given to B. *Lloyds v. Harper*, *ante*, p. 482.

#### Defence.

The want of a written memorandum must be pleaded specially. Rules, 1883, O. xix. r. 20, *ante*, p. 310.

The mere omission on the part of the principal creditor to enforce his rights against the principal debtor does not discharge the surety. *Mansfield Union v. Wright*, 9 Q. B. D. 683, C. A.

*Concealment.*] The surety may sometimes rely on the concealment of material particulars by the principal at the time the contract was made, as a fraud. *Lec v. Jones*, 14 C. B., N. S. 386; 17 C. B., N. S. 482; 34 L. J., C. P. 131, Ex. Ch. So, in the case of concealment during the pendency of a continuing guarantee. *Phillips v. Foxall*, L. R., 7 Q. B. 666; *Sanderson v. Aston*, L. R., 8 Ex. 73. See *Durham, Mayor of, v. Fowler*, *post*, p. 484. The duty of the principal must always ultimately be measured by the jury, but the judge will have to point out what their duty is in this respect; the language in which he ought to do this has not, however, yet been precisely settled. A direction that a concealment must be "wilful and intentional, with a view to the advantage they (the principals) were thereby to receive," is wrong. *Railton v. Mathews*, 10 Cl. & F. 934. See further *Davies v. L. & Provincial Marine Insur. Co.*, 8 Ch. D. 469, and *Scuton v. Heath*, cited *ante*,

p. 458. On the other hand, the creditor is not bound to communicate every circumstance calculated to influence the discretion of the surety in entering into the required obligation; *Owen v. Homan*, 4 H. L. C. 997; for a surety is only entitled to disclosure of any arrangement that may exist between the debtor and creditor that may make his position different from what he would reasonably expect; and hence, if a person undertake to be responsible for a cash credit given to one of the banker's customers, the banker is not bound voluntarily to communicate that the intention is to apply the credit to an old debt due from the customer to the banker. *Hamilton v. Watson*, 12 Cl. & F. 109, *per* Ld. Campbell. *Accord. N. British Insur. Co. v. Lloyd*, 10 Exch. 523; 24 L. J., Ex. 14. So where the guarantee was a continuing one, given to a bank to secure advances "not exceeding in the whole 1,000*l.*," it was held no defence to an action to recover 1,000*l.*, on the guarantee that the bank had made advances together exceeding 1,000*l.* *Laurie v. Scholefield*, L. R., 4 C. P. 622.

*Alteration of position of parties.*—*Giving time, &c.*] Any alteration by a binding agreement in the relative position of the creditor and principal debtor whereby the latter is released or the remedy against him is suspended, or the risk of the surety varied, without the surety's assent, will be a discharge of the guarantee. *Polak v. Everett*, 1 Q. B. D. 669, C. A.; *Lewis v. Jones*, 4 B. & C. 506, and 515, n.; *Cragoe v. Jones*, L. R., 8 Ex. 81; *Bolton v. Buckenham*, (1891) 1 Q. B. 278, C. A.; and see cases cited *ante*, pp. 404, 405. The rule applies where two or more are indebted as principals, and it is afterwards agreed between them that as between themselves one shall be surety only, and the creditor has notice of this. *Rouse v. Bradford Banking Co.*, (1894) A. C. 586, D. P. So any material alteration in the terms of an agreement between the creditor and principal debtor will discharge the surety, provided the agreement forms the basis of the contract of suretyship; *N. W. Ry. Co. v. Whinray*, 10 Ex. 77; 23 L. J., Ex. 261; but not otherwise; *Sanderson v. Aston*, L. R., 8 Ex. 73. See further *Holme v. Brunskill*, 3 Q. B. D. 495, C. A. And in order to discharge the surety by such material alteration, *e.g.*, by giving time to the principal debtor, A., there must be a binding enforceable contract with A. *Clarke v. Birley*, 41 Ch. D. 422. Such contract with a third party has no effect. S. C.; *Lyon v. Holt*, *Fraser v. Jordan*, *ante*, p. 405. "Mere laches of the obligee, or a mere passive acquiescence by the obligee, in acts which are contrary to the conditions of the bond, is not sufficient of itself to relieve the sureties." *Durham, Mayor of, v. Fowler*, 22 Q. B. D. 394, 417; *Hull, Mayor, &c., of, v. Harding*, (1892) 2 Q. B. 494. Nor is it sufficient that the surety's position has been altered by the conduct of the creditor, where that conduct has been caused by the fraudulent act or omission of the principal debtor against which the surety by his contract of suretyship had guaranteed the creditor. S. C., *Id.* 504, 510.

The contract of suretyship is sometimes severable, so that it is only discharged as to part by an alteration in the position of the creditor and the principal debtor. *Harrison v. Seymour*, L. R., 1 C. P. 518; *Skillett v. Fletcher*, L. R., 1 C. P. 217; L. R., 2 C. P. 469, Ex. Ch.; *Croydon Commercial Gas Co. v. Dickinson*, 2 C. P. D. 46, C. A.

If the rights against the surety be expressly reserved, the latter is not discharged; *Kearsley v. Cole*, 16 M. & W. 128; *Price v. Barker*, 4 E. & B. 779; 24 L. J., Q. B. 130; *Bateson v. Gosling*, L. R., 7 C. P. 9; and if the contract of suretyship contain a special clause allowing the creditor to compound with the principal debtor, the surety is not discharged by such compounding. *Cowper v. Smith*, 4 M. & W. 519; *Union Bank of Manchester v. Beech*, 3 H. & C. 672; 34 L. J., Ex. 133. The reservation of rights against



the surety prevents the latter from being discharged, because the principal debtor cannot then complain that the surety, when he has been obliged to pay the debt, immediately claims to be indemnified by the principal debtor, and that this claim makes the discharge of the latter illusory. *Kearsley v. Cole*, ante, p. 484; *Nevill's case*, L. R., 6 Ch. 43, 47; *Muir v. Crawford*, L. R., 2 H. L., Sc. 456, 458. As to the admissibility of oral evidence to prove such reservation, *vide ante*, p. 17. Where the principal debtor is absolutely discharged, as by a novation of debt, the surety is discharged notwithstanding a clause in the contract of suretyship, reserving rights against him. *Commercial Bk. of Tasmania v. Jones*, (1893) A. C. 313, J. C.

Where the liabilities of the principal debtor have been changed by statute during the pendency of the guarantee, the surety is discharged; *Pybus v. Gibb*, 6 E. & B. 902; 26 L. J., Q. B. 41; unless the terms of the guarantee show that it is intended the suretyship should continue. *Oswald v. Berwick, Mayor of*, 5 H. L. C. 856; 25 L. J., Q. B. 383. See *Skillett v. Fletcher*, ante, p. 484.

As a surety on payment of the debt is entitled to all the securities of the creditor, whether he is aware of their existence or not, even though they were given after the contract of suretyship, if the creditor who has had, or ought to have had, them in his full possession or power, lose them or permit them to get into the possession of the debtor, or do not make them effectual by giving proper notice, the surety to the extent of such security will be discharged; a surety, moreover, will be released if the creditor, by reason of what he has done, cannot, on payment by the surety, give him the securities in exactly the same condition as that in which they formerly stood in his hands. See notes to *Rees v. Barrington*, 2 White & Tudor, L. C.; *Wulff v. Jay*, L. R., 7 Q. B. 756. Thus, where the plaintiff held a bill of sale of the debtor's furniture as security for a debt to him for which the defendant was surety, but neglected to register it, and although he had notice of the debtor's insolvency did not seize the furniture under it; and the goods in consequence passed to the debtor's trustee in bankruptcy; it was held that the defendant was discharged to the extent of the value of the goods. S. C. See also *Watts v. Shuttleworth*, 5 H. & N. 235; 29 L. J., Ex. 229; *Mutual Loan Assoc. v. Sudlow*, 5 C. B., N. S. 449; 28 L. J., C. P. 108; and *Lawrence v. Walmesley*, 12 C. B., N. S. 799; 31 L. J., C. P. 143. These rules as to the right of the surety apply as between the acceptor and indorser of a bill where securities had been deposited to secure its payment, and it has been paid at maturity by the indorser. *Duncan v. N. & S. Wales Bank*, 6 Ap. Ca. 1, D. P. In *Polak v. Everett*, 1 Q. B. D. 669, C. A., the distinction is explained between intentional acts which discharge the claim against the surety altogether, and negligent acts which discharge it only to the extent to which the surety has been thereby prejudiced. See also *Carter v. White*, 25 Ch. D. 666, C. A. The right of a surety to the benefit of a collateral security is not in abeyance till he pays the debt. *Dixon v. Steel*, (1901) 2 Ch. 602. The principal creditor is not entitled to the benefit of security given by the principal debtor to the surety. *In re Walker*, (1892) 1 Ch. 621.

In the case of two sureties, A. and B., contracting severally, the creditor does not by releasing A. thereby break his contract and so release B., unless B. can show that he had a right to contribution which has been taken away or injuriously affected. *Ward v. National Bank of New Zealand*, 8 Ap. Ca. 755, J. C.

The release of the principal debtor by discharge in bankruptcy or by arrangement or composition under the Bankruptcy Acts does not release a surety [see Bkey. Acts, 1883, s. 30 (4); 1890, s. 3 (19)], whether he assents or not. See *Ex pte. Jacobs*, L. R., 10 Ch. 211; *Ellis v. Whitmol*, L. R., 10

Ex. 10. This principle applies to the insurance of the debt of a company which afterwards, under a colonial statute, enters into a scheme of arrangement with its creditors. *Dane v. Mortgage Insur. Co.*, (1894) 1 Q. B. 51, 63, 64, *per* Kay, L.J., cited *ante*, p. 455. A creditor who holds security for his debt does not discharge a surety for the debt by surrendering his security to the trustee in the bankruptcy of the principal debtor, in order to entitle himself to prove for the whole debt. *Rainbow v. Juggins*, 5 Q. B. D. 138, 422, C. A. The adjudication in bankruptcy under the Bankruptcy Act, 1890, s. 3 (15), of a debtor who has compounded with his creditors, discharges the liability of a surety who has secured the composition and avoids the security. *Walton v. Cook*, 40 Ch. D. 325.

As to termination and revocation of guarantee, *vide ante*, pp. 481, 482.

### ACTION ON WARRANTY.

A warranty is either express or implied. "Warranties implied by law are for the most part founded on the presumed intention of the parties, and ought certainly to be founded on reason, and with a just regard to the interests of the party who is supposed to give the warranty, as well as of the party to whom it is supposed to be given." *Readhead v. Midland Ry. Co.*, L. R., 4 Q. B. 392, Ex. Ch., *per Cur.*; *accord. Francis v. Cockrell*, L. R., 5 Q. B. 184, 193, *per Cur.* See *The Mooreock*, 13 P. D. 64, 68, *per* Bowen, L.J.; *The Bearn*, (1906) P. 48, C. A.; *Bete SS. Co. v. R. Wear Commrs.*, (1907) 1 K. B. 310, C. A.; and *Hamlyn v. Wood*, (1891) 2 Q. B. 488, C. A. A warranty may arise from an innocent mis-statement. *Low v. Bouverie*, (1891) 3 Ch. 82, *per* C. A.

Where plans and a specification of a certain work to be done for A. are prepared as the basis of tenders, A. does not warrant that the work can be done under such plans and specification. *Thorn v. Mayor of London*, 1 Ap. Ca. 126, D. P. So, where the architect takes out the quantities, A. does not warrant their correctness. *Scrivener v. Pask*, L. R., 1 C. P. 715, Ex. Ch.

As to the warranty of the genuineness of a transfer deed of shares, or of a power of attorney for the transfer of stock at the Bank of England, or of the identity of a stockholder, *vide post*, pp. 494, 1120.

The most frequent cases in which an action is brought on a warranty, are on the occasion of the sale of goods, including horses, and of a representation of authority to enter into a contract on behalf of another person.

### ACTION ON WARRANTY ON SALE OF CHATTELS.

The law of warranty on the sale of goods has been codified and in some respects modified by the Sale of Goods Act, 1893, 56 & 57 V. c. 71, ss. 10-14, 62.

By sect. 62. "In this Act unless the context or subject-matter otherwise requires": *Warranty* "means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated."

By sect. 11. (1). (a.) "Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated."

See as to conditions implied by this Act, sects. 13 and 15, *post*, pp. 540, 541.

*Warranty of title.*] By sect. 12. "In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—

- "(1.) An implied condition on the part of the seller that in the case of a sale he has the right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass:
- "(2.) An implied warranty that the buyer shall have and enjoy quiet possession of the goods:
- "(3.) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made."

At common law there was no warranty of title on the sale by a pawn-broker of an unredeemed pledge at an auction of such pledges; *Morley v. Attenborough*, 3 Exch. 500; nor on a sale under an execution, nor on a sale by the purchaser on that occasion to another purchaser privy to the first sale. *Chapman v. Speller*, 14 Q. B. 621. So, where the defendant had bought at a public auction a boiler set in brickwork which had been seized as a distress for poor rate; the plaintiffs bought it of the defendant, with notice of the circumstances under which it had been originally sold, and were to remove the boiler at their own expense, but were prevented so doing by the mortgagees of the premises: it was held that the seller had not warranted his title to the boiler, or that the plaintiffs would be permitted to remove it. *Bagueley v. Hawley*, L. R., 2 C. P. 625. Willes, J., dissented, observing that the plaintiffs had purchased a boiler and not a lawsuit. In the above cases the maxim "*caveat emptor*" was applied.

*Warranty of quality.*] By sect. 14. "Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—

- "(1.) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose:
- "(2.) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed:
- "(3.) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.
- "(4.) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith."

Evidence of what took place prior to the written contract of sale is admissible to prove that the buyer made known to the seller the particular purpose for which the goods were required, so as to bring the case within sub-sect. (1). *Gillespie v. Cheney*, (1896) 2 Q. B. 59. The particular purpose may be known to the seller L. by the recognized description by which P. purchased the article. *Prest v. Last*, (1903) 2 K. B. 148, C. A. Whether P. thereby showed that he relied on L.'s skill or judgment is a question of fact under all

the circumstances. S. C. The condition of reasonable fitness applies, although the defect was latent and undiscoverable at the time of sale, as in the case of milk sold for consumption. *Frost v. Aylesbury Dairy Co.*, (1905) 1 K. B. 608, C. A. Sect. 14 (2) applies, where a beer-house keeper H. gives a customer W. the particular kind of beer in which H. deals and for which W. asks. *Wren v. Holt*, (1903) 1 K. B. 610, C. A.

Sects. 13, 15, *post*, pp. 540, 541, define the effect of a sale of goods by description or sample.

By the Merchandise Marks Act, 1887 (50 & 51 V. c. 28), s. 17, "On the sale, or in the contract for the sale of any goods to which a trade mark, or mark, or trade description has been applied" (see sect. 5), "the vendor shall be deemed to warrant that the mark is a genuine trade mark and not forged or falsely applied, or that the trade description is not a false trade description within the meaning of this Act" (see sect. 3, modified by sect. 18; see also 54 & 55 V. c. 15, s. 1), "unless the contrary is expressed in some writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to and accepted by the vendee." This section will apply although the trade description is not physically attached to the goods. See *Budd v. Lucas*, (1891) 1 Q. B. 408. By the Fertilizers and Feeding Stuffs Act, 1906, 6 E. 7, c. 27 (replacing 56 & 57 V. c. 56), s. 1, invoices required to be given by those sections imply a warranty.

As to the obligation arising from a contract to supply power, see *Bentley Bros. v. Metcalfe*, (1906) 2 K. B. 548, C. A.

*Remedy where there is a warranty.*] By sect. 53, (1.) "Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may (a) set up against the seller the breach of warranty in diminution or extinction of the price; or (b) maintain an action against the seller for damages for the breach of warranty." (4.) "The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage." See *Bostock & Co. v. Nicholson & Sons*, *post*, p. 492.

In some special cases, however, the buyer may rescind the contract, and recover the money paid under a claim for money had and received: as, where by the contract the purchaser has the power of returning the article, if not approved; *Towers v. Barrett*, 1 T. R. 133; or, where the contract is rescinded with assent of the defendant; *per Buller, J., Id.*; and the article is returned within a reasonable time; *Compton's case*, cited by Buller, J., in 1 T. R. 136; *Adam v. Richards*, 2 H. Bl. 573; *Street v. Blay*, 2 B. & Ad. 456; and, in the same state as sold, and without using the thing sold after the discovery of the breach; *Harmor v. Groves*, 15 C. B. 667; 24 L. J., C. P. 53; *Curtis v. Hannay*, 3 Esp. 82.

But on the purchase of a specific chattel, it is only where there is a condition in the contract authorizing the return, or the vendor has received back the horse or other article, and has thereby rescinded the contract, or has been guilty of a fraud which avoids the contract altogether, that the purchaser may thus recover back the price. *Street v. Blay*, 2 B. & Ad. 462, and the cases there cited; *Goupertz v. Denton*, 1 Cr. & M. 207. See also *Houldsworth v. City of Glasgow Bank*, 5 Ap. Ca. 338, *per* Ld. Blackburn.

If the purchaser sue upon the warranty, he need not return the article sold. *Fielder v. Starkin*, 1 H. Bl. 17; *Pateshall v. Tranter*, 3 Ad. & E. 103.

*Proof of the sale and warranty.*] Where there is no written contract, and

the warranty is (as it often is) mentioned in the receipt for the purchase-money, the sale and warranty may be proved by the production of the receipt without an agreement stamp. *Skrine v. Elmore*, 2 Camp. 407. A sale for the price of 10*l.* and upwards is within the Sale of Goods Act, 1893, s. 4; but as the breach of warranty is not usually discovered till after delivery and acceptance of the goods sold, the statute is then complied with, and the contract may be proved by oral evidence.

The plaintiff must in general prove an express warranty; a high price is not tantamount to an implied warranty. *Stuart v. Wilkins*, 1 Doug. 20; *Parkinson v. Lee*, 2 East, 322. The word "warranty" is not essential; but there may be a mere misrepresentation or opinion of the seller without any intention on either side to give or require a warranty, and this will be a question for the jury. Generally, however, a representation made at the sale is part of the contract, and equivalent to a warranty. *Wood v. Smith*, 5 M. & Ry. 124; *Salmon v. Ward*, *infra*. But not if the contract be reduced to writing. *Pickering v. Dowson*, 4 Taunt. 779. But where the evidence of the contract of sale consists of a series of letters which are ambiguous in their terms on the question of warranty, oral evidence of all the surrounding facts and circumstances of the sale is admissible, for the purpose of showing that a warranty was not contemplated between the parties. *Stucley v. Baily*, 1 H. & C. 405; 31 L. J., Ex. 483. A mere invoice describing articles sold does not amount to a warranty of quality. *Rook v. Hopley*, 3 Ex. D. 209. On the sale of pictures, with a bill of parcels having the artist's name attached, it is for the jury to find whether the seller has guaranteed that they are really the works of the artist, or merely intimated his opinion as to the authorship. *Power v. Barham*, 4 Ad. & E. 473. A., a corn-dealer, sold to B., another corn-dealer, some barley as "seed barley," just before bought by sample from a third person. B. knew that A. had so bought it by sample as "seed barley," and that he had not seen it in bulk: held, that this was not evidence of a warranty, but was a mere expression of A.'s belief. *Carter v. Crick*, 4 H. & N. 412; 28 L. J., Ex. 238.

Where the plaintiff wrote to the defendant, "You will remember that you warranted a horse as a five year old," &c., to which the defendant answered, "The horse is as I represented it," it was ruled that this was evidence of a warranty at the time of sale. *Salmon v. Ward*, 2 C. & P. 211. Where the seller said, "The horse is sound to the best of my knowledge, but I will not warrant it," and the seller knew it to be unsound, he was held answerable on this qualified warranty, viz., that "it was sound to the best of his knowledge." *Wood v. Smith*, *supra*. But *quare*, for this seems to be rather a case of fraud than of qualified warranty. Where the warranty was, "To be sold, a black gelding, five years old; has been constantly driven in the plough. Warranted," this was held to be only a warranty of soundness. *Richardson v. Brown*, 1 Bing. 344. So, "Received of B. 10*l.* for a grey four-year-old colt, warranted sound," is not a warranty of age. *Budd v. Fairman*, 8 Bing. 48. Where there is a manifest defect, a general warranty of soundness will not be deemed to extend to it. *Margetson v. Wright*, 7 Bing. 603. A splint has been held not to be such a manifest defect; S. C., 8 Bing. 454; nor convexity of the cornea of the eye; *Holliday v. Morgan*, 1 E. & E. 1; 28 L. J., Q. B. 9. When a horse is sold with a warranty by private sale at a repository for the sale of horses, where the terms of the sales are painted upon a board fixed up in a conspicuous situation, a purchaser must be taken to be cognizant of these terms, though nothing is said respecting them at the time of sale; and if one of the terms be that the warranty of soundness should remain in force until noon next day, unless in the meantime notice of unsoundness should be given by the purchaser, it must be complied with, though the unsoundness be of such a nature as may not be discovered within

that time. *Bywater v. Richardson*, 1 Ad. & E. 508. So, where the condition was that a horse not answering the warranty must be returned before a given time after the sale. *Hinchcliffe v. Barwick*, 5 Ex. D. 177, C. A. So, where a horse was "warranted sound for one month," it was held that the complaint of unsoundness must be made within one month of the sale. *Chapman v. Gwyther*, L. R., 1 Q. B. 463. The buyer has, however, that time within which to return the horse, though the purchaser had notice of the breach of warranty before he removed the horse, and the horse through an accident became depreciated in value. *Head v. Tattersall*, L. R., 7 Ex. 7. And where, before the time stipulated for return has elapsed, the horse is too injured to be returned, the buyer may recover for breach of warranty without returning it. *Chapman v. Withers*, 20 Q. B. D. 824. So, if the horse die before the time has elapsed. See *Elphick v. Barnes*, 5 C. P. D. 321. There are many cases on variances upon warranty of soundness, but the power of amendment makes it needless to notice them.

As to when a warranty arises by implication of law, *vide ante*, p. 486.

[*Warranty by agent.*] A servant employed to sell a horse has been held to have an implied authority to warrant; *Alexander v. Gibson*, 2 Camp. 555 (the case of a sale at a fair); and, even where the servant of a horse-dealer has express directions not to warrant, but does warrant, the master is bound, unless he has notified to the world that the general authority is limited. *Per Bayley, J.*, in *Pickering v. Busk*, 15 East, 45; *Helyear v. Hawke*, 5 Esp. 72; *Howard v. Sheward*, L. R., 2 C. P. 148. But the doctrine has, according to some authorities, been confined to the case of sales by servants of horse-dealers, who may be supposed to possess a general authority; *Scotland, Bank of, v. Watson*, 1 Dow, 45; *Fenn v. Harrison*, 3 T. R. 760, *per Ashhurst, J.*; *Anon.*, cited 15 East, 407; and it has been decided that the servant of an owner, not a horse-dealer, entrusted on one particular occasion to sell and deliver a horse, is not by law authorized to bind his master by a warranty; and the buyer taking a warranty from such an agent, takes it at the risk of being able to prove that he had the principal's authority. *Brady v. Todd*, 9 C. B., N. S. 592; 30 L. J., C. P. 223. *Quere*, Whether, in the case of a foreman alleged to be a general agent, or such a special agent as a person entrusted with the sale of a horse at a fair or other public mart, the authority would be implied; S. C., *per Curiam*; *semble*, *per Ashhurst, J.*, in *Fenn v. Harrison*, *supra*, that in the latter case it would not. What is said at the time of the sale is evidence, and may amount to a warranty; *per Curiam*, *Brady v. Todd*, *supra*. If the seller repudiates the warranty made by his agent there is no sale; *per Curiam*, S. C. Where the horse had been already sold, and the vendor's servant, on delivering him to the purchaser, made certain statements, and signed a receipt for the price containing a warranty, it was held that the vendor was not bound by such statements, nor by the receipt, no express authority to warrant being shown. *Woodin v. Burford*, 2 Cr. & M. 391. Where the plaintiff wrote to the defendant, referring to the warranty and alleging a breach of it, and the defendant in reply denied that there had been any breach, it was held that the jury were justified in finding a warranty on this evidence. *Miller v. Lawton*, 15 C. B., N. S. 834.

[*Breach of warranty.*] If the breach be denied, the plaintiff must give positive proof of unsoundness, &c., at the time of the sale; a suspicion that a horse was unsound is not sufficient. *Eaves v. Dixon*, 2 Taunt. 343. The term "sound," in the case of a horse, implies the absence of disease, or the seeds of a disease, which impairs the natural usefulness of the animal. *Kiddell v. Burnard*, 9 M. & W. 668. An infirmity, as a temporary lameness, which renders a horse less fit for present use, though not of a permanent

nature, and though removed after action brought, is an unsoundness. *Per* Ld. Ellenborough, *Elton v. Brogden*, 4 Camp. 281; 1 Stark. 127. A cough, though not permanent, is therefore an unsoundness. *Coates v. Stephens*, 2 M. & Rob. 157; *Shillitoe v. Claridge*, 2 Chitty, 425. But see *Garment v. Barrs*, 2 Esp. 673, where Eyre, C.J., held that a horse labouring under a temporary injury or hurt is not an unsound horse. Roaring is not, it is said, necessarily an unsoundness, unless symptomatic of disease; *Bassett v. Collis*, 2 Camp. 523; but, if it is of such a nature as to incommode the horse when pressed to his speed, it is an unsoundness; *Ouslow v. Eames*, 2 Stark. 81. Mere badness of shape (such as may produce cutting or curbs) is not unsoundness; *Dickinson v. Follett*, 1 M. & Rob. 299; *Brown v. Elkington*, 8 M. & W. 132; but, any defect in the structure of a horse, congenital as well as arising from subsequent disease or accident, which diminishes his natural usefulness and renders him less than reasonably fit for present use, is unsoundness; and convexity in the cornea of the eye, making the horse short-sighted, and so inducing a habit of shying, is such a defect. *Holliday v. Morgan*, 1 E. & E. 1; 28 L. J., Q. B. 9. A nerved horse is unsound. *Best v. Osborne*, Ry. & M. 290. Crib-biting is not unsoundness, but vice. *Scholefield v. Robb*, 2 M. & Rob. 210. Whether thrushes, splints, or quidding be unsoundness, is a disputed question; *Bassett v. Collis*, 2 Camp. 524, n.; but a splint which produces lameness is an unsoundness, even before the lameness is produced. *Margetson v. Wright*, 8 Bing. 454. So, a bone spavin. *Watson v. Denton*, 7 C. & P. 85. A chest-foundered horse is unsound. *Atherbury v. Fairmanner*, 8 B. Moore, 32. Proof that a horse is a good drawer will not satisfy a warranty that he is "a good drawer, and pulls quietly in harness." *Coltherd v. Puncheon*, 2 D. & Ry. 10.

It need not be averred, nor if averred, proved, that the defendant knew of the unsoundness. *Williamson v. Allison*, 2 East, 446.

By the Fertilizers and Feeding Stuffs Act, 1906, 6 E. 7, c. 27 (replacing 56 & 57 V. c. 56), s. 3 (5), in an action for breach of the warranty implied by an invoice under sect. 1, the certificate of the analyst to whom a sample has under sect. 3 been submitted for analysis shall, provided that the sample has been treated as thereby prescribed, "be sufficient evidence of the facts therein stated, unless the defendant requires that the analyst be called as a witness."

*Damages.*] By sect. 53. "(2.) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty. (3.) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty."

If a horse has been returned, the plaintiff will be entitled to recover the whole price; if kept, the difference between the real value and the price; or the plaintiff may sell the horse for what he can get, and recover the residue of the price paid, in damages. *Caswell v. Coore*, 1 Taunt. 566. If the horse be not tendered to the vendor, the vendee can recover no damages for the expense of his keep. S. C. But, if the vendee have tendered the horse, he may recover for the keep, for such time as would be required to sell him to the best advantage. *McKenzie v. Hancock*, Ry. & M. 436. So, where after notice to the vendor that the horse might be taken away, it was resold, the vendor is liable for the keep for a reasonable time, which is a question for a jury. *Chesterman v. Lamb*, 2 Ad. & E. 129. Where the vendor rescinded the contract, it was held that he was liable for the keep of the horse from the time of the contract. *King v. Price*, 2 Chitty, 416. Where defendant warranted a horse to plaintiff, who resold him with a warranty to C., and the horse proving unsound, C. sued the plaintiff, and he gave notice

to the defendant of the action, and offered him the option of defending it, but receiving no answer, he defended the action and failed; it was held that defendant was liable, in an action on the warranty, for the costs of the action brought by C. against the plaintiff. *Lewis v. Peake*, 7 Taunt. 153; and see *Rolph v. Crouch*, L. R., 3 Ex. 44. Where B. sold coal to H. as of a particular description, knowing that H. bought it to resell under the same description, and the coal delivered did not answer the description, but this could only be ascertained on use by the sub-vendee, C.; C. sued H. for breach of warranty, and thereupon H. gave B. notice of the action, but B. insisted that the coal was according to contract. In an action, *H. v. B.*, B. paid the damages recovered in the action *C. v. H.* into court; it was held that H. could also recover the costs of that action, as it had been reasonably defended by H. *Hammond v. Bussey*, 20 Q. B. D. 79, C. A. *Accord. Agius v. Gt. W. Colliery Co.*, *post*, p. 548. See also *The Millwall*, (1905) P. 155, C. A. In *Cox v. Walker*, 6 Ad. & E. 523, n., the plaintiff had bought a horse of the defendant for 100*l.*, and had been offered 140*l.* for him, but the horse proving unsound, plaintiff had been obliged to give up the bargain and to sell it for 49*l.* 7*s.* *Ld. Denman, C.J.*, directed the jury that the plaintiff was entitled to recover the difference between the price at which he had sold and the actual value of the horse, if it had been sound at the time of such sale; and he left to the jury as a measure of such value, the price offered for the horse while in the plaintiff's hands. This ruling was questioned, but the case stood over, after argument, for several terms, and was then compromised. The liability of plaintiff for the breach of warranty, given on a resale by him, may be alleged and proved as special damage, though the plaintiff had not actually paid the sub-vendee his demand. *Randall v. Raper*, E. B. & E. 84; 27 L. J., Q. B. 266. See also *Josling v. Irvine*, 6 H. & N. 512; 30 L. J., Ex. 78. Where the defendants broke a warranty in not sending hemp that was merchantable, the measure of damages was held to be the difference between what the hemp was worth when it arrived, and what the same hemp would have realized if it had been shipped in a proper state. *Jones v. Just*, L. R., 3 Q. B. 197. Where the defendant sold a diseased cow to a farmer, warranting that she was free from disease, he was held liable for the value of other cows of the plaintiff which died of the disease, caught from her, if he knew, at the time of the sale, that the plaintiff was a farmer, and might place the cow with others; *Smith v. Green*, 1 C. P. D. 92; for the defendant is liable for such damages as are the natural consequence of the breach of warranty. S. C.; *Randall v. Newson*, 2 Q. B. D. 102, C. A. Where A. employed B. to discharge a ship, supplying him with all necessary gearing, which was however defective, whereby B.'s servant C. was injured in doing the work; C. sued B. under the Employers' Liability Act, 1880, *post*, p. 804, and B. settled the action by paying C. 125*l.*, which was a proper settlement. It was held that B. could recover this 125*l.* from A., as the liability to pay it was the natural consequence of the breach of warranty, and might have been within the contemplation of A. and B. when they made it. *Mowbray v. Merryweather*, (1895) 2 Q. B. 640, C. A. Where N. sold B. sulphuric acid, warranted free from arsenic, and it was not free; and B. in ignorance of that fact used the acid in making glucose which he sold to a brewer H. for brewing beer; the beer was thereby rendered poisonous and H. suffered loss for which B. was liable, and the goodwill of B.'s business was damaged, Bruce, J., held that B. could not recover from N. either of these heads of damage, but that he might recover the price of the acid lost, and also the value of other goods spoilt by being mixed with the acid, as the manufacture of glucose was an ordinary use of the acid. *Bostock & Co. v. Nicholson & Sons*, (1904) 1 K. B. 725. The liability of B. to H. was the full selling value of the beer which had to be destroyed as poisonous. *Hollen v. Bostock & Co.*, 50 W. R. 323,



H. S. 1902; C. A. See further as to the measure of damages, *post*, pp. 648 *et seq.*, and the notes to *Vicars v. Wilcocks*, 2 Smith's L. C. 10th ed. 538 *et seq.*

In an action for breach of contract on the sale of food or drugs, the plaintiff may, under the Sale of Food and Drugs Act, 1875 (38 & 39 V. c. 63), s. 28, recover, as damages, any penalty in which he may have been convicted under the Act in respect of these goods, and the costs paid and incurred by him, if he prove that he innocently sold the goods as he purchased them from the defendant; but the defendant may in answer prove that the conviction was wrong and the costs excessive.

As to damages recoverable on breach of warranty of authority, *vide infra* and *post*, p. 494.

#### ACTION ON WARRANTY OF AUTHORITY.

Where A. contracts on behalf of B. as his agent, but without authority from B., A. is in general not liable as *principal*; *Jenkins v. Hutchinson*, 13 Q. B. 744; *Lewis v. Nicholson*, 18 Q. B. 503; 21 L. J., Q. B. 311; unless he was such in fact; *Carr v. Jackson*, 7 Exch. 382; 21 L. J., Ex. 137; or, unless B. has no existence. *Kelner v. Baxter*, L. R., 2 C. P. 174. See further, *ante*, p. 92. It is, however, now settled that A., by contracting with C. on behalf of B., impliedly warrants that he has authority from B. to enter into the contract; and if he have not such authority he is liable for a breach of the warranty; *Collen v. Wright*, *infra*, and *Ex. pte. Panmure*, *post*, p. 494; and is bound, as far as damages will do it, to place C. in the same position as if he had the authority. S. C.; *Meek v. Wendt*, 21 Q. B. D. 126; (1889) W. N. 14, H. S., C. A.: *Haiigh v. Stuart*, (1890) W. N. 213, T. S., C. A. See as to extent of this warranty in the case of a sub-agent signing a contract, S. C. See on the general principle the judgments in *Dickson v. Reuter's Telegram Co.*, 3 C. P. D. 1, C. A. Other cases decided on a similar principle are cited below, and these settle the measure of damages applicable to such actions. Thus, if A., *bonâ fide*, but falsely, represent to the plaintiff that he is authorized by B. to order goods, and the plaintiff fail in the action against B. for want of such authority, he may recover the value and the costs of the former action in an action against A. *Randell v. Trimen*, 18 C. B. 786; 25 L. J., C. P. 307. So, where the defendant's testator, as agent for G., had let land without authority, he was held liable for breach of warranty that he had authority; and in the damages were included the costs of an unsuccessful chancery suit against G. *Collen v. Wright*, 8 E. & B. 647; 27 L. J., Q. B. 215, Ex. Ch. In a similar action it was held that the proper measure of damages was the value of the term agreed for, and the costs of an abortive chancery suit, but not damages and costs the plaintiff had been compelled to pay to a third person, for the breach of an agreement for a sub-lease of the premises. *Spedding v. Nevell*, L. R., 4 C. P. 212. See also *Simons v. Patchett*, 7 E. & B. 568; 26 L. J., Q. B. 195; *Hughes v. Grame*, 33 L. J., Q. B. 335. F. agreed to sell the plaintiff an estate, representing that he had authority from his co-owners to do so; and on the co-owners repudiating the contract, the plaintiff sued them for breach thereof, and continued his action after they had all sworn in answer to the interrogatories that F. had no authority from them to contract, and was nonsuit; it was held, that in an action against F. for breach of warranty of authority, the plaintiff could recover the costs of the action against the others, down to the time when the answers to the interrogatories had been received and considered, and the difference between the contract price and the market price of the estate, of which latter the price for which the estate was subsequently sold was *primâ facie* evidence. *Golwin v. Francis*, L. R., 5 C. P. 295. Where, however, the plaintiff must anyhow have failed

in his previous action by reason of the contract on which he sued being oral only, the costs of that action are not recoverable from the agent. *Pow v. Davis*, 30 L. J., Q. B. 257. A. being instructed by B. to apply for shares in A.'s name, in a company C., by mistake applied for shares in a company D., which were accordingly allotted to B., and repudiated by him; the company D. had a large number of shares unallotted and the shares were worthless in the market: A. was held liable to the company D. for the full amount of the shares for which he had applied. *Ex pte. Panmure*, 24 Ch. D. 367, C. A.

Where A., a banker, on the faith of a statement made to him by B. and C., the directors of a company, that they had appointed D. manager of the company, and had authorized him to draw on the company's account with A., made advances on cheques so drawn by D.; B. and C. had no power to confer this authority on D., but acted *bonâ fide*; it was held, that B. and C. were liable to A. for the advances so made by him, on the ground that they had warranted to A. that D. had authority to bind the company. *Cherry v. Colonial Bank of Australasia*, L. R., 3 P. C. 24. So, where the plaintiff lent money to a building society, which had no power to borrow money, the directors signing the deposit note were held liable to an action on their implied warranty of authority, for the amount of the loan, it not appearing that the company was insolvent. *Richardson v. Williamson*, L. R., 6 Q. B. 276; see also *Chapleo v. Brunswick Building Soc.*, 6 Q. B. D. 696, C. A. So, the directors of a railway company were held liable for issuing a debenture exceeding the borrowing powers of the company. *Weeks v. Probert*, L. R., 8 C. P. 427; *Firbank's Executors v. Humphreys*, 18 Q. B. D. 54, C. A. So, where the directors of a company, incorporated under a private Act of Parliament, which gave them no power to issue bills, accepted a bill for and on behalf of the company, they were held liable to a *bonâ fide* holder for value. *W. London Commercial Bank v. Kitson*, 12 Q. B. D. 157; 13 Q. B. D. 260, C. A. The plaintiff must however in these cases have relied on the existence of the authority of the agent A., and he cannot do so if A. had disclaimed any present authority. *Halbot v. Lens*, (1901) 1 Ch. 344. Where a stockbroker S. innocently transferred stock at the Bank of England under a forged power of attorney purporting to have been given by the stockholder O. to S. and S.'s partner L., it was held that S. must indemnify the Bank against its liability to O.; *Starkey v. Bank of England*, (1903) A. C. 114, D. P., affirming S. C., *sub nom. Oliver v. Bank of England*, (1902) 1 Ch. 610, C. A.; but that L. was not liable for merely applying for the form of the power of attorney. S. C., (1901) 1 Ch. 652. So where a stockbroker C., has procured the transfer of stock out of M.'s name by innocently identifying to the Bank as M., a person J., who then forges M.'s signature, C. must indemnify the Bank. *Bank of England v. Cutler*, (1907) 1 K. B. 889, *cor.* A. T. Lawrence, J. See also *Sheffield Cor. v. Barclay*, and *A.-G. v. Odell*, cited *post*, p. 1120.

The principle of the above cases does not apply where the misrepresentation is not one of fact, but an erroneous representation of law. *Beattie v. Ebury, Ltd.*, L. R., 7 Ch. 777; affirm. on other grounds, L. C., 7 H. L. 102. See also *McCollin v. Gilpin*, 5 Q. B. D. 390; 6 *Id.* 516, C. A. Nor does it apply where an agent S. employed by his principal R. to enter into a contract for R. with I., untruly tells R. that he has so done: the damages to which S. is liable are those only which R. has in fact sustained in consequence of the misrepresentation, and do not include profits which he might have made if the representation had been true. *Salvesen v. Rederi Aktiebolaget, &c.*, (1905) A. C., 302, D. P. Public servants making contracts on behalf of the Crown do not warrant their authority. *Dunn v. Macdonald*, (1897) 1 Q. B. 401, 555, C. A.

As to the effect of the signature of a charter-party by a ship-broker in the

form "by telegraphic authority of the charterer as agent," see *Lilly v. Smales*, (1892) 1 Q. B. 456, cited *ante*, p. 22.

### ACTION ON PROMISE OF MARRIAGE.

Either a man or a woman may sue for breach of promise of marriage; *Harrison v. Cage*, 5 Mod. 411; although an attempt was made in that case to resist an action by the former, on the ground that marriage is not an advancement for a man. As an infant may enforce an advantageous contract, although not bound thereby, an infant may sue a person of full age for breach of promise of marriage. *Holt v. Ward*, Str. 937; *per* Ld. Ellenborough, C.J., in *Warwick v. Bruce*, 2 M. & S. 209. A married man may be sued on a promise of marriage to the plaintiff, although he was married when he promised, provided the plaintiff was ignorant of the fact; and the plaintiff's remaining unmarried on the faith of such promise is a sufficient consideration, and the inability of the defendant to marry the plaintiff is a sufficient breach. *Milward v. Littlewood*, 5 Exch. 775; *Wild v. Harris*, 7 C. B. 999. This action falls within the general rule *actio personalis moritur cum personâ*, and cannot be maintained by an executor or administrator; *Chamberlain v. Williamson*, 2 M. & S. 408; unless, perhaps, where a strictly pecuniary loss has accrued to the deceased, and the personal estate been damaged accordingly; in such case special damage must be stated on the record, for it will not be intended; *per Cur.*, *Id.* 416. So the action will not lie against an executor without special damage. *Finlay v. Chirney*, 20 Q. B. D. 494, C. A. This must be damage to the property, not the person of the promisee, and be within the contemplation of both parties at the time of the promise; such damage is alone recoverable, and not special damage. S. C.

Until recently the parties to this action were not competent as witnesses; see *ante*, p. 164; but now by 32 & 33 V. c. 68, s. 2, "the parties to any action for breach of promise of marriage shall be competent to give evidence in such action; provided always, that no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise." Evidence of a third person that the plaintiff said to the defendant, that he had promised to marry her, and that the defendant did not deny it, is sufficient to satisfy this section. *Bessela v. Stern*, 2 C. P. D. 265, C. A. The mere fact, however, that the defendant did not reply to letters written to him by the plaintiff, in which she stated he had promised to marry her, is not sufficient. *Wiedemann v. Walpole*, (1891) 2 Q. B. 534, C. A.

*Proof of the contract.*] To maintain this action, the plaintiff must prove, under a traverse, the contract and promise of the defendant as stated. The promises must be mutual, the reciprocity constituting the consideration. *Harrison v. Cage*, *supra*; 1 Rol. Ab. 22, pl. 20. At first, it was held that mutual promises to marry came within the Stat. of Frauds, s. 4; Com. Dig. Action on the Case upon Assumpsit (F. 3); but in Bull. N. P. 280 *c*, a contrary doctrine is laid down, and it is now settled that the promises need not be in writing. *Cork v. Baker*, 1 Str. 34; *Harrison v. Cage*, 1 Ld. Raym. 387, note at end of case. And, if written evidence of the contract be produced, no stamp is required. *Orford v. Cole*, 2 Stark. 351. A promise, on the part of a woman, may be presumed from such circumstances of acquiescence, or tokens of approval, as usually attend the acceptance of an offer of marriage; her presence when the offer was made, and the consent of parents asked, without her making any objection; her subsequent reception

of the suitor's visits, and concurrence in the arrangements for the wedding; her demeanour as one consenting and approving, &c. Express consent in words is not necessary. *Daniel v. Bowles*, 2 C. & P. 553; *Hutton v. Mansell*, 3 Salk. 16. But to prove a promise by a man more would be necessary; neither the usages of society nor considerations of delicacy interfering to restrain an explicit declaration on his part. A promise to marry generally is, in law, a promise to marry within a reasonable time; and although an admission of a special promise to marry at a particular time should be proved in evidence, it may be left to a jury to infer from the circumstances a more general promise. *Potter v. Deboos*, 1 Stark. 82; *Phillips v. Crutchley*, 1 Moore & P. 239. But a promise to marry after a certain event will not support a claim on a general promise if the qualification be properly pleaded in the defence. *Atchinson v. Baker*, Peake, Add. Ca. 103.

*Breach.*] To prove the breach of the promise, if denied, evidence must be given, either that the defendant has married another person, so that performance is no longer possible; or, that a tender has been made by the plaintiff, followed by a refusal on the part of the defendant. For this purpose it is sufficient that the father of a female plaintiff demanded performance of the defendant. *Gough v. Farr*, 2 C. & P. 631. Where the defendant has promised to marry the plaintiff on the death of his father, the marriage of the defendant to another woman, during his father's lifetime, gives the plaintiff an immediate right of action. *Frost v. Knight*, L. R., 7 Ex. 111, Ex. Ch. See *Synge v. Synge*, (1894) 1 Q. B. 466, C. A.

*Damages.*] The affluent circumstances of the defendant are evidence on the question of damages; and not merely the loss of an establishment in life, but the injury to the plaintiff's feelings, may be considered by the jury; and, in this respect the measure of damages is different from that which is adopted in the case of other contracts. *Smith v. Woodfine*, 1 C. B., N. S. 660; *Berry v. Du Costa*, L. R., 1 C. P. 331. It is no misdirection to tell the jury that, in estimating the damages, they may take into consideration the altered social position of the plaintiff, in relation to her home and family, by the defendant's having seduced and deserted her. S. C. It seems doubtful whether evidence of such seduction can be given in aggravation of damages unless it be specially pleaded. See *Millington v. Loring*, 6 Q. B. D. 190, C. A.

*Evidence of character.*] Where the defendant, by his defence, sets up a general charge of immodesty, the plaintiff may, in the first instance, give general evidence of good character for modesty and propriety of demeanour; though this could not be done in the case of a specific charge of immoral acts. *Jones v. James*, 18 L. T. 243, E. T. 1862, Ex.; and see *Evidence of character*, ante, p. 86.

*Costs.*] As to plaintiff's right to costs, vide ante, pp. 296 et seq. The county court has no jurisdiction to entertain an action for breach of promise of marriage; 51 & 52 V. c. 43, s. 56.

### Defence.

If, after entering into a contract of marriage, either party discover gross immorality or depraved conduct in the other, it may be pleaded in bar of the action; thus, brutal and violent conduct in the man, accompanied with threats of ill-usage to the woman, goes to the ground of the action; *Leeds v. Cook*, 4 Esp. 258; and if a man has made a promise of marriage to one

whom he supposes to be a modest person, and he *afterwards* discovers her to be a loose and immodest woman, and he on such account refuses to fulfil his promise, he is justified in so doing. *Irving v. Greenwood*, 1 C. & P. 350. To entitle the defendant to a verdict on the ground of the bad character of the plaintiff, it is not sufficient to show that charges (as of pecuniary dishonesty or perjury, &c.) were made against the plaintiff, which plaintiff promised, but failed, to explain: the defendant must show that the charges are well founded. *Baddeley v. Mortlock*, Holt, N. P. 151. To show the general bad character of the plaintiff, where such evidence is relevant, evidence of general reputation is admissible. *Foulkes v. Sellway*, 3 Esp. 236. Material misrepresentation of the real circumstances of the family and previous life of the plaintiff may be a good defence to the action; as, where the plaintiff's father and brother told the defendant that she would have property from her father (who was insolvent), and denied that she had ever been (as in fact she had been) a barnmaid. *Wharton v. Lewis*, 1 C. & P. 529. The plaintiff was, in this case, living with the relations who misrepresented her, and was probably presumed to be privy to their statements. Letters written by the plaintiff's father, with her knowledge, are evidence against her, though she would not be answerable for particular expressions in them; but a false representation, made orally by the father to a third person in the absence of the plaintiff and without her privity, and by such person communicated to the defendant, is not admissible. *Foote v. Hayne*, 1 C. & P. 546.

A pre-contract on the part of the plaintiff to marry another person, which the plaintiff concealed from the defendant at the time of his promise, is no defence to the action, without fraud. *Beechey v. Brown*, E. B. & E. 796; 29 L. J., Q. B. 105. Nor is bodily infirmity supervening and rendering it dangerous to the defendant's life to marry. *Hull v. Wright*, E. B. & E. 746, 765; 27 L. J., Q. B. 345; 29 L. J., Q. B. 43, Ex. Ch. So insanity in the plaintiff, existing unknown to the defendant previously to his promise, is no defence. *Baker v. Curtwright*, 10 C. B., N. S. 124; 30 L. J., C. P. 364.

An exoneration by the plaintiff of the defendant from his promise, may be implied from the conduct and demeanour of the parties; the total cessation of intercourse and correspondence for two or three years, is evidence for the jury, on a defence of exoneration; although on the last occasion they were seen together the plaintiff refused to give up the defendant's letters, saying it would be like giving him up altogether. *Davis v. Bomford*, 6 H. & N. 245; 30 L. J., Ex. 139.

Infancy is a defence to the action, and the contract of marriage is within the Infants' Relief Act, 1874 (37 & 38 V. c. 62), cited *sub tit.*, *Defences—Infancy*, *post*, p. 675, and cannot, therefore, be ratified after full age; *Coxhead v. Mullis*, 3 C. P. D. 439; and evidence of mere ratification does not amount to a fresh promise. S. C. Where however, the parties continue to associate together after the defendant has attained full age, as they did before, it can rarely happen that there is not *some* evidence for the jury of a fresh promise. Thus, fixing the wedding day was held to be such evidence. *Ditcham v. Worrall*, 5 C. P. D. 410, *Jiss. Id.* Coleridge, C. J. The question for the jury is whether what was said or done was intended by the party to be a new promise, or merely a ratification of the old promise. *Northcote v. Doughty*, 4 C. P. D. 385; *accord.* *Holmes v. Brierley*, (1888) W. N. 158; 36 W. R. 795, Trin. S., C. A.

## ACTION ON AN AWARD.

In an action on an award, the plaintiff must prove the submission and award, and the performance by himself of any conditions precedent put in issue by the pleadings. Where the submission is by a judge's order, which has been made an order of court, it is sufficiently proved by production of the office copy of the latter order. *Still v. Halford*, 4 Camp. 17; *Selby v. Harris*, 1 Ld. Raym. 745; *vide ante*, pp. 111, 112. But not when the submission is by deed or written agreement; for the rule or order of court gives it no binding effect, and is, or may be, obtained *ex parte* *Berney v. Read*, 7 Q. B. 79. In that case the rule or order was evidently not obtained by the party *against* whom it was offered. It is necessary to prove the submission of all parties to arbitration, for without such proof it does not appear that the arbitrator had competent authority to decide the question between the parties. *Ferrer v. Owen*, 7 B. & C. 427; *Brazier v. Jones*, 8 B. & C. 124. If the time for making the award has been enlarged, and the award made within the enlarged time, the plaintiff must show (if it be put in issue) that the enlargement was duly made according to the terms of the submission, or by the consent of the parties, or under the powers granted by the Arbitration Act, 1889 (52 & 53 V. c. 49), s. 9, replacing stat. 3 & 4 W. 4, c. 42, s. 39, and the C. L. P. Act, 1854, s. 15. As to the construction of these repeated sections, see cases collected in Day's Common Law Procedure Acts, 4th ed., pp. 256, 257; *Lord v. Lee*, L. R., 3 Q. B. 404; *In re Dare Valley Ry. Co.*, L. R., 4 Ch. 556, n., and 554; *Denton v. Strong*, L. R., 9 Q. B. 117. If the enlargement were irregularly made, such irregularity is waived by the appearance of the parties having knowledge of it, without objection, before the arbitrator after the enlargement; *In re Hick*, 8 Taunt. 694; *Tyerman v. Smith*, 6 E. & B. 719; 25 L. J., Q. B. 359; so if the time had not been enlarged at all; *Lawrence v. Hodgson*, 1 Y. & J. 16. Such appearance of the parties may be evidence of a new oral submission, for an award to be made within a reasonable time. *Bennett v. Watson*, 5 H. & N. 831; 29 L. J., Ex. 357. But though the parties appear and take part in the reference, if they protest at the time, the objection is not waived. *Ringland v. Lowndes*, 17 C. B., N. S. 514; 33 L. J., C. P. 337, Ex. Ch. So the objection is not waived if it go to the jurisdiction of the arbitrator over the subject-matter. *Davies v. Price*, 34 L. J., Q. B. 8, Ex. Ch. And if the award be not made within the time limited by the submission, and one of the parties, not knowing the fact, take up the award, his so doing will not be a waiver of the conditions as to time stated in the submission. *Darnley, El. of, v. L. C. & Dover Ry. Co.*, L. R., 2 H. L. 43. The plaintiff need not prove that the defendant had notice of the award; for he is bound to take notice of the award as well as the plaintiff. 2 Wms. Saund. 62 (4). Where the award states a "request" to the defendant to pay, this is equivalent to an order to pay. *Smith v. Hartley*, 10 C. B. 800; 20 L. J., C. P. 169. So where, after issue joined, a cause was referred, and although there was no power to direct a verdict to be entered, the arbitrator ordered that there should be a verdict for the plaintiff for a certain sum: this was held good as an award of that sum to the plaintiff, on which an action for the amount could be maintained; *Everest v. Ritchie*, 7 H. & N. 698; 31 L. J., Ex. 350; and where an award directs payment to an arbitrator, or to a stranger, for the use of the plaintiff, the plaintiff may sue on it for the money. *Wood v. Atcock*, 7 Exch. 468; 21 L. J., Ex. 204, Ex. Ch. An award to be made by two arbitrators must be signed by them in the presence of each other, and at the same time and place, and it is no

award unless so signed. *Wade v. Dowling*, 4 E. & B. 44; 23 L. J., Q. B. 302; *Peterson v. Ayre*, 15 C. B. 724; 23 L. J., C. P. 129.

If the award be by an umpire, or by the arbitrators and an umpire, the appointment of the latter must be proved. *Still v. Halford*, 4 Camp. 19. In the absence of any clause to the contrary, the arbitrators may make a valid appointment of an umpire after the time for making the award has expired, if it be within the time limited for the umpirage. *Harding v. Watts*, 15 East, 556; *Holdsworth v. Wilson*, 4 B. & S. 1; 32 L. J., Q. B. 289, Ex. Ch. When the arbitrators have agreed on an umpire they need not sign the appointment at the same time, or together. *In re Hopper*, L. R., 2 Q. B. 367.

In practice there is usually a witness to the execution of an award who, if the execution is disputed, is generally called; but unless the submission require it, attestation is unnecessary; and in general, therefore, an award may be proved like any other deed or writing, viz., by proof of the arbitrator's handwriting.

Under the Arbitration Act, 1889, a submission, unless a contrary intention is expressed therein (sect. 1), is irrevocable, and (sect. 2) is to be deemed to include the provisions set forth in sched. 1.

As to awards of Commissioners under the Inclosure Acts, see *Proof of Awards*, ante, p. 153.

When the business of a company incorporated under the Companies Act, 1862, and being voluntarily wound up, is transferred to another company, and the amount to be paid by the company to a dissenting shareholder for the purchase of his interest (sect. 161) has been settled by arbitration (sect. 162), he may maintain an action against the company on the award so made. *De Rosaz v. Anglo-Italian Bank*, L. R., 4 Q. B. 462.

### Defence.

A denial of the making of the award will now be taken to put in issue its making in point of fact only, and not its validity in law. See Rules, 1883, O. xix. rr. 15, 20, ante, pp. 309, 310. *Adcock v. Wood*, 6 Exch. 814; 20 L. J., Ex. 435. Nor could the defendant under such a defence show that it was set aside. See *Roper v. Levy*, 7 Exch. 55; 21 L. J., Ex. 28.

Where an award ordered a sum to be paid by instalments, a defence of an oral agreement to pay a less sum at earlier dates than so ordered, and payment thereunder, is good, by way of accord and satisfaction after breach, by non-payment of the first instalment; and is proved, although the payment was made and accepted after the substituted day, if the plaintiff received the payment and made no objection on the ground of its being too late. *Smith v. Trowsdale*, 3 E. & B. 83; 23 L. J., Q. B. 107.

Corruption or misconduct of the arbitrators is not matter of defence; at least, where application might have been successfully made to the court to set the award aside. 1 Wms. Saund. 327 a (3); *Wills v. Maccarnick*, 2 Wils. 148; *Braddick v. Thompson*, 8 East, 344; *Beuzier v. Bryant*, 3 Bing. 167; *Grazebrook v. Davis*, 5 B. & C. 534; *Whitmore v. Smith*, 7 Il. & N. 509; 31 L. J., Ex. 107. The omission to give one of the parties an opportunity of being heard, is misconduct of the arbitrators, and falls within this rule. *Thorburn v. Barnes*, L. R., 2 C. P. 384. Nor can the award be impeached on the ground that the decision of the arbitrator has proceeded on a mistake. *Johuson v. Durant*, 2 B. & Ad. 925. But the defendant may show that it is not conformable to the submission, where the defence is properly pleaded.

Although an award is not final if it do not award costs in some way, where they are in the discretion of the arbitrator, yet if the submission can be

made an order of court, the amount need not be specified, as the taxing-master has jurisdiction over them; and the costs need not have been taxed before action brought. *Holdsworth v. Barsham*, 1 B. & S. 1; 32 L. J., Q. B. 299, Ex. Ch.

As to calling the arbitrator as a witness to show that he has exceeded his jurisdiction in making his award, which was good on the face of it, see *Bueclough, Dk. of, v. Metropolitan Board of Works* and *O'Rourke v. Commissioner for Railways*, cited *ante*, p. 165.

It may be observed that, where the amount of compensation to be paid for land compulsorily taken has been fixed by an award under the Lands Clauses Act, 1845, an action for the amount cannot be maintained until a conveyance of the land has been executed. *E. London Union v. Metropolitan Ry. Co.*, L. R., 4 Ex. 309.

### ACTION ON A SOLICITOR'S BILL.

By the J. Act, 1873, s. 87, the time-honoured name of "attorney-at-law" was abolished, and attorneys and solicitors are now all called "solicitors of the Supreme Court," *vide post*, p. 502.

In an action upon a solicitor's bill the plaintiff must prove, when denied, (1) his retainer as solicitor by the defendant; which may be done by showing either an express retainer, or that the defendant attended at his office, and gave directions, or in other ways recognised his employment; (2) that the business was done; which may be proved by a clerk, or other agent, who can speak to the existence of the cause, or the business in respect of which the charges are made, and can prove the main items.

*Retainer.*] Proof of a judge's order, referring the bill to be taxed, and of the defendant's undertaking to pay the taxed costs, and of the master's *allocatur*, will be sufficient proof both of the retainer and of the business having been done. *Lee v. Jones*, 2 Camp. 496. In an action against an ordinary corporation, the plaintiff must show a retainer under seal. *Arnold v. Poole, Mayor of*, 4 M. & Gr. 860; *Sutton v. Spectacle Makers' Co.*, 10 L. T. 411, E. T. 1864, Q. B. But in the case of commercial companies incorporated by Act of Parliament, such as railway companies, there is usually a power to retain solicitors and other like officers without a retainer under seal. So such power is conferred on companies incorporated under the Companies Acts, 1862, 1867, by sect. 37 of the latter Act. And, where, by an Act of Parliament, the directors of a railway company had power to appoint and displace officers, this was held to extend to an attorney, who therefore need not be appointed under the common seal of the company. *R. v. Cumberland, Justices of*, 5 D. & L. 43, n.; 17 L. J., Q. B. 102. And, where the retainer, by a common law corporation, is by resolution only, such retainer is sufficient to warrant payment by the corporation, though it may not be sufficient to found an action against them. *R. v. Lichfield*, 10 Q. B. 534. The managing partner of a firm has an implied authority to retain a solicitor to defend an action brought for the price of goods delivered to the firm in its ordinary course of business. *Tomlinson v. Broadsmith*, (1896) 1 Q. B. 386, C. A. The liquidator of a company is not personally liable to the solicitor employed by him, in a voluntary liquidation, for the costs thereof; *In re Trueman's Estate*, L. R., 14 Eq. 278; nor in a compulsory liquidation; *Ex pte. Watkin*, 1 Ch. D. 130. When several actions against several defendants are consolidated, and are to abide the event of one, the same



solicitor having been retained by each of the defendants, he is entitled to hold all the defendants liable to the costs of the action tried, as on a joint retainer, *Anderson v. Boynton*, 13 Q. B. 308. A solicitor who has obtained judgment for a client has no authority, without special instructions, to engage in interpleader proceedings. *James v. Ricknell*, 20 Q. B. D. 164. Although a lessee or mortgagor is usually to pay the expenses of the lease or mortgage, yet he is not *directly* liable for them to the solicitor of the lessor or mortgagee, who prepared the instruments; *Rigley v. Daykin*, 2 Y. & J. 83; but slight evidence is sufficient to show direct liability, as that the solicitor received instructions from the lessee, and was desired by him to send the bill of costs to him; *Smith v. Clegg*, 27 L. J., Ex. 300; *Webb v. Rhodes*, 3 N. C. 732. Under the Mortgagee's Legal Costs Act, 1895, 58 & 59 V. c. 25, a solicitor can charge profit costs of a mortgage from a client to himself; or in respect of proceedings relating to the mortgage. See *In re Norris*, (1902) 1 Ch. 741. Before this act the rule was otherwise. See *In re Doodly*, (1893) 1 Ch. 129, C. A. and cases cited therein. As to the liability of the husband for the costs of preparing a marriage settlement, see *Helps v. Clayton, et ux.*, 17 C. B., N. S. 553; 34 L. J., C. P. 1; it must, however, be observed that in this case the *dicta* was made *obiter*, as the action was brought against the husband and wife, upon the retainer of the wife, given *dum sola*, and that under the Married Women's Property Act, 1882, s. 14, *post*, p. 1169, a husband is now liable for his wife's antenuptial debts to the extent only thereby defined, and under sec. 13 (*post*, p. 1176) the wife remains liable in respect of her separate property. As to the liability of the husband, on the retainer of his wife, living apart from him, see *Wilson v. Ford*, and other cases cited *post*, pp. 555, 556. As to the continuance of such retainer see *In re Wingfield and Blew*, (1904) 2 Ch. 665, C. A.

*Admittance, Certificate, &c.*] The Solicitors' Act, 1843, (6 & 7 V. c. 73), s. 2, prohibits any person from acting in any way as solicitor unless duly admitted, enrolled, and qualified. By sect. 31 no solicitor shall prosecute or defend suits in his own or another's name whilst in prison, nor sue for fees, rewards, or disbursements, in respect of any business done by him whilst such prisoner.

By the Solicitors Act, 1874 (37 & 38 V. c. 68), s. 12, "No costs, fee, reward or disbursement on account of, or in relation to, any act or proceeding done or taken by any person who acts as an attorney or solicitor, without being duly qualified so to act, shall be recoverable in any action, suit, or matter by any person or persons whomsoever." A person is duly qualified for the purposes of this section if he have a stamped certificate in force, or be appointed solicitor to some public department.

By the Stamp Act, 1891, s. 43 (1), "Every person who in any part of the United Kingdom (a) directly or indirectly acts or practises as a solicitor," &c., in any court, "without having in force at the time a duly stamped certificate; or (b) on applying for his certificate does not truly specify the facts and circumstances upon which the amount of duty chargeable upon the certificate depends": . . . "shall be incapable of maintaining any action or suit for the recovery of any fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by him in any such capacity."

The 37 & 38 V. c. 68, s. 12, applies even where a client has taken out an order of course for taxation of the bill with the usual submission to pay what was found to be due. *In re Sweeting*, (1898) 1 Ch. 268.

An attorney of one court could not practise in another court without signing the roll (6 & 7 V. c. 73, s. 27), nor could he recover his fees till he had so done. *Latham v. Hyde*, 1 Cr. & M. 128; *Vincent v. Holt*, 1 Taunt. 452. So in an action by several partners, attorneys, for business done in a

local court, it appearing that only one of the plaintiffs was an attorney of that court, it was held that they could not jointly recover. *Arden v. Tucker*, 1 M. & Rob. 191. All the superior courts, except the House of Lords, and the Judicial Committee of the Privy Council, are now consolidated together and constitute one Supreme Court of Judicature (J. Act, 1873, s. 3; Bky. Act, 1883, s. 93 (1), and all attorneys and solicitors are now solicitors of that court (J. Act, 1873, s. 87). Signature of the roll of that court only will therefore entitle a solicitor to practise in any branch or division of the Supreme Court.

*Signed bill.—Special agreement.*] The last act which requires delivery of a bill before action is 6 & 7 V. c. 73. By sect. 37 of that act, no solicitor, nor any executor, administrator, or assignee of any solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such solicitor, until the expiration of one [calendar] month after such solicitor, or executor, administrator, or assignee of such solicitor, shall have delivered unto the party to be charged therewith, or sent by the post to, or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, &c., which bill shall either be *subscribed* by the solicitor or by any of the partners, with his own name or with the name or style of the partnership, or of the executor, administrator, or assignee of such solicitor, or be enclosed in or accompanied by a letter subscribed in like manner referring to such bill. Provided that it shall not be necessary in the first instance for such solicitor, &c., to prove the contents of the bill delivered, sent, or left; but it shall be sufficient to prove that a bill, subscribed or enclosed as aforesaid, was delivered, sent, or left; but nevertheless, it shall be competent for the other party to show that the bill so delivered, &c., was not such a bill as constituted a *bonâ fide* compliance with this act. Stat. 38 & 39 V. c. 79 empowers a judge, in certain cases therein specified, to allow the action to be commenced although the month shall not have expired.

The case of bills for business in the House of Lords and Commons respectively, is provided for by 12 & 13 V. c. 78, and 10 & 11 V. c. 69, extended by 42 & 43 V. c. 17.

The 6 & 7 V. c. 73, repeals 2 G. 2, c. 23, on which many cases were decided, and the present Act is expressed in language, in general sufficiently different, to make most of them inapplicable to it. Those decisions only are here retained which, from the similarity of the language used, are not manifestly useless.

One distinction between this Act and the former seems to be that the power of taxing bills now extends to bills for *any business* done by a solicitor. It is no longer confined to proceedings taken in a court, and the only qualification is one evidently implied, though not expressed, *viz.*, that it should be done *as solicitor*. In all such cases a bill must be delivered, sent, or left in the manner required by section 37. See *Smith v. Dimes*, 4 Exch. 32, 40, *per cur.*

By 12 G. 2, c. 13, s. 6, an attorney might sue another attorney for agency business without delivering any bill; but this Act is repealed, and the present Act contains no such exception. It also requires assignees and personal representatives of solicitors to deliver bills. In some cases (as *In re Gedge*, 2 D. & L. 915, and *In re Simons*, 3 D. & L. 156), it had been held that agency business was virtually excepted out of the 6 & 7 V. c. 73. But in *Billing v. Coppock*, 1 Exch. 14, where an attorney employed another attorney to defend an indictment, the bill delivered by the latter to the former was held taxable; and it seems to follow that the delivery of the bill is obligatory. *Accord. Smith v. Dimes*, 4 Exch. 32. The cases on the effect of including taxable and untaxable items in the

same bill are no longer retained, both because all business seems to be now taxable, and because many of the old distinctions were founded on no clear principle, and are not likely to govern the construction of the existing Act.

A solicitor's bill cannot be recovered on an account stated without proof of the delivery of the bill, though the amount has been admitted; *Eicke v. Nokes*, 1 M. & Rob. 359; *Brooks v. Bockett*, 9 Q. B. 847. But the solicitor may recover on a promissory note given for the amount. *Jeffreys v. Evans*, 14 M. & W. 210. And if a solicitor S. has a claim against his client W. for costs, and W. has a cross claim against S., and they orally agree upon the amounts of their respective claims, and state an account showing a balance due to S., S. may recover it without proving delivery of a detailed bill. *Turner v. Willis*, (1905) 1 K. B. 468, C. A. As to setting off a solicitor's bill, see sub tit. *Defences—Set-off*, post. p. 705.

An agreement entered into by a client with his attorney to pay him at a certain special rate for business to be done was not binding, or, at all events, not conclusive upon the client. *Drax v. Scroope*, 2 B. & Ad. 581. Such an agreement was void, at least to the extent that the attorney could not recover on it a larger sum than the master would allow on taxation; and therefore, a bill in which a gross sum is charged by the attorney as *per agreement*, without giving specific items so as to enable the master to tax them, was not a compliance with the 6 & 7 V. c. 73, s. 37. *Philby v. Hazle*, 8 C. B., N. S. 647; 29 L. J., C. P. 370. But, in the absence of a defence pleaded of no signed bill delivered, a solicitor might prove and recover a specified sum agreed to be paid. *Scarth v. Rutland*, L. R., 1 C. P. 642. A solicitor employed as clerk to a public board at a fixed salary can recover his salary, although part of the work be done as a solicitor without having delivered a bill of such part. *Bush v. Martin*, 2 H. & C. 311; 33 L. J., Ex. 17. So an agreement between a solicitor and his client that the former shall be paid a fixed yearly salary, to be clear of all expenses of his office, and to include all emoluments, he paying to his client any surplus that may arise of receipts over payments, and undertaking to do no work for any other client, is legal. *Galloway v. London, Cor. of*, L. R., 4 Eq. 90.

Now by the Attorneys and Solicitors Act, 1870 (33 & 34 V. c. 28), s. 4, a solicitor "may make an agreement in writing with his client respecting the amount, and manner of payment," for his fees or disbursements, &c., either by a gross sum, or commission, or salary, but where the agreement is in respect of business transacted in court, the amount payable thereunder shall not be received by the solicitor until the agreement has been approved by a taxing officer. A client is not now bound by an oral agreement to pay the solicitor a lump sum in satisfaction of past costs. *In re Russell*, 30 Ch. D. 114. A receipt containing the terms of an agreement assented to by the solicitor, signed by the client only, is sufficient, *Ex pte. Baylis*, (1891) 1 Q. B. 462, dissenting from the dictum of Ld. Coleridge, C.J., in *Ex pte. Munro*, 1 Q. B. D. 724, 726. But such a receipt assented to by the client, signed by the solicitor only, is insufficient. S. C. The client may set up an agreement as to costs, although not in writing. *Clare v. Joseph*, (1907) W. N. 116, C. A., reversing S. C. (1906) 2 K. B. 592. By sect. 8, no action shall be brought to enforce an agreement made under sect. 4, but the same may be enforced by the court on motion. This section applies only to an action to recover the agreed remuneration, and does not prohibit an action for refusing to allow the work to be done. *Rees v. Williams*, L. R., 10 Ex. 200. An agreement under this Act obviates (see sec. 15) the objection of no signed bill having been delivered, when an action is brought to enforce a solicitor's charges.

Now under the Solicitors' Remuneration Act, 1881 (44 & 45 V. c. 44), s. 2, general orders are made as to "the remuneration of solicitors in respect

of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business not being business in any action or transacted in any court, or in the chambers of any judge or master, and not being otherwise contentious business." See *Stanford v. Roberts*, 26 Ch. D. 155; *Humphreys v. Jones*, 31 Ch. D. 30, C. A. But by sect. 8 (1), in respect of such business it shall be competent for a solicitor and client, before or after or in the course of such business, to make an agreement for the remuneration of the solicitor to such amount, and in such manner, as they shall think fit, by a gross sum, or by commission or percentage, or by salary or otherwise. (2) "The agreement shall be in writing, signed by the person to be bound thereby, or by his agent in that behalf." (3) The agreement may be made on the terms that the remuneration shall or shall not "include all or any disbursements made by the solicitor in respect of searches, plans, travelling, stamps, fees, or other matters." (4) "The agreement may be sued and recovered on or impeached and set aside in like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor." The agreement must be signed by the party seeking to repudiate it. *Ex pte. Perrett*, (1893) 2 Ch. 284, C. A. As to what is a sufficient agreement, *vide S. C.*, and *In re Baylis*, (1896) 2 Ch. 107. Where an action is brought on such an agreement, the defence of no signed bill will not be available. By sect. 9, "the Attorneys and Solicitors Act, 1870," *ante*, p. 503, "shall not apply to any business to which this Act relates."

*Delivery of the bill, how, and to whom.*] Where the non-delivery of a signed bill is pleaded, plaintiff must prove that the bill was not only delivered, but left with the defendant for examination. *Brooks v. Mason*, 1 H. Bl. 290. Showing and explaining the bill without a regular delivery is not sufficient. *Crowder v. Shee*, 1 Camp. 437. It has been held not sufficient to prove that the bill was delivered at a particular place not shown to be the defendant's abode, and that the defendant afterwards delivered it to the attorney's clerk; *Eicke v. Nokes*, M. & M. 303; unless it appears that the defendant had it in his possession a month before action; *per Alderson, B.*, *Eggington v. Cumberledge*, 1 Exch. 271; in which case a delivery of a bill by a local attorney to the general attorney of a company, who submitted it to the provisional committee, one of whom present was the defendant, a month before action, was held sufficient. *Accord. Phipps v. Daubney*, 16 Q. B. 514; 20 L. J., Q. B. 273, Ex. Ch. A delivery at the office of a public company, or to a person representing it, would be sufficient; but a delivery to one provisional committee-man at his private place of business is not sufficient alone, as against a co-committee-man; *Edwards v. Lawless*, 6 C. B. 329. See also *Blandy v. De Burgh, Ltd.*, *Id.* 623. If, however, two be shown to be joint contractors, the delivery to one is good as against the other. *Mant v. Smith*, 4 H. & N. 324; 28 L. J., Ex. 234.

The delivery of the bill to the attorney of the party has been held good, where that attorney had obtained the order for delivery of the bill; *Vincent v. Slaymaker*, 12 East, 372; or where the party himself afterwards attended the taxation. *Warren v. Cunningham*, Gow, 71. So, a delivery to one of the retaining persons, who has been authorized to act for the others, is a delivery to all. *Finchett v. How*, 2 Camp. 277. Thus, where an attorney had been retained jointly by several persons to defend several suits against each, in the subject-matter of which they had a common interest, it was held that the delivery of a bill to one was sufficient to enable the plaintiff to maintain a joint action against all. *Oxenham v. Lemon*, 2 D. & Ry. 461. Some of the above decisions were under the repealed statute, but they seem to be still applicable, as the wording of the two is very similar;

for by the 2 Geo. c. 23, s. 23, the bill is to be "delivered to the party to be charged therewith, or left for him at his dwelling-house or last place of abode."

*Delivery of the bill, how proved.*] As to proof of delivery of bill by indorsement made on a copy by a deceased clerk in the ordinary course of his business, see *Champneys v. Peck*, 1 Stark. 404, and other cases cited *ante*, pp. 59 *et seq.* As to evidence of sending bill by post, see *Skilbeck v. Garbett*, 7 Q. B. 846, and other cases cited *ante*, p. 385.

*Delivery of the bill at what time.*] The bill must be proved to have been delivered one calendar month before the commencement of the action; 6 & 7 V. c. 73, ss. 37 and 48. See *Ryalls v. The Queen*, 11 Q. B. 781. The month must have been reckoned exclusively of the days on which the bill is delivered and action brought. See *Blunt v. Heslop*, 8 Ad. & E. 577; and *Freeman v. Read*, 4 B. & S. 174; 32 L. J., M. C. 226. In calculating the calendar month, the days of the calendar furnish the only guide to follow; *e.g.*, if the bill be delivered on the 28th day of one month, the action may be commenced on the 29th day of the following month, without regard to the length of the month. S. C.

The commencement of the action is determined by the date of the issuing of the writ of summons (Rules, 1883, O. ii. r. 1); and as this date appears on the statement of claim (see Rules, 1883, Forms, App. C.), the plaintiff need now give no further evidence of when he began the action, in order to show that it is not premature.

*Proof and form of the bill.*] The bill may be proved by a copy or duplicate original, without any notice to produce the bill delivered. *Anderson v. May*, 2 B. & P. 237; *Colling v. Treweek*, 6 B. & C. 394. But, it is not now necessary in the first instance for the plaintiff to prove the contents; it is enough to prove that a bill of fees, &c., subscribed or inclosed in a signed letter, was duly delivered, and the defendant may show that it was not a *bonâ fide* compliance with the Act. See 6 & 7 V. c. 73, s. 37, *ante*, p. 502. The Act does not prescribe any form of making out the bill, as 2 G. 2, c. 23, s. 23, did. See *Reynolds v. Caswell*, 4 Taunt. 193, on the old act. And this has not been sufficiently attended to in cases decided since the last act, in which the courts have been influenced too much by the strict requirements of the old one. Thus, it was held that the bill must still show in what court the business had been done; *Engleheart v. Moore*, 15 M. & W. 518; *Martindale v. Falkner*, 2 C. B. 706; but, it is sufficient if the court appear by reasonable inference; S. C.; *Sargent v. Gannon*, 7 C. B. 742. It was, however, decided that, the authority to tax, and the scale in all the superior courts of law being the same, it was *primâ facie* enough if it appeared to be business done in any of those courts, and that the defendant ought to have applied for a better bill, if it were *bonâ fide* necessary; *Cozens v. Graham*, 12 C. B. 398; 21 L. J., C. P. 206; *Cook v. Gillard*, 1 E. & B. 26; 22 L. J., Q. B. 90; and the cases *contra*, decided shortly after the passing of the present act, must not be relied on. And now the scale in all the divisions of the Supreme Court (*vide ante*, p. 502) is the same. If the cause be sufficiently described to be understood, the technical title need not appear. *Anderson v. Boynton*, 13 Q. B. 308. The bill must show, either by the heading or by the accompanying letter or envelope, the party charged. *Taylor v. Hodgson*, 3 D. & L. 115; *Lucas v. Roberts*, 11 Exch. 41; 21 L. J., Ex. 227; *Gridley v. Austen*, 16 Q. B. 504; *Champ v. Stokes*, 6 H. & N. 683; 30 L. J., Ex. 242. A mistake in the date of the items, which does not mislead, will not vitiate the bill. *Williams v. Barber*, 4 Taunt. 806. So a mistake in the name of the parties to the cause at the head of the bill, if not of a nature

to mislead, or if the right name appears indorsed. *Sergent v. Gannon, ante*, p. 505. If part of the business were done in a court, named in the bill, and part in an unnamed one, it has been considered that the plaintiff cannot recover any part. *Teincy v. Marks*, 16 M. & W. 843; *Dimes v. Wright*, 8 C. B. 831. But this is the rule where only there is not enough in the bill to show on what scale the costs should be taxed; and where a part of the business appeared to have been done in an unnamed superior court of law, but the bulk of it in a named court of law at Westminster, this was held enough. *Keene v. Ward*, 13 Q. B. 515. The reasoning of the Q. B., in S. C., and *Cook v. Gillard, ante*, p. 505, seems to impugn the doctrine of *Teincy v. Marks*, and *Dimes v. Wright, supra*, that a bill insufficient for part is bad altogether; which is, however, supported in *Pigot v. Culman*, 1 H. & N. 837; 26 L. J., Ex. 134. On the other hand, *Cook v. Gillard, ante*, p. 505, and *Keene v. Ward, supra*, are adhered to, and the cases in the Exchequer dissented from, in *Haigh v. Ousey*, 7 E. & B. 578; 26 L. J., Q. B. 217. And the Q. B. point out that the C. P. had expressly decided in *Waller v. Lucy*, 1 M. & Gr. 54, that an attorney may recover for such of the items of his bill as are sufficiently described, although, as to others, the bill is insufficient. Where the solicitor A. who did the work assigned his business and debts to B., it was held that a bill signed by B. was sufficient to entitle him to sue. *Penley v. Anstruther*, 52 L. J., Ch. 367; *Ingle v. McCutchan*, 12 Q. B. D. 518.

*Interest.*] The General Order, cl. 7, made under the Solicitors' Remuneration Act, 1881, 44 & 45 V. c. 44 (to take effect after Dec. 31st, 1882), provides that "a solicitor may accept from his client, and a client may give to his solicitor, security for the amount to become due to the solicitor for business to be transacted by him, and for interest on such amount, but so that interest is not to commence till the amount due is ascertained, either by agreement or taxation. A solicitor may charge interest at 4 per cent. per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from demand from the client. And in cases where the same are payable by an infant, or out of a fund not presently available, such demand may be made on the parent or guardian, or the trustee or other person liable." See *In re Marsden's Estate*, 40 Ch. D. 475.

The solicitor is, under this order, entitled, after the taxation of his bill, to recover interest on the taxed amount, from one month from the date of the delivery of the bill, although he made no claim for interest until the taxed amount was paid. *Blair v. Cordner*, 19 Q. B. D. 516, M. R., and L. J.J.

#### Defence.

*Non-delivery of bill.*] The defence of non-delivery of a bill must be specially pleaded. *Lane v. Glenn*, 7 Ad. & E. 83; see Rules, 1883, O. xix. r. 15, *ante*, p. 309. Proof that the bill was delivered to a servant of the defendant at his house is *primâ facie* evidence of delivery to the defendant. *McGregor v. Keily*, 3 Exch. 794. In the absence of the defence, the solicitor may prove and recover a specific sum agreed to be paid. *Scarth v. Rutland*, L. R., 1 C. P. 642.

*Disputed charges.*] Where a bill has been delivered containing taxable items (and almost all items are so now), it was held, under the old act, that the defendant could not object to the reasonableness of the charges at the trial. *Williams v. Prith*, 1 Doug. 198; *Anderson v. May*, 2 B. & P. 237; *Lee v. Wilson*, 2 Chitty, 65. The reason seems to have been that the defendant might have had them taxed by more competent persons than a

jury, and must therefore be taken to have acquiesced in them conclusively. But by the present Act (6 & 7 V. c. 63, s. 37) it is only after a verdict or writ of inquiry, or the expiration of one year from the delivery of the bill, that the reference to taxation at the request of the party chargeable is not grantable of course; and in point of practice a verdict is almost always taken subject, as to the amount, to taxation by the proper officer. See *Lumsden v. Shipcote Land Co.*, (1906) 2 K. B. 433, C. A., and *Lumley v. Brooks*, 41 Ch. D. 323, C. A. And even where a testator had retained the bill for 12 months before his death, it was held that this was *primâ facie* evidence only that the charges were reasonable, and certain items objected to by the executor were referred to the taxing master for his report as to whether they were fair and proper to be allowed, and to what amount. *In re Park*, *Id.* 326, C. A. It seems, however, that the plaintiff, is not entitled as of right to have the amount so ascertained. *Ex pte. Ditton*, 13 Ch. D. 318, C. A.

The delivery of a former bill is conclusive against an increase of charge on any of the same items contained in a subsequent bill for the same business, and strong presumptive evidence against any additional items; but errors or real omissions are to be allowed for. *Loveridge v. Botham*, 1 B. & P. 49. See *Lumsden v. Shipcote Land Co.*, *supra*. Where the bill had been taxed previously to the signed bill being delivered, the master's *allocatur* was not conclusive against the plaintiff on a plea of *nunquam implebitatus*, but only strong evidence that no more is due; *Beck v. Cleaver*, 9 Dowl. 111: there the difference of amount depended on when the retainer of the plaintiff was revoked. It is a good defence that the plaintiff undertook the cause *gratis*; and the declaration of his clerk to that effect, when he attended to tax costs, is evidence for the defendant. *Ashford v. Price*, 3 Stark. 185. The stat. 33 & 34 V. c. 28, ss. 4, 11, does not require that an agreement with the client "to charge him nothing if he lost the action, and to take nothing for costs out of any money that might be awarded to him in such action," should be in writing. *Jennings v. Johnson*, L. R., 8 C. P. 425. If a solicitor undertake to charge a client only costs out of pocket, "in case the damages or costs should not be recoverable," and the client recovers, but the defendant becomes insolvent, the solicitor is not limited to costs out of pocket. *In re Strutton*, 14 M. & W. 806. The plaintiff is *primâ facie* entitled to be paid for professional services; but, where the defendant proves facts which are evidence of gratuitous services, the jury ought not to be told "to find for the plaintiff unless the defendant has established his defence," but should be asked whether, taking all the evidence together, the plaintiff has proved his title to payment; for the onus of proof lies on him, and if the matter is made *doubtful* in their minds by the evidence, they ought to find for the defendant. *Hingeston v. Kelly*, 18 L. J., Ex. 360.

[*Negligence or misconduct of plaintiff.*] The plaintiff's negligence in the conduct of the business cannot be set up as a *defence*, if it has not been such as to deprive the defendant of all benefit; *Templer v. M'Lachlan*, 2 N. R. 136; but where such has been the case, as where the defendant's appeal against the removal of a pauper wholly failed from the plaintiff going to the wrong sessions and wrongly signing the notices himself, the plaintiff cannot recover; *Huntley v. Bulwer*, 6 N. C. 111; and if a solicitor conducting a suit commits an act of negligence by which all the previous steps become useless in the result, he can recover for no part of his business. *Bracey v. Carter*, 12 Ad. & E. 373. So where an indictment for perjury failed for misnomer of the commissioner before whom it was committed, and the jury found gross negligence, the plaintiff cannot recover; *Lewis v. Samuel*, 8 Q. B. 685; even though the client was only to pay costs out of pocket, which was all the plaintiff sought to recover. S. C. A solicitor

cannot recover costs of suit in an inferior court, which, as he ought to have known, had no jurisdiction in the matter, and was restrained by prohibition. See *Robinson v. Emmanuel*, L. R., 9 C. P. 415, 416. So if a solicitor sue in a court which is without adequate powers to examine material witnesses out of the jurisdiction, and the suit fail accordingly, he cannot recover his costs of the suit; but he may recover the costs of letters before suit demanding the debt. *Cox v. Leach*, 1 C. B., N. S. 617; 26 L. J., C. P. 125. So where a solicitor commences an action on two foreign bills, without having first ascertained whether they had been specially indorsed to his client, which the solicitor knew was necessary by the foreign law, and the action is discontinued for want of such indorsement, he can recover no costs. *Long v. Orsi*, 18 C. B. 610; 26 L. J., C. P. 127. If a solicitor, through inadvertence or inexperience, do useless work, he cannot recover anything for it. *Hill v. Featherstonhaugh*, 7 Bing. 569. And entire items for useless work may be expunged. *Shaw v. Arden*, 9 Bing. 287. But if there be other causes conducing to the loss of the benefit besides the plaintiff's negligence, the negligence is no defence. *Dax v. Ward*, 1 Stark. 409. It was no defence to an action for business done in defending a suit, that the plaintiff was instructed to put in a plea for delay, which he neglected to do. *Johnson v. Alston*, 1 Camp. 176. Nor that the plaintiff refused to go on with a suit in Chancery, if the defendant did not supply him with money; *Rowson v. Earle*, M. & M. 538; for though a solicitor cannot suddenly and without notice abandon a cause, yet if he give reasonable notice, he is at liberty to discontinue the conduct of it, on the refusal by the client to supply him with money; and he may recover for the work done. *Vansaulau v. Browne*, 9 Bing. 402. Where a solicitor prepares for a client a document which turns out to be illegal, but with regard to the legality of which there was reasonable doubt, he is entitled to recover for preparing it. *Potts v. Sparrow*, 6 C. & P. 749. The illegality must at all events be pleaded; S. C., 1 N. C. 594; unless it makes the work done wholly useless; *semb. Tabram v. Warren*, 1 Tyr. & Gr. 153; *Roberts v. Barber*, Chitty, Preced. 3rd ed. 320. So the misinterpretation of a rule or order (such as a standing order of the House of Lords, by a solicitor acting as a parliamentary agent), the construction of which is doubtful, is not such culpable negligence as to disentitle the plaintiff to recover for his work, although in consequence of the mistake the bill is withdrawn. *Bulmer v. Gilman*, 4 M. & Gr. 108; see also *In re Sudd*, 34 Beav. 653; 34 L. J., Ch. 562. It is a good defence that the plaintiff paid no attention to the defendant's case, but resided at a distance from the place where his business was carried on, and that in fact it was transacted there by another person employed by plaintiff; *Taylor v. Glassbrook*, 3 Stark. 75; *Hopkinson v. Smith*, 1 Bing. 13; and this was ruled without reference to the success or miscarriage of the business done.

The plaintiff's negligence may now in any case be set up as a counterclaim *pro tanto* under Rules, 1883, O. xix. r. 3, *post*, p. 704.

[*Want of certificate, admission, &c.*] The defendant may put the plaintiff to prove, under a special defence, that the plaintiff had a certificate; *vide ante*, p. 501; or was duly admitted. *Hill v. Sydney*, 7 Ad. & E. 956. By the 23 & 24 V. c. 127, s. 22, the Law List, purporting to be published by the authority of the Commissioners of Inland Revenue, and to contain the names of solicitors who have obtained stamped certificates for the current year (from 16th November or any later day to 15th November in the next year), on or before the 1st of January in the same year, shall, until the contrary be made to appear, be evidence in all courts, &c., that the persons named in it as such solicitors are so certificated; and the absence of the name of any person from the List shall be *prima facie* evidence that he is



not so qualified to practise as a solicitor under a certificate for the current year; but in the latter case an extract from the Roll of Attorneys under the hand of the registrar for the time being (or of the secretary of the Law Society, while that society acts as registrar) shall be evidence of the facts appearing in the extract. See J. Act, 1875, s. 14.

*Agency business.*] Where one solicitor does business for another, the solicitor who does the business universally gives credit to the solicitor who employs him, and not to the client for whose benefit it is done. If the solicitor in such case intends not to be personally responsible, it is his duty to give express notice that the business is to be done on the credit of the client. *Per cur.*, *Scrace v. Whittington*, 2 B. & C. 13. But such notice, though it may protect the solicitor from liability, will not necessarily make the client liable. See *Robbins v. Fennell*, 11 Q. B. 248, 256; *Robbins v. Heath*, *Id.* 257, n.; and *Peatfield v. Barlow*, L. R., 8 Eq. 61. The usual agency terms are that the agent should be repaid his disbursements, and receive half the profit charges, *i.e.*, charges involving no expenditure, whether they are paid by the client or not; he is not entitled to interest for delay in payment. *Ward v. Lawson*, 43 Ch. D. 353, C. A.

*Non-completion of work—Statute of Limitations.*] The contract of a solicitor to conduct a common law action is entire and can only be determined on reasonable notice that he will not proceed without payment or advances from the client; the solicitor cannot therefore sue for his costs till the action is ended, *Underwood v. Lewis*, (1894) 2 Q. B. 306, C. A.; or the client dead, *Whitehead v. Lord*, 7 Ex. Ch. 691; 28 L. J., Ex. 239. The statute of limitations (six years) does not therefore run as to any items of the bill until the happening of one of those events. S. C.; *Harris v. Osbourn*, 2 Cr. & M. 629; *Harris v. Quine*, L. R., 4 Q. B. 653. In cases, however, other than a common law action, as a suit for administration or proceedings in bankruptcy which may extend over a considerable time, and in which breaks may occur, at the conclusion of separate and distinct parts of the transaction, the solicitor may sue for the costs of each such parts. *In re Hall and Barker*, 9 Ch. D. 538. As to an arbitration see *In re Romer and Haslam*, (1893) 2 Q. B. 286, C. A. And the principle as to the contract being entire does not extend to miscellaneous work done by a solicitor. *Beck v. Pierce*, 23 Q. B. D. 316, C. A. The statute runs in each case from the completion of the work in respect of which the cause of action arises and not from a month after the delivery of the bill of costs. *Coburn v. Colledge*, (1897) 1 Q. B. 702.

On payment of solicitor's bill, he is bound to deliver to his client H. not only original deeds, &c., belonging to H., but also the drafts and copies for which H. has paid. *Ex pte. Horsfall*, 7 B. & C. 528. See *Gibbon v. Pease*, cited *post*, p. 585.

## ACTION AGAINST SOLICITOR FOR NEGLIGENCE.

*What amounts to actionable negligence.*] An error of judgment on a point of law, open to reasonable doubt, is not sufficient; *Kemp v. Burt*, 4 B. & Ad. 424; there must be gross ignorance or gross negligence in the performance of his professional duties. *Parves v. Landell*, 12 Cl. & F. 91. The solicitor is bound to bring a fair amount of skill, care and knowledge to the performance of his duty, and this will be a question of fact for the jury

under the direction of the judge, who will explain the nature of the duty, and the degree of negligence which makes him responsible. *Hunter v. Caldwell*, 10 Q. B. 69, 83, Ex. Ch. See *Blyth v. Fladygate*, (1891) 1 Ch. 337.

The omission to take the proper steps for renewing a writ, issued to save the Statute of Limitations, is evidence of actionable negligence. *Hunter v. Caldwell*, *supra*. Where a mortgage was prepared under the defendant's advice, and the solvency of the mortgagor was questionable to the knowledge of the attorney, it was held his duty to search at the Insolvent Debtors' Court; and if the language of the defendant show that he considered his search expedient, this is evidence of his suspicions; *Cooper v. Stephenson*, 21 L. J., Q. B. 292; but the court declined to say whether or not searches of this kind are necessarily, and in all cases, essential. See also *Langdon v. Godfrey*, 4 F. & F. 445. It may not be part of the duty of a solicitor to know the legal operation of conveyances, but it is his duty to take care not to draw wrong conclusions from deeds before him, but to lay them before counsel, or draw the conclusions at his own peril; and therefore where a solicitor acted on the advice of counsel to whom he had mis-stated the legal effects of certain deeds which did not accompany the case, this was held evidence for the jury of negligence for which he was responsible. *Ireson v. Pearman*, 3 B. & C. 799. As to a solicitor's liability for investing his client's money by way of mortgage on an insufficient security, see *Dooby v. Watson*, 39 Ch. D. 178.

A solicitor instructed to take or to defend legal proceedings is liable for failure by reason of his own culpable neglect; as where he was retained to proceed on a statute against an apprentice, and he proceeded under a wrong section of the statute as against a servant; *Hart v. Frame*, 6 Cl. & F. 193; or where the solicitor and his witnesses were absent when a cause was called on; and the counsel had a brief and was present, and was obliged to withdraw the record; *Hawkins v. Harwood*, 4 Exch. 503; or where he sued in an inferior court, which, as he ought to have known, had no jurisdiction in the matter, and was restrained by prohibition. See *Robinson v. Emanuel*, L. R., 9 C. P. 415, 416.

There are numerous other cases on this subject; and they establish, in general, that a solicitor is liable for the consequence of ignorance or non-observance of the rules of practice of the court in which he sues; for the want of care in the preparation of the cause for trial; or of attendance thereon with his witnesses; and for the mismanagement of so much of the conduct of a cause as is usually allotted to solicitors. But he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or such as are usually intrusted to counsel. His liability must, however, depend upon the nature and description of the mistake or want of skill which has been shown, and he cannot shift from himself such responsibility by consulting counsel where the law would presume him to have the knowledge himself. *Godfrey v. Dalton*, 6 Bing. 467-9, *per cur.* See *Lee v. Walker*, L. R., 7 C. P. 121.

A solicitor will be liable to an action, at least for nominal damages, for compromising an action against the express directions of his client, though the compromise be really for the benefit of the client; *Butler v. Knight*, L. R., 2 Ex. 109; and, under such circumstances, it is no defence that the solicitor acted under the advice of counsel retained to conduct the cause. *Fray v. Youles*, 1 E. & E. 839; 28 L. J., Q. B. 232. A solicitor retained in an action has no implied authority after judgment in favour of his client, to agree on his behalf to postpone execution. *Lovegrove v. White*, L. R., 6 C. P. 440. As to the implied authority of a solicitor to compromise an action, *vide ante*, p. 283.

By the Partnership Act, 1890 (53 & 54 V. c. 39), s. 10, "Where, by any

wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act."

By sect. 11, "In the following cases; namely—(a.) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and (b.) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm; the firm is liable to make good the loss."

By sect. 12, "Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under either of the two last preceding sections."

Where the money of a client comes into the hands of a partner in a firm of solicitors in the ordinary course of their business as solicitors, the firm are liable to make good any loss occasioned by the partner's defalcation. *St. Aubyn v. Smart*, L. R., 3 Ch. 646; *Dundonald, El. of v. Masterman*, L. R., 7 Eq. 504. So in the case of negotiable share warrants or bonds of the client. *Rhodes v. Mowles*, (1895) 1 Ch. 236, C. A. A sum of money received to be invested on a specific mortgage falls within this rule; *Harman v. Johnson*, 2 E. & B. 61; 22 L. J., Q. B. 297; but, not a sum left to be invested on mortgage generally, for this is the business of a scrivener, and does not fall within the province of a solicitor merely as such. S. C.; *Plumer v. Gregory*, L. R., 18 Eq. 621. A firm of solicitors are not liable for money received by a partner *quâ* trustee; *Dundonald, El. of v. Masterman*, *supra*; or otherwise than in a professional capacity. *Cleather v. Twisden*, 28 Ch. D. 340, C. A.

By sect. 13, "If a partner, being a trustee, improperly employs trust-property in the business or on the account of the partnership, no other partner is liable for the trust-property to the persons beneficially interested therein: Provided as follows:—(1.) This section shall not affect any liability incurred by any partner by reason of his having notice of a breach of trust; and (2.) Nothing in this section shall prevent trust money from being followed and recovered from the firm if still in its possession or under its control."

Where B. has a contract with A., who then takes P. into partnership with notice to B., B. may elect whether he will rest with his contract with A. or accept the joint liability of A. & P.; in the former case P. is not liable for the fraud of A. committed against B. in respect of the contract and within the scope of the partnership. *British Homes Assur. Cor. v. Paterson* (1902) 2 Ch. 404. As to the liability of an outgoing partner, see *Scarf v. Jardine*, *post*, p. 560.

A solicitor when making a special agreement under the Attorneys and Solicitors Act, 1870 (*ante*, p. 503), with reference to his fees, cannot stipulate that he shall not be liable for negligence, as such condition is by sect. 7 wholly void.

*Damages.*] This action is maintainable, though the damages be only nominal; *Godefroy v. Jay*, 7 Bing. 413, adopting the rule in *Marzetti v. Williams*, 1 B. & Ad. 415; *Fray v. Voules*, *ante*, p. 510; and where the plaintiff shows that the solicitor has been guilty of negligence, as by letting judgment go by default in an action which he was retained to defend for the plaintiff, it is for the defendant (the solicitor) to show that the plaintiff had no defence in that action, and not for the plaintiff to begin by showing he had a good

defence, and so had been damaged by the judgment by default. *Godefroy v. Jay*, *ante*, p. 511. See also *Whiteman v. Hawkins*, 4 C. P. D. 13. As to damages where the solicitor has compromised the action contrary to his client's instructions, *Butler v. Knight*, *ante*, p. 510; and where he has improperly sold his client's land under a power of sale, *Cockburn v. Edwards*, 16 Ch. D. 393.

### Defence.

[*Statute of Limitations.*] As the action can be maintained without showing special damage (*ante*, p. 510), it follows that the Statute of Limitations runs from the breach of duty complained of; *Howell v. Young*, 5 B. & C. 259; and not from the first discovery of the default; S. C., *Short v. M'Carthy*, 3 B. & A. 626; nor, from the occurrence of the consequential damage; S. CC.; *Smith v. Fox*, 6 Hare, 386; nor is the remedy kept alive by the defendant's admission of his responsibility within six years. *Short v. M'Carthy*, *supra*. The statute runs although the defendant concealed the negligence until within six years before action, unless he were guilty of fraud. *Armstrong v. Milburn*, 54 L. T. 723; E. S. 1886, C. A. Under the Trustee Act, 1888 (51 & 52 V. c. 59), s. 8 (1), *vide post*, p. 680, the defence now extends to cases where the solicitor was a trustee, "except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use."

## ACTION BY SURGEONS OR OTHER MEDICAL PRACTITIONERS.

The following are the statutes which relate to the qualifications of medical practitioners and their capacity to sue.

The Apothecaries Act (55 G. 3, c. 194), s. 20, prohibits any person from acting or practising as an apothecary without having obtained a certificate from the Court of Examiners of the Apothecaries' Company. See *Davies v. Makuna*, 29 Ch. D. 596, C. A. By sect. 21, no apothecary shall be allowed to recover any charges claimed by him in a court of law, unless he shall prove at the trial that he has obtained such certificate.

The Medical Act, 1858 (21 & 22 V. c. 90, amended by 22 V. c. 21, 23 V. c. 7, and 49 & 50 V. c. 48, s. 2), provides for the formation of a general "medical register" of all persons qualified to practise in medicine, surgery, and midwifery; and (sect. 31), *a person so registered is entitled to practise medicine or surgery, or both according to his qualifications*, in any part of the Queen's dominions, and to demand and recover in any court of law, with "full costs of suit," reasonable charges for professional aid, advice, and visits, and the cost of any medicines or other medical or surgical appliances *rendered or supplied to patients*. By sect. 32, "no person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under this Act."

By sect. 27, the registrar of the general council, formed under the Act, shall yearly cause to be printed and published, under the direction of the council, a register of the names and residences of all persons entitled to be registered under it and appearing in it on Jan. 1st in each year, with their medical titles, diplomas, and qualifications, &c.; and a copy of this

“medical register” for the time being *purporting* to be so printed and published shall be evidence in all courts, and before all justices and others, that the persons therein specified are registered according to the Act; and the absence of the name of any person from such a copy shall be evidence, until the contrary appear, that he is not registered. Provided that in the case of a name not in the copy of the register, a certified copy under the hand of the registrar of the general council, or of any branch council, of the entry of the name on the general or local register, shall be evidence of registration. As to the form of register, see *Pedgrift v. Chevallier*, 8 C. B., N. S. 240; 29 L. J., M. C. 225.

By sect. 55, the Act does not extend to prejudice or affect the lawful occupation, trade, or business of chemists and druggists, and dentists, so far as the same extend to selling, compounding, or dispensing medicines. But if a chemist prescribe he must show registration, as sect. 55 exempts chemists only so far as selling, compounding, and dispensing medicine. See *Apothecaries' Co. v. Greenough*, 1 Q. B. 799.

The Medical Act, 1886 (49 & 50 V. c. 48), s. 28, repeals sect. 31, *ante*, p. 512, and by sect. 6, provides that a medical practitioner registered on or after June 1st, 1887 (see sect. 24, *infra*), is entitled to practise medicine, surgery, and midwifery, and to recover in due course of law in respect of such practice any expenses, charges in respect of medicaments, or any fees to which he may be entitled. But, by sect. 24, the act does not increase or diminish the privileges in respect of his practice, of any person registered before June 1st, 1887, and he is entitled to practise in pursuance of the qualification then possessed by him in medicine, surgery, or midwifery, or any of them, according as he was then entitled, but not further or otherwise.

The language of the Medical Act, 1858, s. 32, resembles that of the Apothecaries Act, 55 G. 3, c. 194, s. 21 (*ante*, p. 512), under which act many of the following cases were decided. Proof of qualification is a condition precedent to recovery, but the want of qualification must now be specially pleaded. See Rules, 1883, O. xix. rr. 15, 20, *ante*, pp. 309, 310. The provisions above as to proof of registration are probably only cumulative, and plaintiff may prove it by production of a “local register,” or, *ut semb.*, by an examined copy, or by a copy certified as in the case of public books under 14 & 15 V. c. 99, s. 14. See *ante*, pp. 97, 101. The qualification of an apothecary may be proved by certificate under 14 & 15 V. c. 99, s. 8, *ante*, p. 101. The identity of the plaintiff and the person named in the register will be presumed. *Simpson v. Dismore*, 9 M. & W. 47. The register only shows registration down to the preceding January, but the plaintiff's continuance on the register will probably be presumed, in conformity with the ordinary presumption of things, remaining *in statu quo*; *ante*, p. 31. To entitle the plaintiff to recover for services and medicines supplied, he must have had the necessary qualification, and be registered in respect thereof, at the time the services were rendered and the medicines supplied. *Leman v. Houseley*, L. R., 10 Q. B. 66. The plaintiff, although duly qualified and registered, cannot recover for medical services rendered exclusively by his assistant who was neither qualified nor registered. *Howarth v. Brearley*, 19 Q. B. D. 303.

Sect. 31 only enables persons registered to practise medicine or surgery “according to their qualifications”; hence, where the plaintiff's qualification is to practise surgery only, he cannot recover for attendance in a medical case, for he is not within the section, and is prohibited from recovering by the Apothecaries Act, s. 21 (*ante*, p. 512). *Allison v. Haydon*, 4 Bing. 619; *Leman v. Fletcher*, L. R., 8 Q. B. 319. He might, however, recover for medicine administered as ancillary to a surgical case;

*vide* S. C. See also on this section, *per* Bramwell, B., *Ellis v. Kelly*, 6 H. & N. 226; better, 30 L. J., M. C. 35, 37. But a medical man registered on or after June 1st, 1887, may practise in either branch. See 49 & 50 V. c. 48, s. 6, *ante*, p. 513. Sect. 32 of 21 & 22 V. c. 90, is not confined in its operation to actions against the patients themselves, but extends to a case where a third person has guaranteed payment for medical attendance, &c., or is primarily liable for it, as supplied on his credit. So, a medical practitioner, engaged by another to attend his patients in his absence, cannot recover the price of his services without proof of registration; *De la Rosa v. Prieto*, 16 C. B., N. S. 578; 33 L. J., C. P. 262; but *semble*, that an unregistered assistant may recover his salary from a registered practitioner; *per cur.* S. C. The Act applies to medical attendance given on board a foreign man-of-war in an English port. S. C. By sect. 46, the general council may dispense with the provisions of the Act, or its own regulations, in favour of certain persons practising before the Act passed. A resident physician or medical officer of an hospital solely for foreigners (not being a British subject) is not affected by the Act if he has a foreign degree or diploma of M.D., and has passed such examination as entitles him to practise in his own country, and is in no other medical practice except as such resident officer; 22 V. c. 21, s. 6.

By the Dentists Act, 1878 (41 & 42 V. c. 33), s. 5, a person registered under that Act may practise dental surgery; and no person who is not registered under that Act, or is a legally qualified medical practitioner, is entitled to recover any fee for any dental operation, attendance, or advice. An unregistered dentist may however recover the price of material, such as gold or false teeth, supplied. *Seymour v. Pickett*, (1905) 1 K. B. 715, C. A. Cf. *Lee v. Griffin*, 1 B. & S. 272; 30 L. J., Q. B. 252. As to evidence of registration, see sect. 29.

By the Midwives Act, 1902, 2 E. 7, c. 17, s. 1, midwives acting as such habitually and for gain after April 1st, 1910, must, unless acting under a qualified medical practitioner, be certified. As an uncertified woman is in general liable to a penalty for practising, (sect. 1 (2)), it seems that she is precluded from recovering a fee for so doing. Cf. *Bonnard v. Bott*, (1906) 1 Ch. 740, C. A., *post*, p. 669, decided on stat. 63 & 64 V. c. 51, s. 2 (c). As to evidence of certification, see sects. 6, 7.

By the Veterinary Surgeons Act, 1881 (44 & 45 V. c. 62), s. 17 (2), no person not for the time being on the register of veterinary surgeons, or who on the 27th Aug., 1881, held the veterinary certificate of the Highland and Agricultural Society of Scotland, shall be entitled to recover any fee for performing any veterinary operation or for giving attendance or advice. See *R. College of Veterinary Surgeons v. Robinson*, (1892) 1 Q. B. 557.

The superintendent of a station of a railway company cannot, as such, and without express authority, make the company liable for a surgeon's bill for attendance on a person injured by an accident on the railway; *Cox v. Midland Counties Ry. Co.*, 3 Exch. 268; but the general manager of a railway has, incidental to his employment, authority to bind the company to pay for surgical attendance bestowed at his request on a servant of the company injured by an accident on their railway. *Walker v. Gt. W. Ry. Co.*, L. R., 2 Ex. 228.

### Defence.

If the defendant have received no benefit, in consequence of the plaintiff's want of skill, the latter cannot recover. *Kannen v. M'Mullen*, Peake, 59; *Duffit v. James*, cited 7 East, 480. But the remuneration of a practitioner who has used due skill and diligence does not depend on his effecting a

cure. In the case of a surgeon, if an operation which might have been useful have failed in the event, he is nevertheless entitled to charge; but if it could have been useful in no event, he has no claim. *Per Alderson, J.*, in *Hill v. Featherstonhaugh*, 7 Bing. 574.

#### Physicians' Fees.

At common law, a physician could maintain no action for his fees; *Chorley v. Bolecot*, 4 T. R. 317; nor for travelling expenses; *Veitch v. Russell*, 3 Q. B. 928; unless there were a special contract proved by unambiguous evidence, and not by mere letters acknowledging a "debt" or an "account," in vague general terms; S. C.; *Att.-Gen. v. R. College of Physicians, infra*; or unless he had rendered services as a surgeon. *Battersby v. Lawrence*, Car. & M. 277. But the Medical Act, 1886, s. 6, (*ante*, p. 513), replacing the Medical Act, 1858, s. 31, gives a general right of action to all registered medical practitioners; and a physician, if registered, may now sue without proof of any express contract or implied understanding with the patient that he should be paid. *Gibbon v. Budd*, 2 H. & C. 92; 32 L. J., Ex. 182. By that section, however, any college of physicians in the United Kingdom may make a bye-law that their fellows shall not sue for their fees; and if they do, the bye-law may be pleaded in bar. The R. College of Physicians has passed such a bye-law, but this does not include members. *Vide S. C.* That college can grant licences without restricting their licentiates from compounding and selling the medicine they prescribe. *Att.-Gen. v. R. College of Physicians*, 1 J. & H. 561; 30 L. J., Ch. 757.

### ACTION FOR WAGES AND WRONGFUL DISMISSAL.

In an action by a servant for his wages the plaintiff must prove a hiring, of which service will be evidence, the length of time of service, and the amount of wages due.

An indefinite hiring in the case of servants, without mention of time, is presumably a hiring for a year. *Lilley v. Elwin*, 11 Q. B. 742; *Turner v. Robinson, infra*. The fact that the wages is payable monthly makes no difference. And if, during the year, the master dismiss his servant without cause, the latter is entitled, as damages, to his wages until the end of the year. *Beeston v. Collyer*, 4 Bing. 309; *Fawcett v. Cash*, 5 B. & Ad. 904. See, however, as to damages, *post*, p. 520. If the servant leave his service during the year without good cause, he cannot recover any of the current wages; *Huttman v. Boulnois*, 2 C. & P. 510. So, if he be discharged for good cause during the year, either by his master or a magistrate's order: *Lilley v. Elwin, supra*; *Ridgway v. Hungerford Market Co.*, 3 Ad. & E. 171; and see further, *post*, p. 518; even though the master has recovered damages against him for the misconduct. *Turner v. Robinson*, 5 B. & Ad. 789. So, if the servant die during the year. *Plymouth v. Thrognorton*, 1 Salk. 65. But where S. was employed as consulting engineer, at 500*l.* payable in equal quarterly instalments, for 15 months, to complete certain works, and died after two instalments became due, but before the work was finished, his administrator was held entitled to recover the two instalments. *Stubbs v. Holywell Ry. Co.*, L. R., 2 Ex. 311. The rule that an indefinite hiring is to be taken as a yearly one is not a rule of law; but the jury are to say what the terms of hiring were, judging from the circumstances of the case, including evidence, if any, of usage; thus, on an indefinite hiring at certain weekly wages, the

jury may infer that the hiring is weekly. *Barter v. Nurse*, 6 M. & Gr. 935. So, a hiring at "2l. 2s. a week for one year," *Robertson v. Jenner*, 15 L. T. 514, Bramwell, B.; or at "2l. a week and a house," *Evans v. Roe*, L. R., 7 C. P. 138; is a hiring by the week and not by the year. See also *R. v. Droitwich*, 3 M. & S. 243. And where there is such a written contract, oral evidence that, at the time it was signed, it was intended to be a hiring for a year, is inadmissible. *Evans v. Roe*, *supra*. Where the plaintiff was engaged as a clerk at a yearly salary of 150*l.*, and was paid his wages weekly, and accepted a month's notice as determining his service, and afterwards re-entered the service at a salary of 250*l.*, and was paid weekly; it was held properly left to the jury to say whether the last hiring was on the same terms as the first, and well determined by a month's notice. *Fairman v. Oakford*, 5 H. & N. 635; 29 L. J., Ex. 459. In the case of the master of a ship, the hiring is not for a year certain, and requires reasonable notice to determine it. *Green v. Wright*, 1 C. P. D. 591. Questions may arise as to whether the hiring is even a weekly one. See *Warburton v. Heyworth*, 6 Q. B. D. 1, C. A.

With regard to a menial or domestic servant, there is a common understanding (except where a different custom is shown to prevail), though the contract is for a year, that it may be dissolved by either party on giving a month's warning or a month's wages. *Beeston v. Collyer*, 4 Biog. 313, *per* Gaselee, J.; *Fawcett v. Cash*, 5 B. & Ad. 908; *Nowlan v. Ablett*, 2 C. M. & R. 54. There is no notorious custom of which judicial notice will be taken, that such servant should leave at the end of the first month on a fortnight's previous notice. *Moult v. Halliday*, (1898) 1 Q. B. 125. But *semble*, such custom if proved would be good. S. C. If the master without reasonable cause turn the servant away without notice, the latter would be enabled to recover a month's wages, beyond the arrears; *Robinson v. Hindman*, 3 Esp. 235; the claim must be for wrongful dismissal, and not for work and labour; *Fewings v. Tisdal*, 1 Exch. 295; recognizing *Smith v. Hayward*, 7 Ad. & E. 544, and dissenting from *Eardly v. Price*, 2 N. R. 333; on this special claim the servant can only recover the month's wages, and not the wages down to the dismissal. *Hartley v. Harman*, 11 Ad. & E. 798.

The term "menial servant" within this rule includes a head gardener, though living in a separate house in his master's grounds. *Nowlan v. Ablett*, *supra*; *Johnson v. Blenkinsop*, 5 Jur. 870, T. T. 1841, Q. B. So, a huntsman, although hired at yearly wages, with perquisites that cannot be fully realized till the end of the year. *Nicoll v. Greaves*, 17 C. B., N. S. 27; 33 L. J., C. P. 259. But does not include a governess. *Todd v. Kerrich or Kellage*, 8 Exch. 151; 22 L. J., Ex. 1.

Although a general hiring of an agent at a certain sum per annum, simply, is a hiring for a year, yet a custom to discharge upon notice may be grafted on such general hiring though the contract be in writing, if the terms are not inconsistent with the custom; and they are not inconsistent where the hiring was at a yearly salary, stipulating for a gratuity at the end of a year on approval. *Metzner v. Bolton*, 9 Exch. 518; 23 L. J., Ex. 130; *Parker v. Ibbetson*, 4 C. B., N. S. 346; 27 L. J., C. P. 236. The custom must be of some reasonable antiquity and standing, uniform and sufficiently notorious and well understood that people would make their contracts on the supposition that it exists. *Foxall v. International Land Credit Co.*, 16 L. T. 637, Byles, J. Whether a written contract excludes the custom, is for the judge, and not for the jury, to decide. *Parker v. Ibbetson*, *supra*. When, however, the hiring is expressly for a time certain, a custom of the trade for a master or a servant to determine it at any time without notice is inadmissible to control the contract. *Peters v. Staveley*, 15 L. T. 275; M. T. 1866, Q. B. In *Fairman v. Oakford*, *supra*, Pollock, C.B.,



observed "that juries in London usually find that clerks are entitled to three months' notice." 29 L. J., Ex. 460. *Accord. Foxall v. International Land Credit Co.*, ante, p. 516. In *Darke v. Grosvenor Hotel Co.*, Q. B., T. T., 1865, *ex rel. editoris*, the court awarded the secretary of that public company three months' salary in lieu of notice. In the case of the employment of an advertising and canvassing agent, the jury found that a month's notice was sufficient. *Hiscoe v. Butchellor*, 15 L. T. 543. It was in this case said to make no difference, whether the remuneration is by salary or commission; S. C. *Id. cor. Byles, J.* See, however, *Rhodes v. Forwood* and *Ex pte. Maclure*, cited *post*, p. 519. On the question of notice it may be material to consider whether there exist a contract of *service* between the parties. See on this point, *R. v. Negus*, L. R., 2 C. C. 34, and cases there cited. See also further, *sub. tit. Work as agents*, *post*, pp. 587, 588.

It has never been decided whether, on a hiring for a year without any express contract as to notice, if the service continue beyond the first year either party can determine the contract at the end of the current year, without notice, or whether a reasonable notice ought to be given previously. See *Beeston v. Collyer*, 4 Bing. 309. A contract "for one whole year, and so from year to year so long as the parties should respectively please," can only be determined at the end of a current year. *Williams v. Byrne*, 7 Ad. & E. 177; and *semble*, by reasonable notice; *Id.* 182. An agreement between master and servant, "to be binding between the parties for twelve months certain from the date, and to continue from time to time until three months' notice be given by either party" may be determined by three months' notice expiring at the end of the first year. *Brown v. Symons*, 8 C. B., N. S. 208; 29 L. J., C. P. 251. An agreement "for twelve months certain, after which time either party should be at liberty to terminate the agreement" by three months' notice, may be determined without notice at the end of the twelve months. *Langton v. Curleton*, L. R., 9 Ex. 57, *diss. Kelly, C.B. Sed quere.* An agreement of hiring for six months and "six months' notice from either side to terminate the agreement," may be determined at any time after the expiration of the first six months. *Keon v. Hart*, I. R., 2 C. L. 138, C. P.; Ir. Ex. Ch., I. R., 3 C. L. 388; and see *Ryan v. Jenkinson*, 25 L. J. Q. B. 11.

Where the master has dispensed with the plaintiff's services before he has entered on the service, and has refused to abide by his contract, the servant may elect to treat it as at an end and bring an action then before the time for its commencement has arrived. *Hochster v. De La Tour*, 2 E. & B. 678; 22 L. J., Q. B. 455. *Accord. Frost v. Knight*, L. R., 7 Ex. 111, Ex. Ch. See also *Johnstone v. Milling*, 16 Q. B. D. 460, C. A. An offer by the plaintiff to serve is unnecessary; readiness and willingness to serve, which implies ability, is sufficient. *Wallis v. Warren*, 4 Exch. 361. Whether a contract by A. to employ B. to perform certain duties at a fixed salary is broken by A., who although paying the salary has refused to allow B. to perform those duties, depends on the nature of the employment. Thus in the case of a representative salesman to a cotton warp agent there was held to be no breach. *Turner v. Sawdon*, (1901) 2 K. B. 653. *Scens*, where B. was an actor, or a musical director, engaged as such by A., the theatre manager. *Fechter v. Montgomery*, 33 Beav. 22; *Bunning v. Lyric Theatre*, 71 L. T. 396, T. T. 1894, Stirling, J. As to implied contract by employer to find work, see *Devonald v. Rosser*, (1906) 2 K. B. 728, C. A.

If a servant misconduct himself, the master may turn him away without any warning. *Spain v. Arnold*, 2 Stark. 256. A refusal to obey a lawful order (as to remain at home at a certain time, or to do a proper day's harvest work, &c.) is a good ground of dismissal; S. C.; *Lilley v. Elwin*, 11 Q. B. 742; however reasonable or urgent the excuse for the servant's

wilful absence may be. *Turner v. Mason*, 14 M. & W. 112. As to what amounts to a refusal to work, see *Bowes & Partners v. Press*, (1894) 1 Q. B. 202, C. A. A single case of forgetfulness causing damage to a valuable machine, of which the servant had management, may be ground for dismissal. *Baxter v. J. & County Printing Works*, (1899) 1 Q. B. 901. If a clerk wrongfully claim to be a partner, the master may dismiss him forthwith as clerk. *Amor v. Fearon*, 9 Ad. & E. 548. So, where a clerk disobeys a direction to apply remittances in a particular way; *Smith v. Thompson*, 8 C. B. 44; or, a traveller neglects immediately to remit sums collected, in accordance with the terms of his engagement; *Blenkarn v. Hodges' Distillery Co.*, 16 L. T. 106, Byles, J.; or sell his employer's goods (wines) to a brothel-keeper; S. C.; or, where a servant embezzles, though his wages due exceed what he has embezzled. *Brown v. Croft*, 1 Chitty, Prac. of the Law, 82. So, where a servant employed to purchase goods for his master, accepts even on a single occasion a commission from the seller without his master's knowledge. *Boston Deep Sea, &c., Co., v. Ansell*, 39 Ch. D. 339, C. A. So, where a servant is guilty of such misconduct, outside his employment, as is incompatible with a safe performance of his duties, he may be dismissed; as where a confidential clerk of a firm of merchants who had large dealings in securities was in the habit of speculating to an enormous amount in "differences" on the Stock Exchange, *vide post*, p. 575. *Pearce v. Foster*, 17 Q. B. D. 536, C. A. Where evidence of misconduct is given, it is a question of fact for the jury, whether there has been such misconduct as justified the dismissal. *Clouston & Co. v. Corry*, (1906) A. C. 122, J.C. The master is not bound to assign the cause at the time of the dismissal; and where good ground for dismissal existed at the time, it is immaterial whether or not it was the real cause; *Ridgway v. Hungerford Market Co.*, 3 Ad. & E. 171; or indeed whether the good ground was known then to the master or not till a long time after. *Boston Deep Sea, &c., Co. v. Ansell, supra*. Where a master, having a right to discharge his servant for misconduct, condones the act of misconduct and retains the servant, he cannot afterwards discharge him for the same act. *Phillips v. Foxall*, L. R., 7 Q. B. 680, *per* Blackburn, J.

"A servant who is dismissed for wrongful behaviour cannot recover his current salary, that is to say, he cannot recover salary which is not due and payable at the time of his dismissal, but which is only to accrue due and become payable at some later date, and on the condition that he had fulfilled his duty as a faithful servant down to that later date." *Boston Deep Sea, &c., Co. v. Ansell*, 39 Ch. D. 364, *per* Bowen, L.J.; see also, *ante*, p. 515. He may, however, recover wages due and payable at the time of his dismissal; *Taylor v. Laird*, 1 H. & N. 266; 25 L. J., Ex. 329; *Button v. Thompson*, L. R., 4 C. P. 330; *Perkins v. S. Hetton Colliery, &c., Co.*, (1907) W. N. 81, K. B. D.; unless this right be altered by the terms of the hiring, as where the plaintiff was employed on the terms that if he left without notice he should forfeit all wages due. *Walsh v. Walley*, L. R., 9 Q. B. 367.

The bankruptcy of the master is not a dissolution of the contract of hiring. *Thomas v. Williams*, 1 Ad. & E. 585. Dissolution of the partnership of the employers is not necessarily a breach of the contract of the firm to employ the plaintiff; at all events, if the plaintiff entered into the service of the altered firm, this is evidence in proof of a defence of voluntary exoneration from the first contract before breach. *Hobson v. Cowley*, 27 L. J., Ex. 205. But dissolution of partnership has been held to be a breach of an agreement to teach a business, contained in an agreement of apprenticeship. *Couchman v. Sillar*, 22 L. T. 480, E. T. 1870, C. P.; see also *Eaton v. Western*, 9 Q. B. D. 636, C. A. If there be a contract for service for a time certain between the plaintiff and A. and B., then in partnership, the

death of one of the partners puts an end to the contract; and no action can be maintained against the survivor for not employing the plaintiff. *Tasker v. Shepherd*, 6 H. & N. 575; 30 L. J., Ex. 207; see hereon *Phillips v. Athambra Palace Co.*, (1901) 1 K. B. 59. But a voluntary parting with the business, is a breach of such a contract to employ. *Stirling v. Maitland*, 5 B. & S. 840; 34 L. J., Q. B. 1; *Turner v. Goldsmith*, (1891) 1 Q. B. 544, C. A. *Brace v. Calder*, (1895) 2 Q. B. 253, C. A. See *Cook v. Sherwood*, 3 F. & F. 729; 11 W. R. 595, E. T. 1863, C. P. and *Ogdens v. Nelson*, (1904) 2 K. B. 410, C. A.; (1905) A. C. 109, D. P. An agent or servant paid by commission on the profits of the business carried on, cannot however sue his employer for giving up the business before the expiration of the term for which he was engaged, unless there be an express or implied agreement to employ him; *Rhodes v. Forwood*, 1 Ap. Ca. 256, D. P., distinguished in *Turner v. Goldsmith*, *supra*; nor for giving it up without notice *Egypte. Maclure, L. R.*, 5 Ch. 737; *L. Leith, &c., Shipping Co. v. Ferguson*, 13 Sc. C. of Sess. Cases, 1850, p. 51. An order for winding-up a company, where an official liquidator is appointed and the business is not carried on after the order; *MacDowall's case*, 32 Ch. D. 366; or for the appointment of a manager and receiver on behalf of debenture holders: *Reid v. Explosives Co.*, 19 Q. B. D. 264, C. A.; operates as a discharge of its servants. It is otherwise however in the case of a voluntary winding up, for the company then continues to be the employer. *Midland Counties District Bank v. Attwood*, (1905) 1 Ch. 357.

In contracts for personal service it is an implied condition that the death of either party shall dissolve the contract. *Farrow v. Wilson*, L. R., 4 C. P. 744. The plaintiff was hired as a farm bailiff by A. at weekly wages, with a stipulation for 6 months' notice or 6 months' pay; it was held that the contract was dissolved by A.'s death, and that the stipulation as to notice did not apply. *Id.*

Where an apprenticeship is dissolved by the death of a master during the term, no part of the premium paid is recoverable from his executors. *Whincup v. Hughes*, L. R., 6 C. P. 78. In *Hirst v. Tolson*, 2 Mac. & G. 134; 19 L. J., Ch. 441, an article clerk was allowed to prove against the estate of his master, an attorney, who died during the articles, for the proportionate part of the premium the clerk had paid. *Sed quere*, for this decision was founded on an erroneous view of the rule at common law; see judgments in *Whincup v. Hughes*, *supra*, and it was not followed in *Ferns v. Carr*, 28 Ch. D. 409. See further *Learoyd v. Brook*, *post*, p. 521. Incapacity in a servant from illness, arising after a contract for personal service, absolute in its terms, had been entered into, is an answer to an action for its breach. *Boast v. Firth*, L. R., 4 C. P. 1. So in the case of a contract involving personal skill; as a pianoforte player. *Robinson v. Davison*, L. R., 6 Ex. 269. But where from the circumstances it can be given, the employer is entitled to reasonable notice of such disability. S. C., *per Brett, J.*, at N. P., *Id.* p. 271. Incapacity of the servant from sickness is not a determination of the contract, nor will it justify dismissal without regular notice. *Semble, R. v. Wintersett*, Cald. 298. So where a person entered into service as a brewer for a term certain at weekly wages, and became disabled by illness for several months, but afterwards was employed by the defendant as before,—held, that this involuntary inability did not suspend the right to wages; nor negative the allegation of readiness and willingness to serve. *Cuckson v. Stones*, 1 E. & E. 248; 28 L. J., Q. B. 25. But permanent disability, such as paralysis, &c., would have justified putting an end to the contract. *Per Cur.*, S. C. Total inability to perform his duty will not prevent a servant from recovering wages for the time he actually served, where the agreement is not for any specific term. *Bayley*

v. *Rimmell*, 1 M. & W. 506. A seaman disabled in the course of his duty is entitled to wages for the whole voyage. *Chandler v. Grieves*, 2 H. Bl. 606, n. Inability to perform his duty by reason of incompetency or ignorance will justify the dismissal of an artificer, notwithstanding a contract for a term, where he was hired on the express representation that he had the requisite skill; *Harner v. Cornelius*, 5 C. B., N. S. 236; 28 L. J., C. P. 85; and where a person is employed to do something requiring skill, there is an implied warranty that he possesses the requisite skill: *per Curiam*, S. C. Where the contract of yearly service is determined by consent in the middle of a quarter, there is no necessarily implied contract to pay *pro ratâ*; but a jury may infer such an agreement from circumstances. *Lamburn v. Cruden*, 2 M. & Gr. 253; *Thomas v. Williams*, 1 Ad. & E. 685.

Where a contract of apprenticeship provides that the apprentice's father shall provide him with board and lodging, but is silent as to the place where the apprentice is to be taught, the master is bound to teach him at or near the place where the business was carried on at the time the contract was executed. *Eaton v. Western*, 9 Q. B. D. 636, C. A. But it seems it is otherwise where the apprentice resides in his master's house. *Id.* 641, *per Hannen*, P.; *Coventry v. Windal*, Brownl. 67. An apprentice may be bound to a corporation. *Burnley, &c., Society v. Casson*, (1891) 1 Q. B. 75.

As to agreements for service within the Stat. of Frauds, s. 4, see *post*, pp. 525 *et seq.* See also the Employers and Workmen Act, 1875 (38 & 39 V. c. 90), as to the contracts to which that Act applies.

Servants of the Crown hold their offices during the pleasure of the Crown only. *Shenton v. Smith*, (1895) A. C. 229, J. C.; *Dunn v. The Queen*, (1896) 1 Q. B. 116, C. A. Where a colonial government engages a person W. for military service, it does so on behalf of the Crown under whom W. serves. *Williams v. Howarth*, (1905) A. C. 551, J. C.

*Damages.*] A dismissed servant may (and, if he can, ought to) enter into another service. *Per Cur.*, in *Hochster v. De La Tour*, 2 E. & B. 690; 22 L. J., Q. B. 458. He is not entitled to his full salary for the unexpired period of the contract for service, but that is to be reduced by the probabilities of his having other employment during such service. *Hartland v. General Exchange Bank*, 14 L. T. 863, *cor.* Willes, J. See *Yelland's case*, L. R., 4 Eq. 350; *Ex pte. Clark*, L. R., 7 Eq. 550; and *Ex pte. Logan*, L. R., 9 Eq. 149. In *Gandell v. Pontigny*, 4 Camp. 375; 1 Stark. 198, where wages was payable quarterly, the clerk, who was tortiously discharged in the middle of the quarter, was allowed, on a tender of his services, to recover for the whole quarter. But this decision, which is inconsistent with those above cited, is not now followed. See *Smith v. Hayward*, 7 Ad. & E. 544; *Goodman v. Pocock*, 10 Q. B. 576; and 2 Smith's L. C., 11th ed., pp. 46 *et seq.* Where an apprentice, who could have been lawfully dismissed at a week's notice, was dismissed without notice, he was held entitled to recover for all the damage flowing naturally from the breach, and was not limited to the value of a week's notice. *Mauv v. Jones*, 25 Q. B. D. 107.

#### *Defence.*

The defence of dismissal for misconduct must be specially pleaded. Rules, 1883, O. xix. r. 15, *ante*, p. 309.

It is a good defence that the servant has already recovered damages for wrongful dismissal from the service; for he cannot by subsequently tendering his services recover for a continued refusal to employ him throughout the original time of service. *Burnsley v. Taylor*, 37 L. J., Q. B. 39. See, however, *Unwin v. Clarke*, L. R., 1 Q. B. 417, 423, *per* Blackburn, J. A

workman at weekly wages, who has under the Workmen's Compensation Act, 1906, *post*, p. 808, claimed and received compensation for an injury causing him partial incapacity to work, is not entitled to wages during the time he is so incapacitated. See *Elliott v. Liggins*, (1902) 2 K. B. 84. It is a defence to an action against the master for not teaching an apprentice A. that the latter refuses to be taught; *Raymond v. Minton*, L. R., 1 Ex. 244; or that he is a habitual thief. *Learoyd v. Brook*, (1891) 1 Q. B. 431. In such case no part of the premium paid is recoverable. S. C.

An order made by a Naval Court under the Merchant Shipping Act, 1894, s. 483, discharging a seaman from his ship is a bar to an action by him against the shipowner for wages or wrongful dismissal. *Hutton v. Ras SS. Co.*, (1907) 1 K. B. 834, C. A. By *Id.* s. 165, no seaman or apprentice can in general sue in a superior court for his wages, where they do not amount to 50*l.*; but this defence must be specially pleaded. The term "claim for wages" in 31 & 32 V. c. 71, s. 3 (2), has been held to include a claim for wrongful dismissal. *The Blessing*, 3 P. D. 35.

### ACTION ON CONTRACT OF SALE OF GOODS.

The law relating to the sale of goods has been codified by the Sale of Goods Act, 1893, 56 & 57 V. c. 71. It seems, therefore, that the most convenient arrangement to adopt is to state the chief provisions of that Act, so far as they relate to the various causes of action to which the contract of sale gives rise, before dealing *seriatim* with those causes of action.

The following are the main provisions of the interpretation section:—

Sect. 62.—(1.) "In this act, unless the context or subject matter otherwise requires—

"Action includes counterclaim and set off."

"Buyer means a person who buys or agrees to buy goods:

"Contract of sale includes an agreement to sell as well as a sale."

"Delivery means voluntary transfer of possession from one person to another:

"Document of title to goods has the same meaning as it has in the Factors Acts," *vide* 52 & 53 V. c. 45, s. 1 (4), *post*, p. 957.

"Factors Acts mean the Factors Act, 1889" . . . "and any enactment amending or substituted for the same:

"Fault means wrongful act or default:

"Future goods means goods to be manufactured or acquired by the seller after the making of the contract of sale:

"Goods include all chattels personal other than things in action and money." . . . "The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

"Plaintiff includes defendant counterclaiming:

"Property means the general property in goods, and not merely a special property:

"Quality of goods includes their state or condition:

"Sale includes a bargain and sale as well as a sale and delivery:

"Seller means a person who sells or agrees to sell goods:

"Specific goods means goods identified and agreed upon at the time a contract of sale is made."

"Warranty," *vide ante*, p. 486.

(2.) "A thing is deemed to be done 'in good faith' within the meaning of this act when it is in fact done honestly, whether it be done negligently or not."

(3.) "A person is deemed to be insolvent within the meaning of this act who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not."

(4.) "Goods are in a 'deliverable state' within the meaning of this act when they are in such a state that the buyer would under the contract be bound to take delivery of them."

The following sections are of general operation:—

Sect. 10.—(2.) "In a contract of sale 'month' means *prima facie* calendar month."

Sect. 55. "Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract. See *In re Walkers, &c. & Shaw & Co.*, (1904) 2 K. B. 152, cited *post*, p. 541."

Sect. 56. "Where, by this act, any reference is made to a reasonable time the question what is a reasonable time is a question of fact."

Sect. 57. "Where any right, duty, or liability is declared by this act, it may, unless otherwise by this act provided, be enforced by action."

Sect. 61.—(1.) "The rules in bankruptcy relating to contracts of sale shall continue to apply thereto, notwithstanding anything in this act contained. (2.) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods. (3.) Nothing in this act or in any repeal effected thereby shall affect the enactments relating to bills of sale, or any enactment relating to the sale of goods which is not expressly repealed by this act. (4.) The provisions of this act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security."

By sect. 1.—(1.) "A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another. (2.) A contract of sale may be absolute or conditional. (3.) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell. (4.) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

Sect. 3. "Subject to the provisions of this act and of any statute in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties. Provided that nothing in this section shall affect the law relating to corporations."

Sect. 4 is cited *post*, p. 526.

Sect. 5.—(1.) "The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this act called 'future goods.' (2.) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen. (3.) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods."

Sect. 6. "Where there is a contract for the sale of specific goods" (*vide* s. 62, *ante*, p. 521), "and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void."

Sect. 7. "Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided." See *Howell v. Coupland*, 1 Q. B. D. 258, C. A.

Sect. 9.—(1.) "Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided; provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2.) "Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault."

Sect. 11 (1.) (*a.*), *ante*, p. 486, a condition to be fulfilled by the seller may be treated as a warranty:

"(b.) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract:

"(c.) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.

"(3.) Nothing in this section shall affect the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise."

Sects. 13, 15, *post*, pp. 540, 541, define the effect of a sale of goods by description or sample.

Sect. 14, *ante*, p. 487, defines in what cases there is an implied warranty or condition, as to the quality or fitness for any particular purpose of goods supplied under a contract of sale.

Sect. 27. "It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale."

Sect. 28. "Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods."

Sect. 30.—(1.) "Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate. (2.) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate. (3.) Where the seller delivers to the buyer the goods he

contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole. (4.) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties."

Sect. 35, *post*, p. 568, defines acceptance.

Sect. 54. "Nothing in this act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed."

The sections relating to the vesting of property by sale and to lien and stoppage *in transitu* will be found *post*, pp. 949, 985, 988 *et seq.*, where the authorities relating thereto are also collected. The subjects of non-acceptance and of delivery are treated of, *post*, pp. 537 *et seq.*

*The Contract.*—Points often arise respecting the effect of a contract or negotiation relating to a sale, contained in a written correspondence. On this some cases have been already cited under a former head, *ante*, pp. 311 *et seq.* Where from the circumstances of the case it may be fairly inferred that the acceptance may be sent by *post*, the rule is that as soon as an offer by A. is accepted by B., in a letter duly posted and addressed by B. to A., the contract is complete, although the letter may not reach A. *Duncan v. Topham*, 8 C. B. 225; *Dunlop v. Higgins*, 1 H. L. C. 381; S. C., 9 Sc. C. of Sess. Cases, 1847, p. 1407; *Harris's case*, L. R., 7 Ch., 587; *Household, &c., Insur. Co. v. Grant*, 4 Ex. D. 216 C. A.; *Henthorn v. Fraser*, (1892) 2 Ch. 27 C. A., *ante*, p. 311; see also 2 Ap. Ca. 692, *per* Ld. Blackburn. The acceptance must be unconditional in order to bind the party offering. *Chaplin v. Clarke*, 4 Exch. 403. If, therefore, the acceptance introduce any variation, there is no contract, unless there be evidence of assent by the other party to the alteration, either express or implied. Illustrations of this rule will be found in *Wontner v. Shairp*, 4 C. B. 404; *Duke v. Andrews*, 2 Exch. 290; *Cheveley v. Fuller*, 13 C. B. 122; *Hutton v. Upfill*, 2 H. L. C. 674; *Barker v. Allan*, 5 H. & N. 61; 29 L. J., Ex. 100; *Appleby v. Johnson*, L. R. 9 C. P. 158. See further on the making, accepting and retraction of offers, cases cited *ante*, pp. 311 *et seq.*, and *post*, p. 1100. A tender to supply goods at specified prices, followed by an order for specified quantity of such goods, constitutes a valid contract. *Gt. N. Ry. Co. v. Witham*, L. R., 9 C. P. 16. A mere mental assent to the terms of a proposed contract is not binding, but acting on those terms may amount to evidence of the adoption of the contract. *Metropolitan Ry. Co. v. Brogden*, 2 Ap. Ca. 666, D. P. See also *Carlill v. Carbolic Smoke Ball Co.*, (1893) 1 Q. B. 256, C. A., and cases therein cited; and *Keighley Maxsted & Co. v. Durant*, (1901) A. C. 240, D. P. Where the contract is entered into by telegram, the sender is not liable for a mistake of the telegraph clerk in sending the message. *Henkel v. Pape*, L. R., 6 Ex. 7. As to correspondence by a telegraphic code, see *Fulck v. Williams*, (1900) A. C. 176, J. C.

Where an agent V. makes a contract purporting to sell goods to L. in the name of his principal T., but fraudulently intending to sell them on his own account, T. may ratify and take the benefit of the contract against L. *In re Fiedemann v. Ledermann*, (1899) 2 Q. B. 66.

Conditions cannot be attached to goods on their sale so as to bind subsequent purchasers with notice. *Tudly v. Sterious & Co.*, (1904) 1 Ch. 354; *acc. McGruther v. Pitcher*, (1904) 2 Ch. 306, C. A.

As to the assignability of contracts of sale, see *Tolhurst v. Associated Portland Cement, &c.*, (1903) A. C. 414, D. P., and *Kemp v. Baerselman*, (1906) 2 K. B. 604, C. A.



As to a contract of exchange or barter, *vide post*, p. 551.

The validity of contract of sale without writing will now be considered. The principal decisions on the Stat. of Frauds, so far as relates to contracts not to be performed within a year, and on the S. of G. Act, 1893, s. 4, for the sale of goods therefore may be conveniently collected here.

*The Contract—Stat. of Frauds, s. 4.]* By the Stat. of Frauds, 29 C. 2, c. 3, s. 4, no action shall be brought whereby to charge any person “upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.”

*Contracts within the Stat. of Frauds, s. 4.]* Sect. 4 applies “to contracts the complete performance of which is of necessity extended beyond the space of a year.” . . . “Where the agreement distinctly shows, upon the face of it, that the parties contemplated its performance to extend over a greater space of time than one year, the case is within the statute, but that where the contract is such that the whole *may* be performed within a year, and there is no express stipulation to the contrary, the statute does not apply.” *Per* Tindal, C.J., *Souch v. Strawbridge*, 2 C. B. 815; *Boydell v. Drummond*, 11 East, 142; *Knowlman v. Bluett*, L. R., 9 Ex. 1, 307, Ex. Ch.; *McGregor v. McGregor*, 21 Q. B. D. 424, C. A.; 1 Smith’s L. C., 11th ed., pp. 317 *et seq.*, notes to *Peter v. Compton*.

The following cases have been decided on this section. An agreement to serve for 70*l.* the first year, 90*l.* the second, and so on, is within the section, and requires a writing; and such writing cannot be explained by showing a contemporary or subsequent agreement to pay the salary quarterly. *Giraud v. Richmond*, 2 C. B. 835. A contract for a year’s service to commence on the next day is not within the section. *Smith v. Gold Coast, &c., Explorers*, (1903) 1 K. B. 285, 538, C. A. *Secus*, where it is to commence on a subsequent day; *Braecgirdle v. Heald*, 1 B. & A. 722; *Snelling v. Huntingfield, Ltd.*, 1 C. M. & R. 20; *Britain v. Rossiter*, 11 Q. B. D. 123, C. A. The contract is within the statute, although the service is subject to be determined by a notice within the year. *Dobson v. Collis*, 1 H. & N. 81; 25 L. J., Ex. 267. An agreement by a company that E. “shall be the solicitor to the company,” “and shall not be removed from his office except for misconduct,” was held to be within the section. *Eley v. Positive Assur. Co.*, 1 Ex. D. 20; *affirm.* on another ground, *Id.* 88, C. A. So, an agreement that S. should not carry on a certain trade during the joint lives of himself and another person. *Davey v. Shannon*, 4 Ex. D. 81. So, a contract to maintain a child about 5 years old, “until she is able to do for herself.” *Farrington v. O’Donohoe*, 1 R., 1 C. L. 675. The reason for the above decisions was that the parties contemplated that the agreement would not be performed within a year, notwithstanding it might, owing to the death of the servant or child, &c., before the expiration of the year, be then completely performed.

In *Murphy v. Sullivan*, 14 Ir. Jur., N. S. 111, the Irish Court of Exch. Ch. held, however, that a contract to maintain a child for life was not within the section, as it was possible it might die within the year, and this case was followed with approval by C. A. in *McGregor v. McGregor*, 21 Q. B. D. 424, where an agreement by the husband in a separation deed to pay his wife 1*l.* a week was held not to be within the statute. The decision in *Davey v. Shannon*, *supra*, was the only one of the above cases of which the C. A. distinctly disapproved; but the principle of *Murphy v. Sullivan*, *supra*, if logically carried out, would prevent any contract for a life annuity, or for

personal service, from coming within the section; and it must be observed that although *McGregor v. McGregor*, *ante*, p. 525; was decided in the Q. B. D. on the principle of *Knowlman v. Bluett*, L. R., 9 Ex. 307, Ex. Ch., as an action for money paid at the defendant's request, the C. A. expressly declined to decide the case on that ground.

A contract, not enforceable, because of the statute, is an existing contract, and a fresh contract cannot be implied from acts done in pursuance of it: *Britain v. Rossiter*, *ante*, p. 525; but where A. orally agreed to serve B. for the year, the service to commence on a subsequent day, and A. entered upon the service upon the day named, and B. paid him wages on account, it was held that the jury might infer a new implied contract from that day. *Cawthorn v. Cordrey*, 13 C. B., N. S. 406; 32 L. J., C. P. 152.

The section applies only to contracts which are not to be performed on either side within the year. *Bracegirdle v. Heald*, *ante*, p. 525; *Donellan v. Read*, 3 B. & Ad. 899. If all that is to be done by one party as the consideration for the promise of the other, can be done within the year, it is not within the section. S. C.; *Smith v. Neale*, 2 C. B., N. S. 67; 26 L. J., C. P. 143.

Where in a contract, between the plaintiff and the defendant, one of several terms to be performed by the defendant falls within the section, the contract cannot be enforced; but if the entire work be done under the contract by the plaintiff, and accepted by the defendant, the plaintiff can recover on a *quantum meruit*, without before action electing to abandon the contract. *Savage v. Canning*, I. R., 1 C. L. 134, C. P.; following *Gray v. Hill*, Ry. & M. 420; and see *per Cur.*, *Teal v. Auty*, 2 B. & B. 99; *Harmen v. Reeve*, 18 C. B. 587; 25 L. J., C. P. 257. Where there was a contract for 24 numbers of a periodical work, to be delivered monthly at 21s. a number, it was held that the plaintiff might sue for the price of the numbers actually delivered, the defendant having refused to accept the remainder. *Mavor v. Pyne*, 3 Bing. 285. See *Knowlman v. Bluett*, *ante*, p. 525.

The consideration must appear in the memorandum, at least by necessary inference. *Wain v. Warblers*, 5 East, 10. See further as to the sufficiency of the memorandum, *ante*, pp. 314 *et seq.*, and *post*, pp. 531 *et seq.*

The doctrine of part performance, *vide ante*, pp. 319 *et seq.*, was held in *Britain v. Rossiter*, 11 Q. B. D. 123, 126, C. A., to apply only to contracts relating to land. This, however, has been doubted, see *Maddison v. Alderson*, 8 Ap. Ca. 474, *per* Ld. Selborne, C., and *McManus v. Cooke*, 35 Ch. D. 681, 697, *per* Kay, J.

*The Contract—Sale of Goods Act, 1893, s. 4.]* By the S. of G. Act, 1893, s. 4, (1.) "A contract for the sale of any goods of the value of 10*l.* or upwards shall not be enforceable by *action*," *vide post*, p. 527, "unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

(2.) "The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

(3.) "There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract or not."

Sub-sects. 1, 2, replace and are almost identical with the Stat. of Frauds,

s. 17 (sect. 16 in Stat. of the Realm), and Ld. Tenterden's Act, 9 G. 4, c. 14, s. 7. As to sub-sect. 3, *vide infra*.

By sect. 62 (1), *ante*, p. 521, "action" includes counter-claim and set off; it also defines "goods."

*Contracts within the Sale of Goods Act, 1893, s. 4.]* The following cases were nearly all decided under the repealed sections, the effect of which were in this respect, identical with the S. of G. Act, 1893, s. 4.

Contracts for the sale of existing or future goods, are included; sect. 4 (2). See also sect. 5, *ante*, p. 522. So are sales by auction. *Kenworthy v. Schofield*, 2 B. & C. 945, and see sect. 58, *post*, pp. 534, 535. A sale of shares of a joint stock banking company is not within sect. 4. *Humble v. Mitchell*, 11 Ad. & E. 205. Nor of shares in a canal company. *Latham v. Barber*, 6 T. L. 76. Nor of railway shares. *Bowlby v. Bell*, 3 C. B. 284; *Tempest v. Kilner*, 3 C. B. 249. Nor of shares in a mining company. *Watson v. Spratley*, 10 Exch. 222; 24 L. J., Ex. 53. Nor is a sale or contract to deliver foreign stock consisting of bonds and certificates. *Heseltine v. Siggers*, 1 Exch. 856; see *post*, p. 571. Sales of timber and growing crops where they are not an "interest in land" within the Stat. of Frauds, s. 4, may be within the S. of G. Act, 1893, s. 4. See the interpretation of "goods," *ante*, p. 521, and the cases cited *ante*, pp. 312 *et seq.*, and also the cases under the third exemption from the Stamp Act as to agreements, *ante*, p. 235. Trees lying felled are within sect. 4. *Acraman v. Morrice*, 8 C. B. 449. A contract for work and labour, as an agreement by a printer to print a book, although it involves finding materials, is not within sect. 4; *Clay v. Yates*, 1 H. & N. 73; 25 L. J., Ex. 237; but a contract to make a set of artificial teeth to fit the mouth of the employer is a contract for the sale of a chattel, and therefore within the section. *Lee v. Griffin*, 1 B. & S. 272; 30 L. J., Q. B. 252. If the substance of the contract be goods to be sold and delivered by the one party to the other, it is within the section. S. C.; *Atkinson v. Bell*, 8 B. & C. 277; *Grafton v. Armitage*, 2 C. B. 336. A sale is not less within the statute because it also includes an exchange; *Bach v. Owen*, 5 T. R. 409; or a collateral agreement touching the thing sold. *Harman v. Reeve*, 18 C. B. 587; 25 L. J., C. P. 257. Thus a contract whereby H. agreed to sell a horse of the value of 10*l.* to R., and to agist it and also another horse of R.'s for a fixed time, and R. was to pay 30*l.*, is within sect. 4. S. C. The section applies to a single contract for the sale of several articles, of the aggregate value of 10*l.* although each is under that value. *Baldry v. Parker*, 2 B. & C. 37. It seems that a contract for the sale of goods, not enforceable by reason of sect. 4 (1) is not thereby avoided and the property in the goods may pass to the purchaser. *Taylor v. Gt. E. Ry. Co.*, (1901) 1 K. B. 774.

*Acceptance and receipt within the Sale of Goods Act, 1893, s. 4.]* Under the Stat. of Frauds, s. 17, a very large number of cases were decided as to what constituted a sufficient "acceptance" thereunder; many of these cases could not easily be reconciled together, hence the S. of G. Act, 1893, s. 4 (3), *ante*, p. 526, has laid down a definite rule on the subject, and those cases must therefore be carefully considered before they are followed as guides as to what amounts to "acceptance," under the present section. See *Abbott & Co. v. Wolsey*, (1895) 2 Q. B. 99, 100, Ld. Esher, M.R. It must be borne in mind that the statute uses the term "acceptance," in two different senses; the acceptance required under sect. 4, to make the contract binding, is different from that mentioned in sect. 35, *post*, p. 568, which is necessary to bind the purchaser to pay for the goods. S. C. *per Id.* The rule in sect. 4 (3) follows the principle laid down by Bowen, L.J., in *Page v. Morgan*, 15 Q. B. D. 223, *post*, p. 529. Where hay sold was delivered to the buyer, who took a sample from it, and after examination said "The hay is not to my sample

and I shall not have it," it was held that this was evidence of an act done by him in relation to the hay which recognised a pre-existing contract of sale, and therefore evidence of acceptance within sect. 4 (3). *Abbott & Co. v. Wolsey, C. A., ante*, p. 527. So where B. sold his barley which had been warehoused with the defendant R. to S., and R. advised S. that it was awaiting his orders; S. did not inspect it or take a sample from the bulk, but endeavoured to re-sell the barley by another sample he obtained from the seller, and did not repudiate the sale within 5 weeks. *Taylor v. Gt. E. Ry. Co.*, (1901) 1 K. B. 778. Acceptance without a delivery is insufficient, for the words are "accept and actually receive;" but the acceptance may be prior to the actual receipt and need not be contemporaneous with or subsequent to it. *Cusack v. Robinson*, 1 B. & S. 299; 30 L. J., Q. B. 261; *Kershaw v. Ogden*, 3 H. & C. 717; 34 L. J., Ex. 159, *post*, p. 529; *Morton v. Tibbett*, 15 Q. B. 429; 19 L. J., Q. B. 382.

By sect. 41 (2) the seller may exercise his right of lien although in possession as agent or bailee for the buyer; the cases therefore which decided that there could be no delivery so long as the goods were subject to the seller's right of lien no longer apply.

The following cases were decided under the Stat. of Frauds, s. 17. A delivery of goods to a wharfinger or agent who has been accustomed to forward goods from the plaintiff to the defendant, and a delivery by him to the carrier, is not an acceptance, the carrier having no authority, though named by the vendee, to accept the goods for him, but only to receive them for the purpose of being carried. *Hanson v. Armitage*, 5 B. & A. 557; *Meredith v. Meigh*, 2 E. & B. 364; 22 L. J., Q. B. 401. So where goods bought abroad were delivered at a foreign port on board a ship chartered by the buyer, this was held to be no acceptance. *Acceul v. Levy*, 10 Bing. 376. So, where the buyer appointed the mode in which the goods should be conveyed, and directed a third person, in whose possession the goods temporarily were, to see them delivered and measured and put up properly, and they were accordingly sent to another warehouse of the seller, where the clerk gave an invoice to the buyer, who did not pay for the goods, but the same day gave notice that he would not accept them, these circumstances were held not to amount to an acceptance. *Astey v. Emery*, 4 M. & S. 262. So where a hogshead of wine in the warehouse of the London Dock Company was sold for 13*l.* and a delivery order given to the buyer, but there was no assent on the part of the Dock Company to hold the wine as the agents of the buyer, it was held that there was no actual receipt within the statute. *Bentull v. Burn*, 3 B. & C. 423; *Furinu v. Home*, 16 M. & W. 119. Where A. employed B. to construct a waggon, and while it was in B.'s yard unfinished, A. employed a third person to fix upon it some iron work and a tilt, it was held this did not amount to an acceptance; but, *per* Tindal, C.J., it might perhaps have been otherwise if these acts had been done after the waggon was completed. *Maberley v. Sheppard*, 10 Bing. 99. Where the goods were sent with an invoice, and the buyer declined to receive them of the carrier, who kept them for a month, and until the end of that time the buyer, who had received the invoice, did not communicate with the seller, it was held that there was not sufficient evidence of acceptance to justify a jury in finding one. *Norman v. Phillips*, 14 M. & W. 277. Where spruce deals, bought by the defendant, were taken by a carrier, chosen by the defendant, to the carrier's wharf and there inspected by the defendant, who did not move them, and within a reasonable time gave notice to the vendor that he rejected them, it was held there had been no acceptance. *Taylor v. Smith*, (1893) 2 Q. B. 65, C. A.

There may, however, be a *constructive acceptance* by acquiescence. Thus, where the goods were sent by a named carrier, and a letter of advice

was forwarded to the buyer stating that the credit was three months, and the goods, after arrival, were seen by him in the warehouse of the carrier, when he told the carrier that he refused to take them, but made no communication whatever to the seller till after five months, it was held that this was evidence to be left to the jury of acceptance and actual receipt. *Bushel v. Wheeler*, 15 Q. B. 442. In another case, where wheat was sent by a carrier named by the buyer, who was to take it to a market town, where the buyer resold it by the same sample which he had taken from the seller himself, but never inspected the bulk, this was held to be evidence of acceptance and receipt. *Morton v. Tibbitt*, *Id.* 428. Goods not specified in the original contract, but selected by the seller, and shipped by him for delivery to an inland carrier named by the buyer, who was to convey them to the buyer's residence, were lost at sea; a bill of lading had been sent to the inland carrier; held, that this was not evidence of an acceptance and receipt by the buyer, though it would have been a sufficient delivery to him if the contract had been binding; and that the mere silence of the buyer, on hearing that the goods were shipped, would not justify a verdict for the seller: neither the selection by the seller, nor the receipt by the carrier, being an acceptance of those particular goods by the buyer. *Merclith v. Meigh*, 2 E. & B. 364; 22 L. J., Q. B. 401, *accord.* *Hart v. Bush*, E. B. & E. 494; 27 L. J., Q. B. 271; and *Smith v. Hudson*, 6 B. & S. 431; 34 L. J., Q. B. 145. But where the buyer has received the bill of lading, and dealt with it as owner of the property, this is evidence of an acceptance and receipt. *Currie v. Anderson*, 2 E. & E. 592; 29 L. J., Q. B. 87. Where the buyer receives the articles sold, but disputes the alleged terms of sale on the delivery, the sale is good, and the terms may be proved by oral evidence. *Tomkinson v. Staight*, 17 C. B. 697; 24 L. J., C. P. 85.

The circumstances in the following cases were held to constitute an acceptance and receipt within the Stat. of Frauds, s. 17. The defendant bought a quantity of hay from the plaintiff, and sold it to another person, by whom it was taken away; it was held that the jury might presume an acceptance by the defendant. *Chaplin v. Rogers*, 1 East, 192. Where defendant selected and orally agreed to purchase certain goods of the plaintiff, and directed them to be sent to a particular wharf, where he was in the habit of warehousing his goods, that was held sufficient to constitute an acceptance; and the goods having been placed on the wharf under the control of the defendant, so as to put an end to any rights of the plaintiff as unpaid vendor, that was held a sufficient actual receipt. *Cusack v. Robinson*, 1 B. & S. 299; 30 L. J., Q. B. 261. Where the defendants agreed to purchase of the plaintiff four specific stacks of cotton waste at so much per lb.; they sent their packer with sacks and carts to fetch it; he packed the waste in 81 sacks; 21 were weighed, loaded, and taken to the defendant's premises; the other sacks were not weighed; on arrival of the 21 sacks, the defendants refused to accept any of the waste, on the ground that it was of inferior quality to that purchased; and it was held that there was evidence of an acceptance and receipt. *Kershaw v. Ogden*, 3 H. & C. 717; 34 L. J. Ex. 159. So, where on a sale of wheat by sample, the buyer received several sacks of wheat, delivered under the contract on his premises, and, immediately after opening the sacks and examining their contents, gave notice to the seller that he refused the wheat, as not equal to sample, this was held evidence for the jury of an acceptance. *Page v. Morgan*, 15 Q. B. D. 228, C. A., following *Kibble v. Gough*, 33 L. T. 204, C. A. For "the acceptance contemplated by the statute was such a dealing with the goods as amounts to a recognition of the contract." 15 Q. B. D. 233, *per* Bowen, L. J.

Though the goods remained in the personal possession of the seller, yet if it were agreed between the seller and buyer that the possession should thenceforth be kept, not as seller, but as bailee for the buyer, there was a sufficient receipt to satisfy the statute, as the right of lien was gone. *Cusack v. Robinson*, *ante*, p. 529, *per Cur.*, citing *Beaumont v. Brengeri*, and *Marvin v. Wallis*, *infra*. The defendant bought two horses from the plaintiff, a livery-stable keeper, and desired him to keep them at livery for him; it was held that the plaintiff, by assenting to this order, and changing the horses from the stables in which they had been kept to his livery-stables, had relinquished his lien, and that there was a constructive delivery of them to the defendant. *Elmore v. Stone*, 1 Taunt. 458; *Beaumont v. Brengeri*, 5 C. B. 301, *accord*. And sect. 41 (2), *ante*, p. 528, which retains the right of lien in such cases seems not to affect the two decisions last cited. Where, on an oral sale of a horse by A. to B., B., without having had it in his possession, lent it to A. at his request for a few weeks, and B. afterwards refused to receive or pay for it; and the jury found that the contract of sale was completed before the loan of it to the vendor: held that there was an acceptance and actual receipt within the statute. *Marvin v. Wallis*, 6 E. & B. 726; 25 L. J., Q. B. 369. So, where the defendant bought some spirits from the plaintiffs, who sent an invoice of certain specified casks, terms six months' credit, and to lie in plaintiffs' warehouse till wanted, free six months; the plaintiffs kept a general bonded warehouse, and transferred the particular casks to the defendant's name in their warehouse book, as sold to him, after which the plaintiffs could not take them out; at the end of the six months the defendant asked the plaintiffs to take them back, or sell them for him; held, there was evidence of a receipt and acceptance, as the character of the plaintiffs had changed from sellers to warehousemen or agents of the defendant. *Castle v. Swoorder*, 6 H. & N. 828; 30 L. J., Ex. 310, Ex. Ch. Wool, bought by defendant, was removed to the warehouse of a third person, M., by defendant's direction, and weighed and packed by him; the course of dealing was, that it should not be taken out of M.'s warehouse till payment; this nevertheless was held a delivery and acceptance, as the seller had parted with possession, and had no lien, properly so called. *Dodsley v. Varley*, 12 Ad. & E. 632. Where the goods sold were in the defendant's possession at the time of the sale, a dealing with them by the defendant, and an account rendered to the plaintiffs by defendant, debiting himself with the price, are evidence of an acceptance by defendant. *Edan v. Duffield*, 1 Q. B. 302. Where the act done by the buyer is an ambiguous act, which may or may not be done as an act of ownership, it is evidence on which it ought to be left to the jury to say whether or not there had been an acceptance. *Parker v. Wallis*, 5 E. & B. 21. A bargained for a horse then in a stable, and soon afterwards brought in a third person and stated to him that he had bought the horse, and offered to sell it to him for a profit of 5*l.*; it was held that it ought to be left to the jury to say whether this was or was not a delivery and acceptance. *Blenkinsop v. Cluyton*, 7 Taunt. 597; and see *Phillips v. Bistolli*, 2 B. & C. 511. A wrongful taking by the buyer after a tender and refusal of the money is not an acceptance to bind the seller. *Taylor v. Wakefield*, 6 E. & B. 765; see *Smith v. Hudson*, 6 B. & S. 431; 34 L. J., Q. B. 145.

There need not be an actual delivery, but there may be something tantamount; such as the delivery to the buyer of a key of the warehouse in which the goods are lodged, or the delivery of other *indicia* of property; *per* Ld. Kenyon, C.J., *Chaplin v. Rogers*, 1 East, 192, 195; and this is evidence of acceptance as well as of delivery. *Elmore v. Stone*, 1 Taunt. 460. So, where the purchaser cut down and sold some of a number of trees he had

bought, this was held to be an acceptance and receipt. *Marshall v. Green*, 1 C. P. D. 35. A written order given by the seller of goods to the buyer, directing the person in whose care the goods are to deliver them to the buyer, is a sufficient receipt within the statute, provided the person to whom it is directed accept the order for delivery, and assent to hold the goods as the agent of the buyer. *Searle v. Keeves*, 2 Esp. 598; *Bentall v. Burn*, 3 B. & C. 426; *Salter v. Woollams*, 2 M. & Gr. 650.

When a *joint order* is given for several classes of goods, the acceptance of one class is a part acceptance of the whole, under this section; *Elliott v. Thomas*, 3 M. & W. 170; and *Thompson v. Maceroni*, 3 B. & C. 1, *contra*, is there explained. And part acceptance is sufficient, although the rest are not even made. *Scott v. Eastern Counties Ry. Co.*, 12 M. & W. 33. But the contract for several things must be a joint one. Thus, if A. give to B. an absolute order for one, and a conditional order for another article, and B. sends both, A.'s acceptance of the former is not an acceptance of the latter. *Price v. Lea*, 1 B. & C. 156. Where a buyer selected separate lots of timber, at different and distant places, and various prices, shown to him by the same seller on one day, and afterwards included in one unsigned note, acceptance of one lot dispenses with a signed note. *Biggy v. Whisking*, 14 C. B. 195. The delivery and acceptance of a sample, if considered to be part of the thing sold, is sufficient; *Hinde v. Whitehouse*, 7 East, 588; but otherwise where it is a sample merely, and forms no part of the bulk. *Tulver v. West*, Holt, N. P. 178; *Cooper v. Elston*, 7 T. R. 14.

[*Earnest or part payment.*] If there be no note or memorandum in writing and no acceptance or receipt of the goods, then, to satisfy the statute, the buyer must give something in earnest to bind the bargain, or in part payment. Earnest is given by the buyer, and not by the seller, and the part delivery of goods is not (as Blackstone, 2 Comm. 447-8, assumes) by the way of earnest. In cases of sale at common law, earnest has an effect different from that of the *arra* of the civil law, by binding the bargain instead of merely affording additional proof of it. It is either money or other thing given, to bind the bargain, and to show that it is concluded, and no longer remains in mere proposal or in *feri*. If given in money, it presumably forms part of the price, like a deposit at an auction. *Portage v. Cole*, 1 Wms. Saund. 319. If it be some other article, it is in the nature of a pledge. Pothier, *Cont. de Vente*, p. 6, c. 1, art. 3, s. 2. Acceptance of earnest changes the property. *Langfort v. Tiler*, 1 Salk. 113; *Hinde v. Whitehouse*, 7 East, 558, 571. Customary forms of concluding bargains, as where the purchaser draws the edge of a shilling across the hand of the seller and returns the money into his own pocket, are not equivalent to earnest or part payment, within the statute. *Blenkinsop v. Cluyton*, 7 Taunt. 597. A bargain, that the seller shall take, in part payment, a debt due from him to the buyer, is not in itself a sufficient part payment to dispense with a writing—no money having actually passed, nor receipt for the debt given by the buyer; for this would in effect let in proof of the contract itself in order to evade the statute. *Walker v. Nussey*, 16 M. & W. 302; *Norton v. Davison*, (1899) 1 Q. B. 401, C. A.

[*What note is sufficient within the Sale of Goods Act, 1893, s. 4.*] The note in writing must contain all the terms of the agreement, or be connected with some other document which does. *Kenworthy v. Schafield*, 2 B. & C. 947. Several documents, if sufficiently connected, will constitute a good memorandum within the statute. *Jackson v. Lowe*, 1 Bing. 9; *Saunderson v. Jackson*, 2 B. & P. 238; *Allen v. Bennet*, 3 Taunt. 169; *Warner v. Willington*, 3 Drew. 523; 25 L. J., Ch. 662. A promise in

writing, signed, to pay any one unnamed who shall furnish goods to the writer or a third person making default, will become a binding contract with any one, whosoever he may be, who shall accept the promise in writing and furnish the goods. *Williams v. Byrnes*, 1 Moo. P. C., N. S. 154, 198. It must contain the names of both the contracting parties or their agents; *Champion v. Plummer*, 1 N. R. 252; *Graham v. Musson*, 7 Scott, 569; 5 N. C. 603; *Williams v. Byrnes*, *supra*; as buyer and seller, *Vandenbergh v. Spooner*, L. R., 1 Ex. 316. In this last case the memorandum was as follows: "S. (the defendant) agrees to buy the whole of the lots of marble purchased by V. (the plaintiff) now lying at L. C., at 1s. a foot. (Signed) S.;" it was held that it did not satisfy the statute, because V. did not appear to be the seller. But in *Newell v. Radford*, L. R., 3 C. P. 52, the following memorandum was held sufficient: "N. (the plaintiff), 32 sacks culasses (flour) at 39s.; 280 lbs. to wait orders. J. W.;" it was proved orally that J. W. was the defendant's agent, that the defendant was a flour dealer, and the plaintiff a baker, and the court drew inferences from the surrounding circumstances to explain the ambiguity in the memorandum.

Where there is an insufficient memorandum, such as an unsigned order for goods, a subsequent letter signed by the defendant, referring to the order, is sufficient; *Saunderson v. Jackson*, 2 B. & P. 238; *Buxton v. Rust*, L. R., 7 Ex. 1, 279, Ex. Ch.; but the plaintiff cannot avail himself of a subsequent letter from the defendant, in which, though he recognizes the order, he disaffirms or adds to the terms of the memorandum. *Cooper v. Smith*, 15 East, 103. *Vide ante*, p. 316. A letter, however, referring to all the essential terms of the contract, but refusing to carry it out, is sufficient. *Bailey v. Sweeting*, 9 C. B., N. S. 843; 30 L. J., C. P. 150; *Buxton v. Rust*, *supra*; *Wilkinson v. Evans*, L. R., 1 C. P. 407. So, a memorandum, written and signed by the defendant on the back of an invoice of those goods sold to him by the plaintiff; "The cheese came to-day, but I did not take them in, for they were very badly crushed. So the candles and cheese is returned," was held sufficiently to refer to the contents of the invoice, and the two together were a sufficient memorandum to satisfy the statute. S. C. The letter referring to the terms of the contract need not be to the other party to the sale. Thus, when the defendant's agent bought for him a mare of the plaintiff, and the agent wrote to the defendant telling him the purchase he had made of the plaintiff (naming him), and the price, and the defendant wrote back saying he would send the agent a cheque for the mare "which you have purchased for me," these letters were held a sufficient memorandum. *Gibson v. Holland*, L. R., 1 C. P. 1. See further as to the requisites of a sufficient note, *ante*, pp. 314 *et seq.*

The omission of the particular mode, or time of payment, or even of the price itself, does not necessarily invalidate the contract. *Valpy v. Gibson*, 1 C. B. 837. Where the price is omitted, and it does not appear upon the evidence that any specific price was agreed upon, a reasonable price must be presumed, and the contract should be so stated; *Hoadley v. M'Laine*, 10 Bing. 482; and see sect. 8, *post*, p. 568; but, where the memorandum is silent as to price, and it appears by the evidence that a specific price was agreed upon, the written memorandum is imperfect, and cannot be given in evidence. *Elmore v. Kingscote*, 5 B. & C. 583; *Goodman v. Griffiths*, 1 H. & N. 574; 26 L. J., Ex. 145.

An agreement to sell on "moderate terms" is enough. *Ashcroft v. Morrin*, 4 M. & Gr. 450. Where the price is ambiguous, as where hops are sold "at 100s.," this may be explained orally to mean *per cwt.* *Spicer v. Cooper*, 1 Q. B. 424, see *ante*, pp. 21 *et seq.* A buyer wrote his address in the seller's order book, which had the seller's name on the fly-leaf, and a description and the price of the article: held a sufficient note of the buyer,



though it did not specify an alteration in it to be made by the seller. *Sarl v. Bourdillon*, 1 C. B., N. S. 188; 26 L. J., C. P. 78. See *Goodman v. Griffiths*, and *Elmore v. Kingscote*, *ante*, p. 532.

The written memorandum must be made before action brought. *Bill v. Bament*, 9 M. & W. 36; *Lucas v. Dixon*, 22 Q. B. D. 357, C. A. Where a written order was given by defendant for goods of the price of 10*l.* and upwards, which defendant *accepted* with the accompanying invoice, and neither order nor invoice mentioned the time of payment, defendant was allowed to prove a previous conversation between plaintiff and defendant showing that the sale was to be on credit. *Lockett v. Nicklin*, 2 Exch. 93. In this case the acceptance was sufficient within the statute, and no written memorandum being necessary, the oral evidence was admitted as not inconsistent with the writing, and forming with it the complete contract: *vide ante*, p. 17.

The terms of the written contract cannot be orally varied. *Vide ante*, p. 29; *Plevins v. Downing*, 1 C. P. D. 220. But forbearance on the part of the plaintiff is not a variation. *Ogle v. Vane, Et.*, L. R., 3 Q. B. 272, Ex. Ch.; *Hickman v. Haynes*, L. R., 10 C. P. 598. Where the buyer, after an oral contract, receives without objection an invoice or sold note signed by the seller differing from the contract, he cannot, in a case within the statute, set up the original terms to contradict the sold note. *Harnor v. Groves*, 15 C. B. 667; 24 L. J., C. P. 53.

[To be made and signed by the party to be charged.] It is not necessary that the note or memorandum should be signed by both parties to the contract. It is sufficient if it be signed by the party to be charged. *Laythourp v. Bryant*, 2 N. C. 735. A proposal in writing signed by the party to be charged and verbally accepted by the person to whom it is made is sufficient. *Reuss v. Picksley*, L. R., 1 Ex. 342, Ex. Ch.; *Buxton v. Rust*, L. R., 7 Ex. 279, Ex. Ch.; see *Watts v. Ainsworth*, 1 H. & C. 83; 31 L. J., Ex. 448. And it makes no difference that there is no remedy against the person who does not sign. *Allen v. Bennet*, 3 Taunt. 169. It is immaterial where the signature is placed on the document. A person writing at the head of a note, I, A. B., agree, or A. B. agrees, is sufficient, although the document is not signed at the bottom. *Knight v. Crockford*, 1 Esp. 190; *Saunderson v. Jackson*, 2 B. & P. 238; *Schneider v. Norris*, 2 M. & S. 286; *Durrell v. Evans*, *post*, p. 531; see also *Evans v. Houre*, (1892) 1 Q. B. 593, decided on Stat. of Frauds, s. 4, cited *ante*, p. 317. But the signature must be so introduced as to govern or authenticate every material part of the instrument. *Hubert v. Turner*, 4 Scott, N. R. 486; *Caton v. Caton*, L. R., 2 H. L. 127, decided on Stat. of Frauds, s. 4. The question, however, is always open to the jury, whether the party, not having regularly signed it at the foot, meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it; but where it is ascertained that he meant to be bound by it as a complete contract, the statute is satisfied, there being a note in writing showing the terms of the contract, and recognized by him; *per Id.* Abinger in *Johnson v. Dodgson*, 2 M. & W. 659; in which case the defendant wrote, "Sold J. Dodgson" (his own name), so and so, and requested the plaintiff's agent to sign the entry; and the court held the defendant bound by such entry. Where a person is in the habit of printing instead of writing his name that will be a sufficient signature. *Per Eldon, C.J.*, *Saunderson v. Jackson*, *supra*. Where the name of a vendor is printed on a bill of parcels on which the name of the vendee is written by the vendor, that is a sufficient signature to charge the vendor. *Schneider v. Norris*, *supra*. See some additional cases, *ante*, pp. 316 *et seq.* Signature by mark or initials is sufficient, *vide ante*, p. 317.

*Or by his agent in that behalf.]* An agent, to bind the defendant by his signature, must be some third person, and not the other contracting party. *Farebrother v. Simmons*, 5 B. & A. 333; *Wright v. Dunnah*, 2 Camp. 203; *Bird v. Boulter*, *ante*, p. 318; *Sharman v. Brandt*, L. R., 6 Q. B. 720, Ex. Ch.

It is not necessary that an agent should have the authority of his principal by a written instrument; an oral authority is sufficient. *Rucker v. Cammeyer*, 1 Esp. 105; *Emmerson v. Heelis*, 2 Taunt. 38. Although the agent may not have had authority at the time of signature, it will be sufficient if the principal subsequently recognize the agent's act and adopt the contract. *Maclean v. Dunn*, 4 Bing. 722. Where A., by his traveller B., sold goods to C., and at the time of the sale B., at the request and in the presence of C., made an entry of the sale in C.'s book, and signed it in his, B.'s, own name, it was held there was no sufficient note within the statute to bind C., because the circumstances did not show any authority to B. to sign on C.'s behalf. *Graham v. Musson*, 5 N. C. 603. The plaintiff, his agent N., and the defendant E., met, and after agreeing upon the price of certain hops, N. wrote a sale note heading it "E., bought of," &c. At E.'s request an alteration was made in one of the terms of the note which was then given to him. It was held that N. was E.'s agent to draw up and sign for him a memorandum of the contract between them, and therefore E. was bound thereby. *Durrell v. Evans*, 1 H. & C. 174; 31 L. J., Ex. 337, Ex. Ch. "If the name appears on the contract and be written by the party to be bound, or by his authority, and issued or accepted by him, or intended by him as the memorandum of a contract, that is sufficient." *Per* Blackburn, J., S. C.; see *Thompson v. Gardiner*, 1 C. P. D. 777.

But the mere writing by the plaintiff's traveller in the presence of the defendant of a duplicate memorandum of the defendant's order, with his name as purchaser, which duplicate was handed to and kept by the defendant, was held insufficient, as it did not appear that the traveller had signed as agent for the defendant, or had authority so to do. *Murphy v. Boese*, L. R., 10 Ex. 126.

As to a telegram sent by the defendant being a sufficient signed memorandum, see *Godwin v. Francis*, L. R., 5 C. P. 295, cited *ante*, p. 318. The sender is not liable for a mistake of the telegraph clerk in sending the message. *Henkel v. Pape*, L. R., 6 Ex. 7.

*Sale by auction.]* A sale of goods by auction is within sect. 4. *Kenworthy v. Schofield*, 2 B. & C. 945. By the Sale of Goods Act, 1893, sect. 58, "In the case of a sale by auction—(1) Where goods are put up for sale by auction in lots, each lot is *primâ facie* deemed to be the subject of a separate contract of sale: (2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid." An auctioneer is for some purposes an agent for both parties; therefore, where an auctioneer writes down the buyer's name in the catalogue opposite the lot, together with the price bid, it is a sufficient memorandum. *Emmerson v. Heelis*, *supra*; *Kenworthy v. Schofield*, *supra*. But where the conditions of sale are not annexed or referred to in the catalogue, signing the buyer's name in the catalogue is not a compliance with the statute. *Hinde v. Whitehouse*, 7 East, 558; *Kenworthy v. Schofield*, *supra*; *Peirce v. Conf*, L. R., 9 Q. B. 210; *Rishton v. Whatmore*, 8 Ch. D. 467. It must, however, be observed that the auctioneer only becomes the vendee's agent after his bid is accepted; before then he is exclusively the vendor's agent. *Warlow v. Harrison*, 1 E. & E. 295, 309; 28 L. J., Q. B. 18; 29 L. J., Q. B. 14. Where the auctioneer himself sues, his signature for the defendant cannot be relied upon as a

compliance with the statute. See *Farebrother v. Simmons*, 5 B. & A. 333; *Sharman v. Brandt*, L. R., 6 Q. B. 720, and cases cited *ante*, p. 318. Where a person, to whom money was due from the owner of goods sold by auction, agreed with the owner before the auction that goods bought by him should be set against the debt, and he became the purchaser of goods, and was entered as such by the auctioneer, it was held that he was not bound by the conditions of sale which specified that purchasers should pay part of the price at the time of the sale and the rest on delivery. *Bartlett v. Parnell*, 4 Ad. & E. 792. But, in general, where there are printed conditions of sale, no oral declaration made by the auctioneer at the time of the sale is admissible in evidence to alter them. *Shelton v. Livius*, 2 C. & J. 411. Though where the goods are of less value than 10*l.*, and there is no signature, such declarations are admissible; *Eden v. Blake*, 13 M. & W. 614; and *semble*, *per Rolfe, B., S. C.*, that as the contract would be complete on the fall of the hammer, a subsequent signing by the auctioneer would make no difference.

As to the liability of the auctioneer to the buyer, *vide ante*, p. 328, and *post*, p. 544.

*Sale by a broker.*] Where a broker is the agent of both parties, he may bind them by signing the same contract on behalf of the buyer and seller. See the usual forms, and the effect of broker's notes fully considered in Blackburn's Treatise on Contract of Sale, Part I., c. 5. The practice (at least among London brokers) is to make an entry of the contract in his book and sign it, and then to send a copy of it to each party, and, in general, the "bought note" to the buyer, and "sold note" to the seller, and these notes, duly delivered by the broker to the parties, have been held, if not the contract itself, proper evidence of the contract, and constitute a sufficient note in writing to bind each party. *Rucker v. Cannmeyer*, 1 Esp. 105; *Thornton v. Meux*, M. & M. 43; *Trueman v. Loder*, 11 Ad. & E. 589. And such notes are admissible, where the entry in the broker's book has never been signed by him. *Goom v. Afalo*, 6 B. & C. 117. But if the entry in the book has been signed, it is questionable whether this is not the best evidence, as being the original entry of the contract. See *Heyman v. Neale*, 2 Camp. 337. "Where there has been an entry of the contract by the broker in his book, signed by him, I should hold . . . that this entry is the binding contract between the parties, and that a mistake made by him when sending them a copy of it, in the shape of a bought or sold note, would not affect its validity." . . . "But the broker, to save himself trouble, now omits to enter and sign any contract in his book, and still sends the bought and sold note as before. If these agree they are held to constitute a binding contract. If there be any material variance between them they are both nullities, and there is no binding contract." *Per* Ld. Campbell, C.J., in *Siewright v. Archibald*, 17 Q. B. 124-5; 20 L. J., Q. B. 538; and see *per* Patteson, J., S. C. Where there is a material variance between the bought and sold notes, and the broker has not signed the contract in his book, there is no valid contract. *Grant v. Fletcher*, 5 B. & C. 436; *Greyson v. Ruck*, 4 Q. B. 737; *Cowie v. Remfrey*, 5 Moo. P. C. 232. But where the differences can be reconciled by oral testimony of mercantile usage, and shown to be only apparent, such evidence is admissible. *Bolt v. Rayner*, 1 M. & W. 343; *Kempson v. Boyle*, 3 H. & C. 763; 34 L. J., Ex. 191. Where the bought note was in the form "Bought of R. & Co., for account of H. & Co.," and the sold note in the form "Sold to our principals for account of R. & Co.," it was held there was no variance between them, oral evidence being admissible to show who the principals were. *Cropper v. Cook*, L. R., 3 C. P. 194. Where the sold note is in the name of an agent, it may be shown orally on behalf of the buyer, that in all previous

transactions between them the vendor had contracted in the agent's name. *Truman v. Loder, ante*, p. 535. So where the contract was made by a broker, on behalf of principals whose names were not disclosed, oral evidence that by the usage in London in such a case the broker is liable to be treated as principal, is admissible to charge the broker, unless the contract provides for the final determination of differences by him, *vide ante*, p. 25.

Where a broker employed to buy goods for his principal, A., himself sells the goods, he cannot sign a valid note, so as to bind A., and, indeed, it seems that there is no contract at all. *Sharman v. Brandt*, L. R., 6 Q. B. 720, Ex. Ch. In an action by the purchaser against the seller of goods for not delivering them, the bought note *per se* is evidence of the contract against the seller on proof of the employment of the broker by him. *Hawes v. Forster*, 1 M. & Rob. 368. The conduct of the defendant may afford evidence that the broker was authorized to contract for him. *Thompson v. Gardiner*, 1 C. P. D. 777. If the seller intend to insist on a variance between the bought and sold note, it is for him to produce and prove the latter. *Hawes v. Forster, supra*. So the sold note signed by the broker acting for both parties, and delivered by him to the purchaser, is a sufficient memorandum to bind the purchaser within sect. 17, in the absence of proof of any variance between it and the bought note. *Parton v. Crofts*, 13 C. B., N. S. 11; 33 L. J., C. P. 189. Even if they differ, yet if one be signed by a principal in the contract, it will be evidence of the contract as against him. *Lowe v. Osborne*, 1 Stark. 140. So where the notes disagree, the entry in the book, if brought home to the knowledge of the parties, or even if not known to them, may be evidence of the contract: *semb. Thornton v. Charles*, 9 M. & W. 802; and see the observations of Parke, B., in that case; but the point is not a settled one; see *Heyman v. Neale, Sieveuright v. Archibald, ante*, p. 535; and *Parton v. Crofts, supra*. Where the broker in the bought and sold notes described the sellers' firm as A., B., and C.; but the firm had, unknown to the broker, been changed to A., D., and E., it was held that A., D., and E. might sue on the contract, it not appearing that the defendant had been prejudiced or excluded from a set-off, and there being some evidence of his having treated the contract as subsisting with the plaintiffs. *Mitchell v. Lepage*, Holt, N. P. 253.

A material alteration in the sale note by the broker, at the instance of the seller, after the bargain made and without the consent of the purchaser, precludes the seller from recovering. *Powell v. Divett*, 15 East, 29. So, where the buyers altered the bought note in a material particular by an addition at the foot of it (referred to by an asterisk in the body of it), though the breach was unconnected with the alteration. *Mollett v. Wackerbarth*, 5 C. B. 181. Where the sold note was sent back altered and signed by the seller, and the buyer proceeded on it as the contract, it was held to be a question for the jury whether this was a contract, or only an offer by the seller provided a bought note to the like effect were signed by the buyer. In this case there was no bought note in evidence at all, and the broker was agent of the buyer only. *Moore v. Campbell*, 10 Exch. 323; 23 L. J., Ex. 310. If the two principals agree in the broker's presence, and the broker's note does not correspond with the terms agreed upon, then there is no written contract by an agent lawfully authorized, and a party, who did not assent to the alteration, is not bound. *Pitts v. Beckett*, 13 M. & W. 743; *contra*, where there is evidence from which a subsequent assent to such alteration may be implied. *Harnor v. Groves*, 15 C. B. 667, 24 L. J., C. P. 53.

A distinction has been made between a *contract in writing* and a *note or memorandum in writing of a contract* within the Stat. of Frauds, s. 17

(now the S. of G. Act, 1893, s. 4); see the judgments in *Siewwright v. Archibald*, 17 Q. B. 107, 114, 124; 20 L. J., Q. B. 533; and in *Partou v. Crofts*, *ante*, p. 536, but in many cases this distinction seems to have been lost sight of.

## ACTION FOR NOT ACCEPTING GOODS SOLD.

By sect. 50 (1), "Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance."

In an action for not accepting goods sold, the plaintiff may be put to proof of the contract, the performance of all conditions precedent on his part, the refusal to receive, and the amount of damage.

*The contract.*] The validity of the contract is considered, *ante*, pp. 524 *et seq.*

*Readiness of the plaintiff to deliver.*] By sect. 28, *ante*, p. 523, unless otherwise agreed, delivery and payment are to be concurrent acts, *i.e.* the seller must be ready and willing to give possession of the goods in exchange for the price. Sect. 29, *post*, pp. 545, 546, lays down the rules as to delivery. Where readiness and willingness is denied it is enough for the plaintiff to show, either that he has offered to deliver, or that the defendant has dispensed with delivery, or has made it an idle and useless form to attempt to deliver. The plaintiff must also prove his *ability* to deliver, see *Lawrence v. Knowles*, 5 N. C. 399; an article corresponding with that which was contracted for, *per* Cresswell, J., in *Boyd v. Lett*, 1 C. B. 222, 225. It is sufficient "that the non-completion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it, if it had not been renounced by the defendant." *Cort v. Ambergate Ry. Co.*, 17 Q. B. 127, 144; 20 L. J., Q. B. 460; *Baker v. Farminger*, 28 L. J., Ex. 130; *Braithwaite v. Foreign Hardwood Co.*, (1905) 2 K. B. 543, C. A.

Under a contract for the sale of a cargo, if the buyer reject a cargo tendered, the seller may, within the time limited by the contract, tender another cargo. *Borrowman v. Free*, 4 Q. B. D. 500. As to what is sufficient tender of bills of lading, on the sale of goods to be shipped, see *Sanders v. Maclean*, 11 Q. B. D. 327, C. A.

Where the plaintiff has, otherwise than at the buyer's request, delayed delivery beyond the proper time, he cannot enforce acceptance, unless the defendant has entered into a new binding contract. *Plevins v. Downing*, 1 C. P. D. 220. As to waiver by the buyer of performance by the seller of a term of the contract, see *Leather Cloth Co. v. Hieronimus*, L. R., 10 Q. B. 140, cited *post*, p. 553. See, however, *Sanderson v. Graves*, L. R., 10 Ex. 234.

*Refusal to receive.*] It must be shown that the defendant has refused to receive under circumstances which do not warrant a refusal. Therefore, where a tender is necessary, it must be made at a reasonable time and place, and be such as to afford the defendant an opportunity of examining and receiving the goods; for without such opportunity it is no tender. See sect. 34 (2), *post*, p. 568. Thus, a tender of articles in closed casks, so as to prevent inspection, is no tender. *Isherwood v. Whitmore*, 10 M. & W. 757. Nor is it sufficient to show a tender of the goods at the defendant's warehouse at a late hour after it is shut up, and the defendant has left it. But if the defendant be present, and able to examine and receive them, the tender will not be bad merely because the hour is late and unreasonable. *Startup v.*

*Macdonald*, 6 M. & Gr. 593. On the sale of goods for shipment by steamer or steamers, the defendant must accept such part of the goods as arrives in one steamer. *Brandt v. Lawrence*, 1 Q. B. D. 344, C. A. But, where, on the sale of twenty-five tons of pepper, October shipment, the name of vessel, &c., were to be declared within sixty days from the date of the bill of lading, and within the time twenty-five tons were declared by the B. vessel, only twenty tons of which complied with the contract, and no further declaration was made, it was held that the defendant need not accept the twenty tons. *Reuter v. Sala*, 4 C. P. D. 239, C. A. The tender must not be of a larger quantity than was bought; *Dixon v. Fletcher*, 3 M. & W. 146; *Hart v. Mills*, 15 M. & W. 85; at least, unless the tender be divisible, or the surplus not charged for. If the buyer give a limited order for certain specified goods, and the seller send those and others from a distant place in one package, charged at a lump sum, the consignee may repudiate the whole and refuse to receive the package. *Levy v. Green*, 8 E. & B. 575; 27 L. J., Q. B. 111; Ex. Ch., 1 E. & E. 969; 28 L. J., Q. B. 319; and see *Macdonald v. Longbottom*, 1 E. & E. 977, 987; 28 L. J., Q. B. 293; 29 L. J., Q. B. 256; *Tamvaco v. Lucas*, 1 E. & E. 581; 28 L. J., Q. B. 150, 301. If the defendant notify his intention to refuse, and forbid the plaintiff to deliver goods ordered to be made, then the plaintiff need not proceed to complete the contract on his part, and may show this under an alleged refusal to accept, although the goods are not ready for delivery, and could not be delivered; for the plaintiff is thereby "discharged" from proceeding further; and such a notice to the plaintiff will support an allegation that the defendant "prevented and discharged" the plaintiff from supplying the goods and executing the contract. *Cort v. Ambergate Ry. Co.*, ante, p. 537. And a countermand by the person ordinarily representing the defendant in his dealings with the plaintiff (as the engineer of a railway) is sufficient, although the defendant be a corporate body, and the notice not under seal; S. C. See further, as to readiness to receive, *post*, p. 545.

*Damages.*] In an action for not accepting goods, by sect. 50 (2), "The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract. (3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept."

By sect. 37, "When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery" (*vide* sect. 62, ante, p. 521), "and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract."

By sect. 48, "(3) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

"(4) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages."

The measure of damages under sect. 50 (3) is not affected by notice given by the buyer, while the goods are on their way, that he would not accept them. See *Phillpotts v. Evans*, 5 M. & W. 475; and see *Leigh v. Patterson*, 8 Taunt. 540, *post*, p. 548. Where the defendant has ordered goods and then wrongfully countermanded the order, and thereupon the vendor ceases to manufacture them, he is entitled to damages for the goods in hand, and to such profit as he would have made if the contract had been fully carried out. *Dunlop v. Higgins*, 1 H. L. C. 381. Where the payment was to be by bill, plaintiff may recover the amount which would have accrued on it for interest. *Boyce v. Warburton*, 2 Camp. 480. Where no difference is proved between the contract price and the market price, only nominal damages are recoverable. See *Valpy v. Oakeley*, 16 Q. B. 941.

### Defence.

By Rules, 1883, O. xix. r. 15, the defendant must plead specially all facts not previously stated on which he relies, and must raise all such grounds of defence as, if not pleaded, would be likely to take the plaintiff by surprise; and r. 17 provides that the defendant shall not deny generally the allegations in the statement of claim; *vide ante*, p. 310. Where therefore the defence is that the contract is materially different from the one alleged in the statement of claim, or that the goods were in fact sold with a qualification or condition annexed, which the goods tendered did not satisfy, this must be specially pleaded in the defence.

The admissibility of evidence under certain common defences will be found under the general head of *Defences in actions on simple contracts*, *post*, p. 658 *et seq.*

*Denial of contract.*] By Rules, 1883, O. xix. r. 20, *ante*, p. 310, a denial of a contract operates only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise. This requires the defendant specifically to allege in his defence that he relies on the objection to the contract arising under that statute. *Clarke v. Callow*, 46 L. J., Q. B. 53, C. A. An objection on the ground of non-compliance with the Sale of Goods Act, 1893, s. 4, must also be specially pleaded.

The following are defences which must also be specially pleaded:—Where a joint order is given for several articles at several prices, the contract is entire, and the purchaser may refuse to accept one, unless the others are delivered; *Champion v. Short*, 1 Camp. 53; and where goods are sold as “about” a certain quantity, “more or less,” the latter words are intended to provide only for a small excess, and the purchaser is not bound to accept 350 tons on a bargain for “about 300 tons, more or less”; at least, not unless it be shown that a large excess was contemplated. *Cross v. Eglin*, 2 B. & Ad. 106; *Tamvaco v. Lucas*, *ante*, p. 538. See also *Cockerell v. Aucombe*, 2 C. B., N. S. 410; 26 L. J., C. P. 191; *Macdonald v. Longbottom*, 1 E. & E. 977, 987; 28 L. J., Q. B. 293; 29 L. J., Q. B. 256; *Beekh v. Page*, 5 C. B., N. S. 708; 7 *Id.* 861; 28 L. J., C. P. 164, 341; *Miller v. Borner*, (1900) 1 Q. B. 619. As to the effect of delivery of the wrong quantity of goods, or of goods mixed with others, or by instalments, see sect. 30, *ante*, p. 523, and sect. 31 (2), *post*, p. 515. Where the defendant instructed the plaintiffs to buy for him 500 tons of sugar, “50 tons more or less of no moment if you are enabled to get a suitable vessel”; and the plaintiffs bought 400 tons, parcel by parcel according to the usage of the market, and could buy no more at the price named, it was held that the defendant was not bound to accept the 400 tons, as the usage could not affect the express

order. *Ireland v. Livingston*, L. R., 5 Q. B. 516, Ex. Ch. (reversed on another ground, L. R., 5 H. L. 395). See, however, *Johnston v. Kershaw*, L. R., 2 Ex. 82. A contract to sell "all spars manufactured by M., say about 600 red pine spars," was held not to amount to a warranty as to the quantity of the spars. *McConnell v. Murphy*, L. R., 5 P. C. 203. See also *Gwillim v. Daniell*, 2 C. M. & R. 61. A contract to buy a "cargo of about the following lengths, &c., in all about 60 fathoms," is not satisfied by the delivery of 60 fathoms, part of a cargo of 80 fathoms, although the 60 fathoms were severed from the remainder, for "cargo" means the whole loading of the ship. *Kreuger v. Blanck*, L. R., 5 Ex. 179, following *Sargent v. Reed*, Str. 1228; *Borrowman v. Drayton*, 2 Ex. D. 15, C. A.; *Anderson v. Morice*, 1 Ap. Ca. 713, D. P., distinguished in *Colonial Insur. Co. of New Zealand v. Adelaide Marine Insur. Co.*, 12 Ap. Ca. 128, J. C. A contract to supply "the whole steel" required for the Forth bridge, subject to conditions which contained the clause, "the estimated quantity of steel we understand to be 30,000 tons, more or less," is not limited by the clause. *Tancred v. Steel Co. of Scotland*, 15 Ap. Ca. 125, D. P.

A sale of goods "on arrival," or "to arrive" in a particular ship, is a contract for the sale of goods at a future period, subject to the double condition of the arrival of the ship and the goods being on board, and is not a warranty on the part of the seller that the goods shall arrive. *Boyd v. Siffkin*, 2 Camp. 326; *Hawes v. Humble*, *Id.* 327, n.; *Lovatt v. Hamilton*, 5 M. & W. 639; *Johnson v. Macdonald*, 9 M. & W. 600. See also *Smith v. Myers*, L. R., 5 Q. B. 429; L. R., 7 Q. B. 139, Ex. Ch.; and *Nickoll v. Ashton*, (1901) 2 K. B. 126, C. A. But, a contract for the sale of goods "now on passage and expected to arrive by," or "to be delivered on the safe arrival of," a certain ship: *Gorrissen v. Perrin*, 2 C. B., N. S. 681; 27 L. J., C. P. 29; *Hale v. Rawson*, 4 C. B., N. S. 85; 27 L. J., C. P. 189; is conditional on the arrival of the ship only. The stipulation in a contract of sale, "the cotton to be taken from the quay," was held an independent stipulation for the seller's benefit, and not a condition precedent which the purchaser had a right to insist on being performed. *Neill v. Whitworth*, L. R., 1 C. P. 684, Ex. Ch. See also *Castle v. Playford*, L. R., 7 Ex. 98, Ex. Ch. A sale of a cargo "from the deck" means that the vendor is to pay the harbour dues. *Playford v. Mercer*, 22 L. T. 41, Q. B.

When goods are supplied under a single special contract with a committee of several persons, and a new member of the committee is added before the contract has been performed, he cannot be joined as co-defendant in an action for not accepting, though he assented to and recognized the contract after he had become a member; *Beale v. Mous*, 10 Q. B. 976; *accord. Newton v. Belcher*, 12 Q. B. 921; and it matters not whether the property in the goods sold vested in successive portions during the execution of the contract. But it might be otherwise, if the circumstances were such that a new contract could be implied, on successive deliveries, or successive acts, done by the plaintiff; as on a standing contract to work for a firm, on certain terms, when required; see the cases, *supra*, and *Heilsby v. Mears*, 5 B. & C. 504. A person employed by the defendant, as broker to buy the goods, cannot himself be the vendor; *Sharman v. Brandt*, L. R., 6 Q. B. 720, Ex. Ch.; even by the usage of the market, if the principal were ignorant of the usage. *Robinson v. Mollett*, L. R. 7 H. L. 802.

*Repudiation of the goods.*] By sect. 13, "Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description."



The first paragraph applies "to all cases in which the purchaser has not seen the goods, but is relying on the description alone." *Tarley v. Whipp*, (1900) 1 Q. B. 513, 516. Where the goods correspond with the description and are marketable, the buyer cannot repudiate the whole on the ground that a small portion is inferior in quality, and therefore subject to a reduction in price. *Braithwaite v. Foreign Hardwood Co.*, (1905) 2 K. B. 543, C. A.

Sect. 14, *ante*, p. 487, defines the implied condition as to quality and fitness on the sale of goods.

*Sale by sample.*] Sect. 15 (1). "A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect. (2) In the case of a contract for sale by sample—(a) there is an implied condition that the bulk shall correspond with the sample in quality: (b) there is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample: (c) there is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample."

Hence in the case of sales by sample, if the bulk do not correspond with it, the defendant may refuse to receive it, and may keep the article any reasonable time to examine, and then repudiate it. But where a contract for the sale of barley was "about as *per sample*" and contained an arbitration clause, a custom of the London Corn Exchange applicable to such contracts, that the buyer might not reject for difference or variation in quality, unless excessive or unreasonable, and so found by arbitration, is good, and by sect. 55, *ante*, p. 522, varies the condition implied by sect. 15 (2). *In re Walkers, &c., & Shaw & Co.*, (1904) 2 K. B. 152.

By sect. 36, "Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them."

By sect. 53 (1), *ante*, p. 488, where there is a sale of a specific article with a warranty, it cannot be returned for breach of warranty only. In the case, however, of an executory contract for the supply of goods of a particular quality, the goods may be refused or returned, if not of the kind contracted for. *Street v. Blay*, 2 B. & Ad. 463; *Heilbutt v. Hickson*, L. R., 7 C. P. 438. Thus where a contract is made for the purchase of hops by sample, conditional on sulphur not having been used in their growth, if sulphur have been so used, the defendant may reject the hops, although they correspond with the sample; *Bannerman v. White*, 10 C. B., N. S. 844; 31 L. J., C. P. 28; and where goods are sold under a certain denomination, the defendant is entitled to have such goods delivered to him as are commercially known under this denomination, though he may have bought after inspection of the bulk and without warranty. *Josling v. Kingsford*, 13 C. B., N. S. 417; 32 L. J., C. P. 94; and see *Hopkins v. Hitchcock*, 14 C. B., N. S. 65; 32 L. J., C. P. 154; *Jones v. Just*, L. R., 3 Q. B. 197, and *Shaul v. Bowes*, 2 Ap. Ca. 455, 480, *per* Ld. Blackburn. A contract for the sale of 600 tons (8,200 bags) of rice to be shipped at Madras "during the months of March <sup>and</sup> April," *per Rajah*, is not satisfied by the delivery of rice all shipped in February except 50 bags shipped on March 2nd. S. C., D. P. See also *Reuter v. Sala*, *post*, p. 542. On the sale of goods by a manufacturer of such goods, who is not otherwise a dealer in them, the buyer is entitled to receive the goods as of the manufacturer's own make; *Johnson v. Raylton*, 7 Q. B. D. 438, C. A.; unless a custom in the particular trade is proved that the goods of another maker may be substituted. S. C.

So, if the sale note refer to the sample, and the bulk prove not to be of the same *kind* as the sample, the buyer may reject the goods, even though there be a condition in the contract that the contract should not be avoided if the bulk prove of inferior *quality* to the sample, but that an allowance should in that case be made. *Azimir v. Casclar*, L. R., 2 C. P. 431; Ex. Ch. *Id.* 677; see *Vigers v. Sanderson*, (1901) 1 K. B. 608. But, generally, where the seller produces a sample, and represents that the bulk is of equal quality, and the sale note does not refer to any sample, the defence that the goods are not equal to it is inadmissible. *Meyer v. Everth*, 4 Camp. 22; *Pickering v. Dowson*, 4 Taunt. 779; *Kain v. Old*, 2 B. & C. 631. The defendant may, however, show that all sales of tobacco are by sample by general usage in that trade, though there was no mention of sample in the contract. *Syers v. Jones*, 2 Exch. 111. And the plaintiff may show in reply the custom of certain markets as to the time for objecting to the bulk, or as to returning, or allowing for, articles not answering the sample. *Sanders v. Jameson*, 2 Car. & K. 557; *Cooke v. Riddlehen*, 1 Car. & K. 561.

By sect. 15 (2, b), *ante*, p. 541, there is an implied condition that the purchaser by sample shall have a reasonable opportunity of comparing the bulk with the sample. The place of inspection is, in the absence of express stipulation, presumed to be the place of delivery; *Perkins v. Bell*, (1893) 1 Q. B. 193, C. A.; if after an inspection of a sample there, the purchaser orders the goods to be sent to his sub-vendee, he cannot afterwards reject them. S. C.

By sect. 10 (1), "Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract."

The rule of equity stated *ante*, p. 323, is confined to contracts for the sale of land. *Reuter v. Sala*, 4 C. P. D. 239, 249, *per* Cotton, L.J. Thus where a contract for the sale of goods, to arrive by ship, provides that the name of the vessel, marks, and particulars shall be declared "within 60 days from the date of the bill of lading," such time is of the essence of the contract, and if such declaration be not made within the time limited, the buyer is not bound to accept the goods. S. C. See further, *Hoare v. Rennie*, 5 H. & N. 19; 29 L. J., Ex. 73 (explained by C. A. in *Mersey Steel and Iron Co. v. Naylor*, 9 Q. B. D. 658, 671; see also S. C., 9 Ap. Ca. 446, 447); *Coddington v. Paleologo*, L. R., 2 Ex. 193; and *Shand v. Bowes*, *ante*, p. 541. But in general a partial breach by the plaintiff of his contract to deliver does not justify the defendant in subsequently refusing to accept. *Jonassohn v. Young*, 4 B. & S. 296; 32 L. J., Q. B. 385. See further as to the effect of a partial breach, *Simpson v. Crippin*, L. R., 8 Q. B. 14, and *Fretth v. Burr*, L. R., 9 C. P. 208.

*Fraud.*] A *wilful* misrepresentation by the vendor, which induced the defendant to purchase, will warrant the defendant in refusing to complete the contract; but this must be pleaded specially. Even where the sale is "with all faults," any artifice to disguise a fault may vitiate the sale. *Baglehole v. Walters*, 3 Camp. 151; *Schneider v. Heath*, *Id.* 506. See *Ward v. Hobbs*, 4 Ap. Ca. 13, D. P.

By sect. 58, "(3) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person. Any sale contravening this rule may be treated as fraudulent by the buyer. (4) A sale by auction may be notified to be subject to a reserved or upset price, and

a right to bid may also be reserved expressly by or on behalf of the seller. Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction."

ACTION FOR GOODS BARGAINED AND SOLD.

By sect. 49, "(1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

"(2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract."

Sects. 16—19 relate to the passing of the property on a contract of sale; they will be found, *post*, pp. 949 *et seq.*; *Action for conversion—Vesting of the property—Sale of goods.*

The plaintiff, an artist, agreed "to finish three pictures for F. (the defendant), which are now submitted to him, in my best manner, for 60*l.* and a clock." The pictures were not then completed, but afterwards the defendant expressed approval of them and said he would send for them: held, to constitute sufficient appropriation of the pictures to support the common count for goods bargained and sold, and sold and delivered. *Girardot v. Fitzpatrick*, 21 L. T., 470, Mellor, J. Where acceptance of goods is conditional on something to be done by the seller, if the buyer prevent the possibility of the seller's fulfilling the condition, the contract is satisfied. *Muckay v. Dick*, 6 Ap. Ca. 251, D. P.

The plaintiffs in London sold to the defendants a quantity of butter, expected from Sligo, of specified quality and price. The butter was to be shipped for London in October, and paid for by bill at two months from the landing. The butter was not shipped till November; but the defendants waived the objection, and accepted the invoice and bill of lading. The butter having been lost by shipwreck on the passage, it was held that the property had passed to the defendants; and that they might be sued for goods bargained and sold, or, *per* Park, J., for goods sold and delivered. *Alexander v. Gardner*, 1 N. C. 671. Where goods are destroyed, the question is not necessarily whether the property had passed, but at whose risk the goods were; *Castle v. Playford*, L. R., 7 Ex. 98, Ex. Ch.; *Martineau v. Kitching*, L. R., 7 Q. B. 436, 455, 459; in such case, if the price were not ascertained prior to the destruction, it must be ascertained as nearly as possible. *S. C. Id.*

By sect. 20, "Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not. Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault. Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodian of the goods of the other party."

As to re-sale by the seller on default of the buyer, see sect. 48 (3, 4), *ante*, p. 538.

By Rules, 1883, O. xxi. r. 3, *post*, p. 658, a defence in denial must deny the order or contract or the amount claimed.

## ACTION FOR NOT DELIVERING GOODS SOLD.

By sect. 51 (1), "Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery."

In an action against the seller of goods for not delivering them, the plaintiff may be called upon, by proper defences, to prove the contract and the breach, the performance of all conditions precedent on his part, and the amount of damages. Much of the matter under the last preceding head applies equally to this action.

*Construction of the contract.—Time, &c.*] Where L. & Co., brokers, sold hemp by auction (described in the invoice as bought of "L. & Co."), and received part of the price, it was held that they had made themselves responsible as sellers, and that they could not defend themselves in an action for non-delivery, by evidence that they sold as agents only, and that the invoice had been made out in their names according to a local custom of brokers to secure the passing of the purchase-money through their hands. *Jones v. Littledale*, 6 Ad. & E. 486. But where the invoice does not itself constitute a contract (as in fact it rarely does), but is only used to show that the defendant was the vendor of goods sold by a previous contract, the defendant may contradict it by showing that he was not the real vendor, and that his name was put in the invoice at the plaintiff's request. *Holding v. Elliott*, 5 H. & N. 117; 29 L. J., Ex. 134; and *per cur.*, an invoice is, generally, not *per se* a contract or any estoppel. S. C. An auctioneer may be liable for non-delivery of goods sold by him, although his principal's name appears on the conditions. *Woolfe v. Horne*, 2 Q. B. D. 355; *Rainbow v. Hawkins*, (1904) 2 K. B. 322.

As to when stipulations as to time amount to a condition precedent, see sect. 10 (1), *ante*, p. 542. Where the contract was for the sale of sponge, to be paid for by oebre, at, &c., the value to be delivered on or before the 24th inst., in an action for not delivering the sponge, it was held that the delivery of the oebre on the 24th was a condition precedent to the plaintiff's right of action. *Parker v. Rawlings*, 4 Bing. 280.

So where the defendant undertook to supply a steam-engine for a vessel of the plaintiff according to drawings and specifications of P. B., and the specification required its completion within two months; the court held that time was essential, and that an action lay for non-delivery within that time. *Wimshurst v. Deeley*, 2 C. B. 253. But where the defendant has sold to plaintiff specific goods, to be taken and paid for at a certain time, and the plaintiff fails to pay at the end of that time, the defendant, though he retains a lien on them if in his possession, cannot re-sell them; but the plaintiff, on tendering the money at a subsequent day, will entitle himself to receive them. *Martindale v. Smith*, 1 Q. B. D. 389, *Woolfe v. Horne*, *supra*; *Page v. Cowasjee*, L. R., 1 P. C. 127, 145. So if there be a sale of goods to be delivered to the vendee "as required," it may be that he ought to require them within a reasonable time; but the vendor cannot rescind the contract till he has called on the vendee to require or take them, even though an unreasonable time has elapsed. *Jones v. Gibbons*, 8 Exch. 920; 22 L. J., Ex. 347.

Where a contract is to make and deliver goods "as soon as possible," there is at any rate an implied contract that the maker has all the necessary appliances ready for the manufacture. *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. D. 670, C. A.

An invitation to tender for supplying meat to a workhouse, specified that

a written contract would be required to be signed upon acceptance of the tender: held that a written tender of the defendant, withdrawn by him after acceptance by the plaintiffs, was not a contract on which they could sue. *Kingston-on-Hull, Guardians of v. Petch*, 10 Exch. 610; 24 L. J., Ex. 23. A contract to deliver 150 tons of girders by three deliveries of 50 each on certain days, according to drawings provided by the plaintiff, is one entire contract; and if the plaintiff do not supply drawings within a reasonable time, the defendant is under no obligation to deliver any girders. *Kingdom v. Cox*, 5 C. B. 522. The intention of the parties is to be looked at in the construction of all contracts; and the decision on one is seldom a guide to the construction of another. *Bannerman v. White*, 10 C. B., N. S. 844; 31 L. J., C. P. 28. See further the cases cited under the next heading, *post*, pp. 549 *et seq.*

A promise by the seller M. to a purchaser, following a contract of sale, "If we are satisfied with you as a customer, we would favourably consider an application from you at the expiration of the term for a renewal of the same for another period," imposes on M. no obligation to renew the contract. *Montreal Gas Co. v. Vasey*, (1900) A. C. 595, J. C.

[*Readiness to accept and to pay.*] In order to prove that the plaintiff was ready and willing to accept the goods and to pay for the same, it will not be necessary to prove a tender of the money; *Rawson v. Johnson*, 1 East, 203; *Waterhouse v. Skinner*, 2 B. & P. 447; and a demand of the goods is sufficient evidence that the plaintiff was ready and willing to pay; *Wilks v. Atkinson*, 1 Marsh, 412; *Levy v. Herbert, Ltd.*, 7 Taunt. 318; and this though the demand may be by the plaintiff's servant. *Squier v. Hunt*, 3 Price, 68.

By sect. 31 (2), "Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated."

When the vendee becomes insolvent, and takes no steps to obtain delivery in performance of the contract, he practically gives notice to his creditors that he does not intend to perform his contract, and this, when assented to by the vendor, amounts to a rescission of the contract. *Ex pte. Chalmers*, L. R., 8 Ch. 289, followed in *Morgan v. Bain*, L. R., 10 C. P. 15. See also *Bloomer v. Bernstein*, L. R., 9 Q. B. 558, as to the questions to be left to the jury in such a case. But the insolvency must be an inability to pay, avowed either in act or word, and a consequent intention of the vendee not to pay his debts when due. *Ex pte. Carnforth, &c., Co.*, 4 Ch. D. 108. It is sufficiently avowed if the vendee file a petition for liquidation, and within a reasonable time tender of the price in cash be not made by the trustee appointed thereunder; *Ex pte. Stapleton*, 10 Ch. D. 586, C. A.; or, it seems, by his sub-vendee. S. C. Where the delivery is to be by monthly quantities, the plaintiff can compel the defendant in a subsequent month to make up for short deliveries in the previous months, although the defendant had forborne to deliver the full quantities at the plaintiff's request. *Tyers v. Rosedale, &c., Iron Co.*, L. R., 10 Ex. 195, Ex. Ch.

[*Non-delivery.*] By sect. 28, *ante*, p. 523, payment and delivery are concurrent conditions. The rules as to delivery are laid down in sect. 29.

“(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller’s place of business, if he have one, and if not, his residence: Provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.

“(2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

“(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf; provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

“(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

“(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state” (see sect. 62 (4), *ante*, p. 522) “must be borne by the seller.”

Sect. 30 (3), *ante*, p. 524, relates to the case of delivery of the wrong quantity of goods or of goods mixed with others.

By sect. 31 (1), “Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.”

By sect. 34 (2), *post*, p. 568, the seller, on tendering delivery of the goods, must, on request, give the buyer reasonable opportunity of examining them to ascertain if they are in conformity with the contract.

If the vendor be to deliver, but the contract do not (expressly or impliedly) provide where the delivery is to take place, as on board ship, he is not bound to deliver, or offer to deliver, till the place of delivery is notified by the vendee. *Armitage v. Insole*, 14 Q. B. 728. Hops, when sold by T. to W., were lying at a warehouse to T.’s use. W. paid for them and took away part from the warehouse with the consent of the warehouseman, F.; but before he had carried away the rest, they were seized by a creditor of T.’s vendor under a claim of right; held, that W. could not sue T. for non-delivery, although the latter had given no delivery order to W. *Wood v. Tassell*, 6 Q. B. 234. In this case F. had, in fact, become T.’s agent, and it was not shown that the seizure was rightful. If it had appeared that F. had, from the first, refused to deliver on the order of T., an action for non-delivery would have lain against T. *Semb. Thöl v. Hinton*, 4 W. R. 26, M. T. 1855, Ex. If, before the time of delivery, the seller announce to the buyer his intention not to deliver, the latter may sue at once. *Roper v. Johnson*, L. R., 8 C. P. 167, following *Frost v. Knight*, L. R., 7 Ex. 111, Ex. Ch. As to delivery of goods “to arrive,” &c., *vide ante*, p. 540. As to delivery to a carrier, see sect. 32, *post*, p. 552. If goods sold be in a carrier’s hands, subject to lien, an action for non-delivery lies against the seller if the carrier refuse to deliver, on readiness by the buyer to pay charges thereon. *Buddle v. Green*, 27 L. J., Ex. 33.

By sect. 33, “Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.”

[*Damages.*] In an action for non-delivery of goods, by sect. 51 (2) “the measure of damages is the estimated loss directly and naturally resulting, in

the ordinary course of events, from the seller's breach of contract." This follows the principle enunciated in *Hudley v. Baxendale*, 9 Exch. 341; 23 L. J., Ex. 179; cited *post*, p. 648. See *Borries v. Hutchinson*, 18 C. B., N. S. 445; 34 L. J., C. P. 169; *Hinde v. Liddell*, L. R., 10 Q. B. 265; and see *Hughes v. Græme*, 33 L. J., Q. B. 335, 340. Thus, if a ship be ordered to be made or be left for repair and not delivered at the stipulated time, the measure of damages is *primâ facie* the sum which would have been earned by the ship in the ordinary course of trade since the period when it should have been delivered. *Fletcher v. Tayleur*, 17 C. B. 21; 25 L. J., C. P. 65; *Ex pte. Cambrian S. Packet Co.*, L. R., 4 Ch. 112, 117. See *Cory v. Thames Ironworks Co.*, L. R., 3 Q. B. 181. So, where sets of waggon wheels and axles were to be made by the defendant according to patterns furnished by the plaintiffs, the jury may give damages for the loss of the use of the waggons. *Elbinger Actien-Gesellschaft v. Armstrong*, L. R., 9 Q. B. 473.

By sect. 51 (3), "Where there is an available market for the goods in question the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver." This applies although there are several periods of delivery and the action was commenced before the periods of delivery have elapsed; for the repudiation of the contract before the time for its fulfilment goes to the question of breach, but does not affect the damages. *Brown v. Maller*, L. R., 7 Ex. 319; *Roper v. Johnson*, *ante*, p. 546. But where delivery was to be made between January and May, and on default the defendants to pay a fine per ton per week, it was held that the fine was to be computed from May until delivery actually was complete. *Berghelm v. Blaenavon Iron, &c., Co.*, L. R., 10 Q. B. 319.

If no difference be proved between the contract and market prices, the damages must be nominal. *Valpy v. Oakeley*, 16 Q. B. 911; 20 L. J., Q. B. 380; *Griffiths v. Perry*, 1 E. & E. 680; 28 L. J., Q. B. 204. When the price has been paid, the measure of damages is the market price, without deducting the contract price; and this will be the rule where the payment is by bills which are still outstanding. But if the bills be dishonoured, even though after breach of the contract to deliver, the parties are placed in the same position as if the bills had never been given, or the contract had been to pay in ready money; and the vendee can only recover the difference between the contract price and the market price of the goods. S. CC. This principle applies even although the goods are not specific. S. CC.

If the buyer, at the request of the seller, forbear to enforce the contract at the time the goods ought to be delivered, but afterwards do so, the measure of damages is the difference between the contract price and the market price when the buyer so enforces the contract, *e.g.*, by buying the goods in the market. *Ogle v. Fane, El.*, L. R., 3 Q. B. 272, Ex. Ch. See *Tyers v. Rosedale, &c., Iron Co.*, L. R., 8 Ex. 305; Ex. Ch., L. R., 10 Ex. 195, where the postponement of delivery was at the request of the buyer. Where there has been a written contract, the vendee cannot enhance the damages by oral proof that the contract price was higher than the market price, by reason of the shortness of the time fixed by the contract for delivery. *Brady v. Ostler*, 3 H. & C. 112; 33 L. J., Ex. 300.

Where the goods delivered were of inferior quality to those contracted for, and plaintiff (vendee) had paid for them in advance, but objected to them when delivered and re-sold them at a reduced price, and the re-sale was within a reasonable time, the measure of damages is the difference between the market price of goods of the quality contracted for at the date of delivery, and the re-sale price. *Loder v. Kekulé*, 3 C. B., N. S. 128; 27 L. J., C. P. 27.

The purchaser is entitled to recover general loss occasioned to him by the non-delivery. *Bridge v. Wain*, 1 Stark. 504. But he cannot recover damages arising from any reason peculiar to himself or from any special contract into which he may have entered, of which the vendor had no notice, for such damages could not have been contemplated by the vendor. Thus, where A. contracts to repair an engine for B. within a certain time; C. agrees to execute part of the work for A. within a less time, but without any knowledge of the contract between A. and B. C. fails to do his part within the time stipulated by him; A. cannot recover from C., as special damage, compensation made by A. to B. for the delay in the completion of A.'s contract occasioned by C.'s breach of contract. *Portman v. Middleton*, 4 C. B., N. S. 322; 27 L. J., C. P. 231. See also *Prior v. Wilkinson*, 8 W. R. 260, H. T. 1860, Q. B.; and *Hales v. L. & N. W. Ry. Co.*, 4 B. & S. 66; 32 L. J., Q. B. 292; and other cases cited *post*, pp. 648 *et seq.*, *Actions against carriers—Damages*. Defendant contracted to deliver a steam threshing-engine on a day fixed, at which time he knew the plaintiff would want to thresh his wheat. He failed to deliver it till six weeks after the day. He was held liable for damage and expense occasioned by long exposure of the corn, kiln-drying, stacking, &c.; but not to the loss caused by a fall in the market price of corn. *Sneed v. Foord*, 1 E. & E. 602; 28 L. J., Q. B. 178. So, where the defendant contracted with the plaintiffs to make for them a part of a machine which the plaintiffs, to the defendant's knowledge, had contracted to make for J. by a given time, and the defendant did not deliver according to his contract, so that the plaintiffs could not deliver the machine to J. by the given time, J. therefore rejected it: it was held that the plaintiffs might recover damages for the loss of profit on their contract with J., and for the expenditure uselessly incurred by them in making the rest of the machine. *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. D. 670, C. A. In such cases where the seller, A., knows that the buyer, E., is under a sub-contract with R., E. may recover damages in respect of his probable liability thereunder; that liability is the limit, but not as a matter of law, the measure of such damages. *Elbinger Actien-Gesellschaft v. Armstrong*, L. R., 9 Q. B. 473; *Grelèrt-Borgnis v. Nugent*, 15 Q. B. D. 85, C. A. And if R. sue E., and A. repudiate liability and refuse to defend the action, and E. thereupon prudently pay 20*l.* into court and succeed at the trial, by showing this to be enough, E. may recover from A. the 20*l.* and the excess of his costs in the action *R. v. E.* beyond what he received from R. *Agius v. Gl. W. Colliery Co.*, (1899) 1 Q. B. 413. On a contract to sell cotton of a certain quality at a certain price, the buyer cannot recover for his loss of profit which he would have made by carrying out a re-sale, at a higher price, made in the interval between the contract and the time for delivery. *Williams v. Reynolds*, 6 B. & S. 495; 34 L. J., Q. B. 221; *Borrics v. Hutchinson*, *ante*, p. 547. But evidence of such re-sale may be admissible to show that there has been a rise in the market value. See *Engel v. Fitch*, L. R., 4 Q. B. 659, 667, Ex. Ch. The vendor cannot diminish the damages by giving previous notice to the purchaser of his intention not to deliver the goods, as such notice does not alter the time at which the damages are to be assessed, which is the date appointed for delivery. *Leigh v. Paterson*, 8 Taunt. 540; and see *Phillipotts v. Evans*, 5 M. & W. 475, *ante*, p. 539, and *Brown v. Muller*, L. R., 7 Ex. 319. The plaintiff may, under the Sale of Food and Drugs Act, 1875 (38 & 39 V. c. 63), s. 28, cited *ante*, p. 493, in some cases recover special damages if goods of the kinds mentioned in the acts of an inferior quality are delivered to him.

Where a commission agent, A., purchases and ships goods for his principal, B., inferior in quality to those ordered by B., B. can recover from A. the actual loss only which he has sustained, and not the difference between the



price which the goods fetch, and what they would have fetched if of the proper quality. *Cussaboyton v. Gibb*, 9 Q. B. D. 220; 11 Q. B. D. 797, C. A. *Accord. Sulvesen v. Rederi Aktiebolaget, &c.*, (1905) A. C. 302, D. P.

*Specific performance.*] By sect. 52, "In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just, and the application by the plaintiff may be made at any time before judgment or decree." A writ of delivery is now issued and enforced under Rules, 1883, O. xlviii. r. 1.

### Defence.

The defence arising under the Sale of Goods Act, 1893, s. 4, must, if relied on, be specially pleaded. Rules, 1883, O. xix. r. 20, *ante*, p. 310.

Where goods sold under a contract required by the Stat. of Frauds to be in writing were to be delivered at a certain place or time, and the parties afterwards orally varied their stipulation as to delivery, it was held that this did not amount to a rescission of the original contract; *Moore v. Campbell*, 10 Exch. 323; 23 L. J., Ex. 310; *Noble v. Ward*, L. R., 2 Ex. 135, Ex. Ch.; *vide ante*, p. 28: but if the goods had been actually accepted, or even a delivery order accepted under the agreement as so varied, that would have been a defence under a plea of accord; *semb. Moore v. Campbell, supra*. Though a contract made in error may be avoided, yet the vendor cannot treat as void, at law or in equity, a sale to the vendee of an article misrepresented by the vendor in error, unless the vendee consents. *Semb. Scott v. Littledale*, 8 E. & B. 815; 27 L. J., Q. B. 201.

The case of the goods having perished is provided for by sects. 6, 7, *ante*, p. 523. See also sect. 32 (2, 3), *post*, p. 552, and sect. 33, *ante*, p. 546. See *Howell v. Coupland*, 1 Q. B. D. 258, C. A.

As to defence arising from the want of readiness in the plaintiff to accept, *vide ante*, p. 545. As to rescission of a contract before breach, see *Defences in actions on simple contracts—Rescission, post*, p. 703. As to defence on the ground of the insolvency of the buyer, *vide Action for conversion of goods—Evidence of right of possession, post*, p. 967.

### ACTION FOR GOODS SOLD AND DELIVERED.

The plaintiff in an action for goods sold and delivered must be in a condition to prove, if denied, 1. The contract of sale; 2. The delivery of goods according to contract; 3. The value or price.

*The contract of sale.*] The general statutory and other rules relating to contracts of sale will be found, *ante*, pp. 521 *et seq.*, and the cases in which the contract must be in writing are collected, *ante*, pp. 525 *et seq.* The necessity of a writing under the S. of G. Act, 1893, seldom, however, comes in question in this action, because the delivery, on which the action is founded, generally, though not necessarily, amounts also to a receipt and acceptance by the defendant. In general, proof of the delivery of the goods to, and receipt of them by, the defendant is *prima facie* evidence of the contract, and supersedes the proof of an order. *Bennett v. Henderson*, 2 Stark.

550. But this may, of course, be rebutted; as by proof that the defendant was in the habit of selling such goods for the plaintiff on commission. *Miller v. Newman*, 4 M. & Gr. 646. Defendant sent an order to A., who had meanwhile sold his business to B.; B. supplied goods to defendant, who consumed them, and was sued for them by B.; it was held, that the defendant, having a previous set-off against A., and having never contracted with B., nor had been informed of B.'s position and ownership till after the goods had been consumed, so that they could not be returned or refused, the defendant was not liable on a contract express or implied. *Boulton v. Jones*, 2 H. & N. 564; 27 L. J., Ex. 117.

In some cases where goods have been wrongfully taken, the plaintiff may waive the tort, and sue on the implied contract. Thus, where the defendant by fraud procured the plaintiff to sell goods to an insolvent, and afterwards got them into his own possession, he was held liable in an action for goods sold. *Hill v. Perrott*, 3 Taunt. 274. *Accord. Abbotts v. Barry*, 2 B. & B. 369. But see B. N. P. 130; *Bennett v. Francis*, 2 B. & P. 554. So, where a father fraudulently represented that he was about to relinquish his business in favour of his son, to whom (being a minor) goods were, upon such representation, supplied, which the father took into his own hands, he was held liable for goods sold and delivered. *Biddle v. Levy*, 1 Stark. 20. Where the owner of property, which has been taken away by another, waives the tort, and seeks to raise an implied assumpsit, it is incumbent on him to show a title to the property; and mere possession is not sufficient. *Per Abbot, C.J., Lee v. Shore*, 1 B. & C. 94. A carrier misdelivered teas to the defendant of more value than the teas which he had really ordered. The defendant kept them in ignorance, and mixed and sold part. On the discovery of the error, defendant offered to pay the carrier for tea of the price really ordered: held, that this was some evidence of goods sold and delivered by the carrier to the defendant. *Coles v. Bulman*, 6 C. B. 184.

Where goods are lent, and if damaged to be taken by the bailee at a certain price, if they are damaged, an action for goods sold lies; *Bianchi v. Nash*, 1 M. & W. 545; so if goods are delivered on terms of approval or return, and they are retained an unreasonable time; *Beverley v. Lincoln Gas Co.*, 6 Ad. & E. 829; *Moss v. Sweet*, 16 Q. B. 493; 20 L. J., Q. B. 167; see also *Ray v. Barker*, 4 Ex. D. 279, C. A.; and in such case the property passes under sect. 18, rule 4, *post*, p. 950. But where they are destroyed without the fault of the bailee before the lapse of such reasonable time, no action lies against him. See *Elphick v. Burnes*, 5 C. P. D. 321, cited *ante*, p. 490, and sect. 7, *ante*, p. 523, and sect. 20, *ante*, p. 543.

The value of fixtures cannot be recovered under a claim for goods sold and delivered. *Lee v. Risdon*, 7 Taunt. 188; 2 Marsh. 495. But the value of trees, which the defendant has purchased and carried away, may be recovered under a claim for trees sold and delivered. *Bragg v. Cole*, 6 B. Moore, 114. The value of growing crops may be recovered on a claim for crops bargained and sold; *Parker v. Staniland*, 11 East, 362; and the value of crops taken by an incoming from an outgoing tenant, may be recovered under a claim for goods sold; *per Holroyd, J., in Mayfield v. Wadsley*, 3 B. & C. 364. *Poulter v. Killingbeck*, 1 B. & P. 397. The price of railway shares may be recovered under a claim for "goods and chattels sold and delivered." *Lawton v. Hickman*, 9 Q. B. 563. A builder is not entitled to recover the value of the building materials employed by him in building a house for the defendant, under a claim for goods sold and delivered; *Cotterell v. Apsey*, 6 Taunt. 322; nor can one who contracts to make and erect a steam-engine on the defendant's premises recover the contract price in this form. *Clark v. Bulmer*, 11 M. & W. 243; see *Atkinson v. Bell*, 8 B. & C. 277, 283, cited *post*, p. 585.

Where the contract was, that certain goods should be paid for partly in money and partly in buttons, Buller, J., held that the plaintiff could not recover under a count for goods sold, but should have declared specially. *Harris v. Fowle*, cited 1 H. Bl. 287; *Talver v. West*, Holt, N. P. 179. But see *Hands v. Burton*, 9 East, 349. And generally, a contract of barter must be declared upon as such, and the mere neglect or omission of the defendant to send his goods will not make it a contract of goods sold. *Harrison v. Luke*, 14 M. & W. 139. However, where A. agreed to give a horse in exchange for a horse of B. and a sum of money, and the horses were exchanged, but B. refused to pay the money, it was held that A. might recover for a horse sold and delivered. *Sheldon v. Cox*, 3 B. & C. 420. So in an action to recover the value of a gun, for which the defendant was to give another gun and 15*l.* 15*s.*, *Ld. Ellenborough* held that, upon the refusal of the purchaser to pay for the gun in that mode, a contract resulted to pay its value in money. *Forsyth v. Jervis*, 1 Stark. 437; *accord. Ingram v. Shirley*, *Id.* 185.

An auctioneer may maintain an action in his own name against the buyer of goods sold and delivered by him in the course of his employment, though known to be the principal's, for he has possession, and an interest in respect of his lien, and is not a mere servant. *Williams v. Millington*, 1 H. Bl. 81. Therefore, payment to his employer is no answer to an action by the auctioneer. *Robinson v. Rutter*, 4 E. & B. 954; 24 L. J., Q. B. 250. But the auctioneer has only the same right as the party employing him to sell, and the defendant may therefore show that the rightful owner has claimed the value. *Dickenson v. Naul*, 4 B. & Ad. 638; see also *Grice v. Kenrick*, L. R., 5 Q. B. 340.

As to the power of corporations to sue and their liability to be sued on parol sales of goods, *vide*, Part III., *Actions by and against companies—Contracts by Corporations*, *post*, pp. 1091, 1109, 1125.

*Proof of delivery.*] A party cannot maintain this action unless he has either delivered the goods or done something equivalent to delivery. *Smith v. Chance*, 2 B. & A. 755. As before observed, *ante*, p. 527, the acceptance required to satisfy the statute is not the same as that necessary to create a liability to pay for the goods. As to the latter, *vide post*, p. 568.

Where A. agreed to sell to B. certain goods, an earnest was paid, and the goods were packed in cloths furnished by B. and deposited in a building belonging to A., till B. should send for them, A. declaring at the same time that they should not be carried away till he was paid,—it was held that this was not such a delivery as to entitle A. to maintain an action for goods sold and delivered; for there must be a transfer of possession as well as property. *Goodall v. Skelton*, 2 H. Bl. 316; see *Simmons v. Swift*, 5 B. & C. 857. So where goods sold for ready money were packed up in boxes of the buyer for him and in his presence, but remained at his request on the premises of the seller, it was held that a count for goods sold and delivered would not lie. *Boulter v. Arnott*, *supra*. Where there is an entire contract to deliver a large quantity of goods consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot before the expiration of that time bring an action to recover the price of the part delivered, because the purchaser may, if the vendor fail to complete his contract, return the part delivered; but if he retain the part delivered after the seller has failed in performing his contract, the latter may recover the value of the goods so delivered. *Oxendale v. Wetherell*, 9 B. & C. 386; *Shipton v. Cusson*, 5 B. & Co. 378; *Colonial Insur. Co. of New Zealand v. Adelaide Marine Insur. Co.*, 12 Ap. Ca. 128, J. C. See also sect. 30, *ante*, p. 523.

Where the delivery deviates from the mode pointed out by the buyer, yet

if notice be sent to him and he do not repudiate it, he is liable. *Richardson v. Dunn*, 2 Q. B. 218. Sale and delivery by a former agent of an intestate between the time of the death and grant of administration will support an action by the administrator, as such, for goods sold. *Foster v. Bates*, 12 M. & W. 226.

A symbolical delivery of goods, if sufficient to enable the vendee to take possession and to divest the seller's lien for the price, is a sufficient delivery; as the delivery of the key of the warehouse, or of a delivery order on a wharfinger, or of other *indicia* of property, so as to put it under the control of the vendee. See *Chaplin v. Rogers*, 1 East, 192, 194; *Elmore v. Stone*, 1 Taunt. 460. And this species of constructive delivery is particularly applicable to ponderous goods not capable of ordinary delivery, as timber; or which the vendor has not engaged to deliver in any other way. Where a ship or goods at sea are sold, the delivery is by delivery of the documentary proofs of title, as the bill of sale or lading, &c. 2 Kent's Comm. 500, 501. An order by seller for delivery to defendant of a rick of hay made on a third person who has consented to let it remain on his land, is a sufficient delivery as between the seller and buyer, the latter having undertaken to carry it away himself. *Salter v. Woollams*, 2 M. & Gr. 650, 654. Other cases applicable to this head of constructive delivery will be found, *ante*, pp. 527 *et seq.*

*To whom delivered—Carrier, agent, or servant.*] Proof of a delivery to a third person at the defendant's request will support a count for goods sold and delivered to the defendant. *Bull v. Sibbs*, 8 T. R. 328. And where a buyer orders goods to be sent by a carrier, though he does not name any particular one, or where that is the usual course of business between the plaintiff and defendant, a delivery to a carrier operates as a delivery to the buyer; B. N. P. 36; *Dutton v. Solomonson*, 3 B. & P. 584; *King v. Meredith*, 2 Camp. 639; *Shepherd v. Harrison*, L. R., 5 H. L. 116, 127. And now by sect. 32 (1), "Where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *prima facie* deemed to be a delivery of the goods to the buyer. (2) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages." So delivery on board ship with the bill of lading indorsed so as to make the goods deliverable to the buyer or his assigns operates as a delivery to the buyer. *Groning v. Mendham*, 5 M. & S. 189; *Meredith v. Meigh*, 2 E. & B. 364; 22 L. J., Q. B. 401, cited *ante*, p. 529. *Secus*, if the bill of lading be for delivery to order of the consignor or his assigns, and the consignor does not indorse it to the buyer. *Wait v. Baker*, 2 Exch. 1. See sect. 19 (2, 3), *ante*, p. 461; *Gubarron v. Kreeft*, L. R., 10 Ex. 274; *Ogg v. Shuter*, 1 C. P. D. 47, C. A. But though the bill of lading be to the consignee's order, if it be indorsed at the time of shipment to the consignee's order, the property passes, and it was held that the consignee must pay for the goods though lost on the voyage; especially since the Bills of Lading Act, 1855, *ante*, p. 460. *Brown v. Hare*, 3 H. & N. 484; 27 L. J., Ex. 372; 4 H. & N. 822; 29 L. J., Ex. 6, Ex. Ch. See *Shepherd v. Harrison*, cited *ante*, p. 461. Now, however, by sect. 32 (3), "Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to

insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit." This provision is new. Where the written contract required by the S. of G. Act, 1893, s. 4, provides that the goods shall be sent by a particular route, and they are sent by another route, it may be shown that the buyer ratified this change of route, and such ratification need not be in writing. See *Leather Cloth Co. v. Hieronimus*, L. R., 10 Q. B. 140; and *Hickman v. Haynes*, L. R., 10 C. P. 528.

The master of a ship has a general authority to bind the shipowner for goods sold or money lent: but in an action by the creditor against the owner the plaintiff must show that they were necessities. *Mackintosh v. Mitcheson*, 4 Exch. 175. See further as to liability of shipowner on contracts of the master, *post*, p. 586.

The members of a club managed by a committee are not, merely as such, personally liable for goods supplied on the order of the committee for the use of the club, it appearing that the committee are supplied with funds by the members, who are subject only to annual subscriptions, and to other ready money payments, and that the committee has no express authority to bind the members by contracts. *Fleming v. Hector*, 2 M. & W. 172; see *Wise v. Perpetual Trustee Co.*, *post*, p. 593. And it seems that such committees are not generally authorized to deal on credit; therefore the person who supplies goods on credit can only sue those members of the committee who were privy to the contract, unless he can prove that such dealing was in furtherance of the purposes for which the committee was appointed. *Todd v. Emly*, 7 M. & W. 427; *In re London Marine Assur. Assoc.*, L. R., 8 Eq. 176. Nor are the members of the committee liable as such on the contract of their servant, the house steward, unless there be some proof of an authority from them. *Todd v. Emly*, 8 M. & W. 505. But where the secretary of a club, for supply of coals to each member, was authorized to deal on credit with the coal merchant, each member was held liable though there existed particular rules of the club for collecting and paying over the money from its members. *Cockerell v. Aucompte*, 2 C. B., N. S. 440; 26 L. J., C. P. 194.

A master is not responsible for goods ordered by his servant in his name but without his authority unless he accepts and adopts them, or has accredited the servant by paying for goods so ordered before. *Maulder v. Couyers*, 2 Stark. 281; *Pearce v. Rogers*, 3 Esp. 214. And when the master has always been used to give his servant money to pay for commodities as he buys them, and the servant buys them without paying and embezzles the money, the master is not liable. *Stubbing v. Heintz*, Peake, 47; *Anon.*, 1 Show. 95. But if even in one instance the master have employed the servant to buy on credit, he will be liable for any goods which the same servant subsequently orders until the authority is distinctly withdrawn by notice; *Hazard v. Treadwell*, Stra. 506; *Rusby v. Scarlett*, 5 Esp. 76; *Anon.*, *supra*; and see *Gilman v. Robinson*, Ry. & M. 226; *Filmer v. Lynn*, 4 Nev. & M. 559; though he has given the servant money to pay for the goods in some instances. *Wayland's case*, 3 Salk. 234; *Bolton v. Arliden*, *id.*; S. C. *sub nom.* *Bolton v. Hillersden*, 1 Ld. Raym. 225; *Rusby v. Scarlett*, *ante*, p. 553. The coachman of G. has not, as such, ostensible authority to pledge G.'s credit for forage supplied for G.'s horses. *Wright v. Glyn*, (1902) 1 K. B. 745, C. A.

Where the contract has been made with an agent and delivery to him, the seller may in some cases resort to the principal. As to suing the principal on a sale to his agent, the following cases are important. Where the principal is unnamed or unknown at the time of sale, the following has been laid down as the rule:—"If a person sells goods supposing at the time of the

contract he is dealing with a principal, but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if at the time of the sale the seller knows not only that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and, notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him and him alone, then, according to the cases of *Addison v. Gaudassequi*, 4 Taunt. 574, and *Puterson v. Gaudassequi*, 15 East, 62, the seller cannot afterwards, on the failure of the agent, turn round and charge the principal; having once made his election, at the time when he had the power of choosing between the one and the other." *Thomson v. Davenport*, 9 B. & C. 78, 86, *per* Id. Tenterden, C.J. Where the seller has sued the agent to judgment, he cannot, although he has not received satisfaction, afterwards proceed against the principal. *Priestly v. Fernie*, 3 H. & C. 977; 34 L. J., Ex. 172; even in the case of the master and owner of a ship. S. C. But mere proof in bankruptcy against the estate of the agent will not amount to a binding election. *Curtis v. Williamson*, L. R., 10 Q. B. 57.

Where F., an undisclosed principal, employs H. to carry on a business for him, he is liable for all the acts of H. within the authority usually confided to an agent of that character, and cannot by a secret reservation divest himself of that authority. *Watteau v. Fenwick*, (1893) 1 Q. B. 346; *Edmunds v. Bushell*, L. R., 1 Q. B. 97, cited *ante*, p. 367. The seller who has given credit to an agent, believing him to be the principal, cannot recover against the undisclosed principal, if the latter have *bonâ fide* paid the agent, when the vendor still gave credit to the agent, and knew of no one else as principal. *Armstrong v. Stokes*, L. R., 7 Q. B. 598. See, however, the observations of the C. A. on this case in *Irvine v. Watson*, *infra*. The knowledge at the time of the contract that there is a principal, his name not being disclosed, does not enable the seller to make his election, and will not prevent him, although he has debited the agent, from afterwards resorting to the principal; *Thomson v. Davenport*, *supra*; even although the principal has in the meantime *bonâ fide* paid the agent, unless there has been conduct on the part of the seller which has misled the principal into the belief that the agent had already settled with the seller, and the payment was made in consequence of such belief. *Irvine v. Watson*, 5 Q. B. D. 414, C. A.; *Davison v. Donaldson*, 9 Q. B. D. 623, C. A. Mere delay in enforcing payment from the agent is not sufficient. S. CC. The fact of the principal's name being disclosed at the time of the sale does not, until the seller has elected to charge the agent, prevent his resorting to the principal; such disclosure merely enables the seller to charge the principal in the first instance if he so desire. *Calder v. Dobell*, L. R., 6 C. P. 486, Ex. Ch. A., as agent of the defendant, a foreign merchant, bought goods of the plaintiff, and the plaintiff made out invoices describing them as bought by A. "on account of" the defendant, and drew for the amount on A., who accepted; the defendant remitted the amount to A. to meet the acceptances, but A. became insolvent before they were due; held that defendant was not liable. *Smyth v. Anderson*, 7 C. B. 21. When the seller elects to sue an undisclosed principal, it is a good defence if the defendant show that he has paid his agent; S. C.; and the books of the seller cannot be admitted as evidence *for him* that he always debited the principal. S. C. And it is now clearly established that where an agent contracts on behalf of a foreign principal, whether disclosed or not, he has, in the absence of express authority to that effect, no authority to

pledge his principal's credit, or to establish privity between him and the person in this country entering into the contract, and the agent alone is liable thereon. *Armstrong v. Stokes*, L. R., 7 Q. B. 605, *per Cur.*; *Ireland v. Livingston*, L. R., 5 H. L. 408, *per Blackburn. J.*; *Elbinger Actien-Gesellschaft v. Clape*, L. R., 8 Q. B. 313; *Hutton v. Bulloch*, *Id.* 331, Ex. Ch.; L. R., 9 Q. B. 572. See also *Mildred v. Maspons*, 8 Ap. Ca. 874, D. P.; and *New Zealand Land Co. v. Watson*, 7 Q. B. D. 374, C. A., explained in *Kaltenbach v. Lewis*, 10 Ap. Ca. 617, D. P., cited *post*, p. 605. Where the contract is in writing, signed by the agent in his name, the result of the authorities seems to be that oral evidence is admissible to charge the undisclosed principal, but not to discharge the agent. See *ante*, p. 25, and notes to *Thomson v. Davenport*, 2 Smith's L. Cas., 11th ed., 403 *et seq.*, and the cases there cited. It may be shown that a party professing to be acting as agent is the real principal, and he will be then liable to be sued as such. See *Carr v. Jackson*, 7 Exch. 382; 21 L. J., Ex. 137. So, if the principal for whom the agent professes to act does not at the time exist, the latter is liable. *Kelner v. Baxter*, L. R., 2 C. P. 174, cited *post*, p. 563.

The receiver and manager of a business, appointed by a judge of the Ch. D., who orders goods for the purpose of the business, *prima facie*, does so on his own credit. *Burt v. Bull*, (1895) 1 Q. B. 276, C. A. *Secus*, where appointed by trustees having power to carry on the business. *Owen v. Cronk*, *Id.* 265, C. A.

Where the defendant A. gave authority to his wife B. to order goods from the plaintiff C., on which authority B. acted: A. was held liable for goods ordered by B. of C. after A. had become insane, C. having no notice of such insanity. *Drew v. Nunn*, 4 Q. B. D. 661, C. A.

Meat was supplied to I. during the lifetime of her husband, H., by his authority, for the support of herself and her family: it was held that I. was not liable for the price of the meat so supplied, after the death of H. on a distant voyage, before news of the death came to hand. *Smout v. Ilbery*, 10 M. & W. 1. *Accord. Salton v. New Beeston Cycle Co.*, (1900) 1 Ch. 43.

*Delivery to partner.*] The law of partnership has now been declared and amended by the Partnership Act, 1890, 53 & 54 V. c. 39, and the most convenient course seems to be in the first instance to state the provisions of the Act which define partnership, and give the rules for determining its existence, and afterwards to show what is the effect of the relation of partnership. The Act expressly provides by sect. 46, "The rules of equity and of common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of this Act."

By sect. 1 (1), "Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.

"(2) But the relation between members of any company or association which is—(a.) Registered as a company under the Companies Act, 1862, or any other Act of Parliament for the time being in force and relating to the registration of joint stock companies; or (b.) Formed or incorporated by or in pursuance of any other Act of Parliament or letters patent, or Royal Charter; or (c.) A company engaged in working mines within and subject to the jurisdiction of the Stannaries: is not a partnership within the meaning of this Act."

Sect. 2. "In determining whether a partnership does or does not exist, regard shall be had to the following rules:

"(1) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

"(2) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

"(3) The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular—(a.) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such: (b.) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such: (c.) A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such: (d.) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is *in writing, and signed* by or on behalf of all the parties thereto: (e.) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such." (28 & 29 V. c. 86, ss. 1—4.)

Sect. 4. (1) "Persons who have entered into partnership with one another are for the purposes of this Act called collectively a firm, and the name under which their business is carried on is called the firm-name."

Sect. 5. "Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner."

A partner is responsible for the act of his co-partner, within the general scope of his authority as partner, although such act is an actionable wrong. *Hindyn v. John Houston & Co.*, (1903) 1 K. B. 81, C. A.

Sect. 6. "An act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorized, whether a partner or not, is binding on the firm and all the partners.

"Provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments." See *Marchant v. Morton Down & Co.*, *ante*, p. 137, and *Ex pte. Wright*, (1906) 2 K. B. 209.

Goods delivered in pursuance of an order by one partner are delivered to all, unless it appear that they were delivered on the exclusive credit of one only; but debiting one only, and taking the separate acceptance of that one, is not decisive of this. *Bottomley v. Nuttall*, 5 C. B., N. S. 122; 28 L.J., C. P. 120; *Keay v. Fenwick*, 1 C. P. D. 745, C. A. A question sometimes arises in such actions whether all the defendants are liable as partners.



Although the defendant cannot compel the joinder of a dormant partner, as co-defendant, yet the dormant partner *may*, at the option of the plaintiff, be so joined. *Lloyd v. Archbowl*, 2 Taunt. 327; *Ruppell v. Roberts*, 4 Nev. & M. 31. And such a partner may be joined as defendant, though the contract, which was in writing (not under seal) and *inter partes*, did not name him. *Drake v. Beckham*, 11 M. & W. 315, Ex. Ch. Though a partnership is constituted by deed, it may be proved by parol evidence. An examined copy of an answer in Chancery by two of the defendants, to a bill of a third defendant, charging them as partners and praying for an account, is good evidence to prove the partnership as against the persons so answering. *Studdy v. Sanders*, 2 D. & Ry. 347.

Persons may be partners in a particular concern or business, yet, if they do not hold themselves out as general partners, it will not make them liable in other cases not connected with that business. *De Berkom v. Smith*, 1 Esp. 29. Where the publisher, editor, and printer agree to share the profits of a periodical work equally, and the printer is to furnish paper at cost price, the stationer who supplied the printer with paper cannot sue either publisher or editor as partners. *Wilson v. Whitehead*, 10 M. & W. 503. If there be a stipulation between apparent partners, that one of them shall not participate in the profit and loss, and shall not be liable as a partner, he is not liable as such to those persons who have notice of the stipulation. *Alderson v. Pope*, 1 Camp. 404, n.

Sect. 14. (1) "Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made. (2) Provided that where after a partner's death the partnership business is continued in the old firm-name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executor's or administrator's estate or effects liable for any partnership debts contracted after his death." As to liability of retiring partner, *vide* sect. 36, *post*, p. 560.

The plaintiff must show that the name of the defendant was used in the firm with his own consent. *Newsome v. Coles*, 2 Camp. 617; 2 H. Bl., 4th edit. 235, n. Where a person allows his name to remain in a firm, either exposed publicly over a shop door, or used in printed invoices or bills of parcels, or published in advertisements, this precludes him from disputing his liability as a partner. *Per* Tindal, C.J., *Fox v. Clifton*, 6 Bing. 791. Where the defendant, having advanced money to a person who was getting up a mining company, on the security of 200 shares, permitted the captain of the mine to represent, without naming the defendant, that the mine was being worked by a person of substance, and the plaintiff on the faith of these representations supplied goods, it was held that he could recover against the defendant as a partner in the mine. *Martyn v. Gray*, 11 C. B., N. S. 824.

Where a firm, consisting of several, carry on business in the name of one of the partners, the whole firm will be bound by acts done by him as representing the firm; *S. Carolina Bank v. Case*, 8 B. & C. 427; *Vere v. Ashby*, 10 B. & C. 293, *per* Parke, J.; unless it be proved that the act was done by that partner, on his own behalf alone, and not on behalf of the firm. *Yorkshire Banking Co. v. Beatson*, 5 C. P. D. 109, C. A., *ante*, p. 365.

The liability of a person as partner, whether called one or not, may also be proved, *prima facie*, by showing that he participated in the profits of the

concern, sect. 2 (3), *ante*, p. 556, and it is immaterial whether he receives the profits for his own use, or as a trustee for others. Thus the executors of a deceased partner, carrying on trade for the benefit of the estate, are liable personally as partners. *Wightman v. Townroe*, 1 M. & S. 412. However small the stipulated portion of profits, the participation renders the party liable to all the engagements of the partnership. *R. v. Dodd*, 9 East, 527. And this whether the plaintiff knew or not, at the time of his dealing with the concern, that the person whom he charges as a partner participated in the profits. *Ex pte. Gellar*, 1 Rose, 297; *Vere v. Ashby*, *supra*.

The participation, to render the party liable, must be in the profits *as such*, and several illustrations are given in sect. 2 [3] (*a-e*) *ante*, p. 556, as to what receipt of profits will not of itself constitute a partnership.

A person employed to sell goods, and who was to have for himself whatever he could procure for them above a stated sum, was held not to be a partner. *Benjamin v. Porteus*, 2 H. Bl. 590.

But where a retiring proprietor of a newspaper guaranteed the purchaser of it a certain profit, stipulating for the surplus profit for a certain number of years in a certain event, he was held to be a partner. *Barry v. Nesham*, 3 C. B. 641. And this case would seem not to fall within 53 & 54 V. c. 39, s. 2 (3, *e*), *ante*, p. 556. An agreement between two persons, that one shall make purchases of goods for the other, and in lieu of brokerage shall have one-third of the profits of the sales, and bear a certain proportion of the losses, would make him liable as a partner as to third persons. *Per Holroyd, J., Smith v. Watson*, 2 B. & C. 409. A distinction is recognized between receiving a share of the profits, which renders the person liable as partner, and relying on the profits as a fund for payment, which will not have that effect. See *Grace v. Smith*, 2 W. Bl. 998; *Ex pte. Hamper*, 17 Ves. 404; *Lyon v. Knowles*, 3 B. & S. 556; 32 L. J., Q. B. 71; 5 B. & S. 756 Ex. Ch.; and *Mollwo v. Court of Wards*, *post*, p. 559; H. Bl., 4th ed., 235, n. In *Ex pte. Jones*, (1896) 2 Q. B. 484, however, a contract that a person should receive 3l. a week "out of the profits of the business" was held to be a contract for "a share of the profits" within sect. 2 (3).

The following cases give further instances in which the mere perception of the profits of a business does not give rise to a partnership. Two persons, who carried on business as iron-smelters, in partnership, compounded with their creditors by means of a composition deed, conveying the partnership property to trustees, to carry on the business under the name of a company, and to divide the net profits annually among the creditors of the partnership; it was held, that a creditor who had executed the deed, was not liable as a partner for debts contracted by the trustees in carrying on the trade. *Cox v. Hickman*, 9 C. B., N. S. 47; 8 H. L. C. 268; 30 L. J., C. P. 125. The proper test of liability, as a partner, of a person not ostensibly a partner, is not merely whether the person sought to be charged has stipulated for participation in the profits, as such, but whether the person, by whom the trade was actually carried on, carried it on as agent for the other. S. C.; *In re English, &c., Assur. Society*, 1 H. & M. 85; *Kilshaw v. Jukes*, 3 B. & S. 847; 32 L. J., Q. B. 217; *Bullen v. Sharp*, L. R., 1 C. P. 86, Ex. Ch.; *Holme v. Hammond*, *Mollwo v. Court of Wards*, *post*, p. 559; *Ex pte. Tennant*, 6 Ch. D. 303, C. A.; and *Budeley v. Consolidated Bank*, 38 Ch. D. 283, C. A.; *Gosling v. Gaskell*, (1897), A. C., 574, D. P. See also *Pooley v. Driver*, 5 Ch. D. 458; and *Newbigging v. Adam*, 13 Ap. Ca. 308, 315, 316, D. P.

Where, under the provisions of a partnership deed between A., B., and C., the defendants, the executors of a deceased partner, A., after his death took the share in the business to which A. would have been entitled, if living, but did not interfere therein; it was held that they were not liable

to third persons on contracts made with B. and C. after A.'s death. *Holme v. Hammond*, L. R., 7 Ex. 218. So, where a firm being indebted to a Rajah, it was agreed that the business of the firm should be carried on, subject to his control, that he should receive 20 per cent. commission on all profits made by the firm, till the debt due should be paid, and 12 per cent. interest on cash advances made by him to the firm; and he was accordingly afterwards credited with proceeds of the business in the books of the firm, though he never received the same, nor did he hold himself out as an ostensible partner in the firm; it was held that the primary object of the agreement being a security to the Rajah for the debt and advances, and there being no intention of creating a partnership between the parties, the Rajah was not liable to third persons on contracts made by the firm. *Mollwo v. Court of Wards*, L. R., 4 P. C. 419.

It seems very doubtful if the provisions in italics in sect. 2 (3), *ante*, p. 556, make any alteration in the law as settled by the later cases above cited. See *Holme v. Hammond*, *supra*; *Pooley v. Driver*, 5 Ch. D. 458, 483. The only effect that can be suggested for the statute to have is, that, as regards the protected classes, the sharing in profits shall be no evidence at all of a contract of partnership, whereas with regard to others it is evidence, though insufficient of itself to establish the liability. *Holme v. Hammond*, L. R., 7 Ex. 227, *per Kelly*, C.B.

A contract to be within sect. 2 (3, *d*), *ante*, p. 556, must by the terms of the section be in writing and signed by or on behalf of the parties thereto. The advance must be by way of loan: see *Pooley v. Driver*, *supra*; *Ex pte. Delhasse*, 7 Ch. D. 511, C. A.; *Syers v. Syers*, 1 Ap. Ca. 174, D. P.; and it must appear to be so, on the face of the contract. S. C. Where from the agreement it appears that the nominal lender is a partner, a declaration that the loan is made under the Act, and that the lender shall not be a partner, will not prevent his being a partner. *Ex pte. Delhasse*, *supra*. The Act applies only to a loan on the personal responsibility of the trader to whom it is made, and not to a loan made on the security of his business. S. C. See on sect. 3, which postpones, in the case of insolvency, the rights of the persons lending, or selling in consideration of a share of the profits. *Ex pte. Mills*, L. R., 8 Ch. 569; *Ex pte. Taylor*, 12 Ch. D. 366, C. A.; *In re Stone*, 33 Ch. D. 541; *In re Vince*, (1892) 2 Q. B. 478, C. A.; *In re Hildesheim*, (1893) 2 Q. B. 357, C. A.; *Badeley v. Consolidated Bank*, *ante*, p. 558.

By the Partnership Act, 1890, s. 7. "Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorized by the other partners: but this section does not affect any personal liability incurred by an individual partner."

Sect. 8. "If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement."

Sect. 16. "Notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner."

Sect. 8 seems to alter the rule laid down in *Ex pte. Greenwood*, 3 D. M. & G. 459; 23 L. J., Ch. 966, and to harmonize the rule as to other simple contracts with that which governed negotiable instruments, *vide ante*, pp. 364 *et seq.* The section does not, however, apply where there has been no agreement between the partners to restrict their power to bind the firm, and the question may therefore still arise how far the presumed agency of a partner to bind the firm can be determined, or excluded, by timely

notice to the vendor or other creditor, from another member of the firm, disclaiming the act or order of his partner. The general question as to the effect of such notice has not, it is believed, been settled. See Story on Partnership, sect. 123; 3 Kent's Com. pp. 44, 45. In cases where the majority can bind the rest of the partnership, it is questionable whether such notice or disclaimer can have any operation at all. *Vide Id.*

Sect. 17. (1) "A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner."

This rule applies even though the partnership has been made retrospective by agreement between the new and old partners. *Vere v. Ashby*, 10 B. & C. 288.

Sect. 17. (2) "A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement."

(3) "A retiring partner may be discharged from any existing liabilities, by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted."

If a creditor, knowing of a dissolution of partnership, transfer his account from the old to the new firm, and continue to deal with the new firm, this is evidence of accepting that firm as his debtors, and will release a retiring partner. *Hart v. Alexander*, 2 M. & W. 484; *Rolfe v. Flower*, L. R., 1 P. C. 27. So, where the creditor receives interest from the new firm on the debt due from the old. *Bilborough v. Holmes*, 5 Ch. D. 255, distinguished *In re Head*, (1893) 3 Ch. 426. See also *Kirwan v. Kirwan*, 2 Cr. & M. 617; *Ex pte. Gibson*, L. R., 4 Ch. 662.

Sect. 36. (1) "Where a person deals with a firm after a change in its constitution he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change." (2) "An advertisement in the *London Gazette* as to a firm whose principal place of business is in England or Wales, . . . shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised." (3) "The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively."

In the case provided for by sub-sect. (3) the retiring partner is not liable from the mere fact of his having allowed the continuing partner to carry on the business under the firm-name. *Ex pte. Central Bank of London*, (1892) 2 Q. B. 633, C. A. As to persons who knowing that the retiring partner was a partner, had dealings with the firm, there must be actual notice to them of his retirement, in order to free him from liability for the price of goods ordered subsequently to his retirement. *Farrar v. Deslinne*, 1 Car. & K. 580, *per* Cresswell, J.

Sect. 36 (3) does not apply to the case of an entire contract entered into by C. with the acting partner, during the partnership, C. not knowing that the defendant was a partner, or that he had retired. *Court v. Berlin*, (1897) 2 Q. B. 396, C. A.

Of two partners A. and B., A. retired, and B. carried on business with C. as partner under the same style; a customer of the old firm who sold goods to the new firm after the change of partners, but without notice of it, is put to his election, whether he will sue A. and B. for the price on a liability by estoppel, or B. & C. on a liability in fact. *Scarff v. Jardine*, 7 Ap. Ca. 345, D. P. If after notice of A.'s retirement he sue B. and C., or prove in

their liquidation, he cannot afterwards sue A. S. C.; see *Morel Brothers & Co. v. Westmoreland*, *El. of, post*, p. 564. As to the liability of a new partner, see *British Homes Insur. Co. v. Paterson*, *ante*, p. 511.

By Sect. 38. "After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise. Provided that the firm is in no case bound by the acts of a partner who has become bankrupt; but this proviso does not affect the liability of any person who has after the bankruptcy represented himself or knowingly suffered himself to be represented as a partner of the bankrupt."

Sect. 9. "Every partner in a firm is liable jointly with the other partners," . . . "for all debts and obligations of the firm incurred while he is a partner: and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject" . . . "to the prior payment of his separate debts."

Thus during the lifetime of partners, A. and B., a partnership debt due from them to C. is joint only, and a judgment recovered against B. bars the remedy against A., although C. was unaware when he sued B. that A. was jointly liable. *Kendall v. Hamilton*, 3 C. P. D. 403, C. A.; 4 Ap. Ca. 504, D. P. On the death, however, of A., C. may, unless there has been such judgment in A.'s lifetime, prove his debt against A.'s estate; S. C.; *In re Hodgson*, 31 Ch. D. 177, C. A.; but C. can be paid only after A.'s separate creditors have been paid in full. S. C. Hence the expression that the debt of a partnership is several as well as joint is inaccurate, for the debt does not lose its joint character. S. C. On B.'s death, C. may prove against his estate, notwithstanding his prior proof against A.'s estate. S. C. A regular judgment obtained by C. against B. by his consent, cannot be set aside also by his consent, so as to enable C. to sue A. *Hammond v. Schofield*, (1891) 1 Q. B. 453. Such judgment may have been obtained in an action against A. and B. in which they both appeared. *M-Leod v. Power*, (1898) 2 Ch. 295. But an unsatisfied judgment against A. on a bill of exchange given for the joint debt of A. and B. is no bar to an action against B. on the original contract. *Drake v. Mitchell*, 3 East, 251. *Accord. Wegg Prosser v. Evans*, (1895) 1 Q. B. 108, C. A. The above principles apply where one of the contractors is a married woman contracting in respect of her separate estate. *Hoare v. Niblett*, (1891) 1 Q. B. 781. As to what are "debts and obligations," see *Friend v. Young*, (1897) 2 Ch. 421; *Bugel v. Miller*, (1903) 2 K. B. 212, cited *post*, p. 1154.

Under Sects. 10, 12, *ante*, pp. 510, 511, where partners are liable for a breach of trust committed by one of them, their liability is several as well as joint, and a judgment against one is no bar to an action against the others. See *Blyth v. Fladgate*, (1891) 1 Ch. 337.

[*Delivery to an unincorporated mining company.*] Working mines is a species of trade, and has some of the qualities of an ordinary partnership. Mines within the stannaries of Devon and Cornwall are often worked by unincorporated partnerships, with transferable shares, on what is termed the "cost-book" principle. *Vide ante*, pp. 83, 275.

The shareholders in an ordinary mining company, conducted by managers or other agents, are personally liable on the contracts made for the supply of the mines, where such contracts are necessary or usual, or where the defendants can be shown to have authorized the contracts. *Tretwen v. Bourne*, 6 M. & W. 461; *Steigenberger v. Carr*, 3 M. & Gr. 191. And such shareholders are for this purpose partners, and therefore liable on all usual

contracts for goods supplied, &c., made by their agents, though there may be an agreement *inter se* not to deal on credit; unless the plaintiff knew of the restriction, and that the goods were ordered without the authority of the shareholder sued. *Hawken v. Bourne*, 8 M. & W. 703. The defendant may be charged as partner on proof of an admission of his interest either before or after the debt was incurred, without proving a deed of co-partnership or any strict legal interest in the mine; *Ralph v. Harvey*, 1 Q. B. 845; or by proof that he acted as partner; *Owen v. Van Uster*, 10 C. B. 318; 20 L. J., C. P. 61; unless the admission be shown to have been made under error. *Vice v. Anson*, 7 B. & C. 409, 411. The defendant's interest may be proved by his acceptance of the shares in a mine, written at the foot of a certificate of transfer by the seller, although it be not stamped as a transfer; but if the document do not itself convey any legal interest, the admission of the defendant is not *conclusive* proof. *Tull v. Lee*, 4 Exch. 230. See *ante*, p. 275, as to stamp duty; and as to evidence of transfer, see *Watson v. Spratley*, 10 Exch. 222; 24 L. J., Ex. 53, cited *ante*, p. 314. Attendance of the defendant at a meeting in the character of a shareholder is evidence that he is one. *Harrison v. Heathorn*, 6 M. & Gr. 81. Where the facts showed that the defendant became a shareholder on the terms that the directors should not proceed without a certain capital, and they proceeded (without the defendant's assent) before that capital was raised, the defendant was held not liable on his contract. *Pitchford v. Davis*, 5 M. & W. 2. But the non-performance of this condition by the directors will not prevent the liability of a shareholder from attaching, where he sanctions the contract either directly or by acquiescing in the working. *Steigenberger v. Carr*, *ante*, p. 561.

[*Delivery to members of an inchoate company.*] A joint-stock company is in the nature of a partnership; but the constitution of such companies generally distinguishes them from ordinary partnerships. When incorporated, the direct liability of individual members ceases. When inchoate, or not incorporated, the liability of a member depends on his being actually or constructively a party to the contract on which the plaintiff sues. In such cases the questions to be considered are:—Was the defendant directly a party to the contract? Was he a member of the body which contracted? Did he hold himself out as a partner by acting, or permitting others to act, in such a way as reasonably to induce the plaintiff to believe that he was a partner, and responsible as such? Had he legally withdrawn from the concern at the time of the contract? See *Wood v. Argyle, Dk. of*, 6 M. & Gr. 928; *Lake v. Id.*, 6 Q. B. 477; *Fox v. Clifton*, 6 Bing. 792 (cited *post*, p. 563); *Bright v. Hutton*, 3 H. L. C. 341. The question that most frequently presents itself, is the liability of persons who have become subscribers to a company projected, but not finally established.

When the defendants consented to be directors of a water company and attended meetings, and were privy to an order given to the plaintiff (an engineer), though not actually present when the order was given, they were held liable, notwithstanding the subsequent failure of the project. *Doubleday v. Muskett*, 7 Bing. 110. See *Collingwood v. Berkeley*, 15 C. B., N. S. 145. But the mere consent of the defendant to become a member of the provisional committee of an intended company, and the insertion, with his authority, of his name in a prospectus accordingly, will not *per se*, and without further privity, make him liable on orders given by other members of the committee, or by the secretary, or the solicitor of the company. *Reynell v. Lewis*, 15 M. & W. 517; *Barker v. Stead*, 3 C. B. 946; *Cooke v. Tonkin*, 9 Q. B. 936; *Bailey v. Maccalday*, 13 Q. B. 815; *Burbidge v. Morris*, 3 H. & C. 664; 34 L. J., Ex. 131. The facts of the case may,

however, warrant a judge in leaving them to the jury, as evidence that the defendant had authorised the contract to be made, either by his co-provisional committeemen or by the managers of the concern, *i.e.*, by the managing committee, if any, or the majority of them, or by the solicitor or other officer of the company; and the terms of the printed prospectus, if circulated with the defendant's privity and consent, and known, or presumably known, to the plaintiff, may be sufficient to justify such inference. *Semb. per cur.*, in *Reynell v. Lewis*, *ante*, p. 562; *Maddick v. Marshall*, 16 C. B., N. S. 387; 17 C. B., N. S. 829, Ex. Ch.; *Riley v. Packington*, L. R., 2 C. P. 536; and see *Bailey v. Maraulay*, *ante*, p. 562. But a managing committee, appointed by the provisional committee, are not *therefore* agents of the latter for the purpose of pledging their credit by contracts. *Williams v. Pigott*, 2 Exch. 201. Where the defendant, as one of an acting committee, assented to the contract with the plaintiff, it was held a proper question for the jury whether the contract was on the personal liability of the defendant, either alone or as a committeeman, or on the sole credit of the funds. If on the credit of the funds, the contract becomes absolute on receipt of funds, and may be enforced. *Higgins v. Hopkins*, 3 Exch. 163. A minute in the books of an incorporated railway company appointing the plaintiff their engineer, not authenticated by any signature, or by any proof *aliunde* that a board meeting was held on the day, or that the defendant, a provisional committeeman, had sanctioned the resolution, is not *per se* evidence to fix the defendant; nor is a letter of the secretary to the plaintiff, stating the minute, admissible against the defendant without some proof of his authority to write it. *Rennie v. Wynn*, 4 Exch. 691.

Where the defendants, as agents on behalf of a proposed company, entered into a written contract with the plaintiff for the supply of goods to the company, which was not then constituted, it was held that, as the defendants had no existing principal, they were personally liable, and that a subsequent ratification by the company, when formed, could not relieve them from this responsibility, as the company was a stranger to the contract. *Kelner v. Baxter*, L. R., 2 C. P. 174. See also *Scott v. Ebury, Ltd.*, *Id.* 255; *Hopcroft v. Parker*, 16 L. T. 561, E. T. 1867, C. P.; *Melhado v. Porto Alegre Ry. Co.*, L. R., 9 C. P. 505, and other cases cited; and Part III., *Actions by and against Companies*, *post*, p. 1111.

A person who applied for shares in an unincorporated joint stock company, and paid a deposit on them, but had not otherwise interfered in the concern, was not therefore liable on contracts made by a board of directors, who have taken upon themselves to act before the necessary capital had been raised, agreeably to the prospectus, and after the shares had been declared forfeited by reason of non-payment of subsequent calls. *Fox v. Clifton*, 6 Bing. 776. See *Howbeach Coal Co. v. Teague*, 5 H. & N. 151; 29 L. J., Ex. 137, and *Ornamental Woodwork Co. v. Brown*, 2 H. & C. 63; 32 L. J., Ex. 190.

Some of the cases belonging to this head have already been mentioned under the last head of *Delivery to partner* (*ante*, pp. 555 *et seq.*), such companies having formerly been treated as partnerships, and so called. In *Reynell v. Lewis*, *ante*, p. 562, it is denied that associations of this kind (at least, so long as they are *in fieri*) are partnerships at all.

As to actions against incorporated or registered companies, *vide* Part III., *Actions by and against companies*, *post*, pp. 1090 *et seq.*

*Delivery to wife.*] Where a husband gives his wife *express* authority to pledge his credit he is liable for the price of goods delivered on such credit, as in the case of any other agent; as to which *vide ante*, pp. 552 *et seq.* Under the present head is considered the authority of the wife to pledge her

husband's credit, to be *implied* from the mutual relation of the parties in the absence of such express authority. Where a husband is living in the same house with his wife, he is liable for any goods which he permits her to receive there. If they are not cohabiting, then the husband is in general only liable for such necessaries as from his situation in life it is his duty to supply to her. *Waithman v. Wakefield*, 1 Camp. 121; *Atkins v. Curwood*, 7 C. & P. 756. The question of the husband's liability must therefore be considered separately in the cases where his wife is and is not living with him, and the latter cases must be further distinguished with reference to the cause of the wife's separation from her husband. These questions are fully discussed and the cases thereon collected, in the notes to *Manby v. Scott*, and other cases in 2 Smith's L. Cases.

Where husband and wife live together, and necessaries are delivered to the wife by her order, a jury may presume the husband's assent. *Bac. Abr. Baron and Feme (H.)*; *Freem.* 2nd ed. 249, n. As, however, the liability of the husband turns on the question of the wife's power as his agent, the plaintiff, who relies on this presumption of agency arising from cohabitation, must show that the goods he delivered to the wife were necessaries. *Phillipson v. Hayter*, L. R., 6 C. P. 38. The question, however, is one of authority for the jury, and not simply whether the articles supplied were necessaries or not. *Jolly v. Rees*, 15 C. B., N. S. 628; 33 L. J., C. P. 177; *Debenham v. Mellon*, 5 Q. B. D. 394, C. A.; 6 Ap. Ca. 24, D. P. And the husband may rebut the presumption of agency by showing that he had forbidden his wife to pledge his credit, although the plaintiff had no notice of the prohibition. S. C.C.; *Morel Bros. & Co. v. Westmoreland*, *El. of, infr.* The presumption of agency may also be rebutted by proof that the credit was given to the wife; *Bentley v. Griffin*, 5 Taunt. 356; *Metcalfe v. Shaw*, 3 Camp. 22; or by proof of any other circumstances negating the husband's assent, as that the goods supplied are beyond the rank and station the husband maintains. *Montague v. Benedict*, 3 B. & C. 681. So in an action for the price of dresses delivered to his wife, the husband may show that his wife was already supplied with sufficient articles of dress, although the plaintiff did not know she was so supplied. *Reneaux v. Teakle*, 8 Exch. 680; 22 L. J., Ex. 241. Where the order is plainly an extravagant one, that fact may be considered by the jury as tending to rebut the presumed agency. *Lane v. Ironmonger*, 13 M. & W. 368. The fact that necessaries have been supplied for the household on the order of the wife, both she and her husband each having property, affords no evidence of a joint liability to pay for them. *Morel Bros. & Co. v. Westmoreland*, *El. of*, (1903) 1 K. B. 64; (1904) A. C. 11. Judgment obtained against either of them for the price of the necessaries bars any remedy against the other; S.C. See also *French v. Howie*, (1906) 2 K. B. 674, C. A. Where a wife carried on business of her own account during the imprisonment of her husband, and after his return articles were furnished in the same business with his knowledge, he was held liable for these articles, though the invoices and receipts were made out in the wife's name. *Petty v. Anderson*, 3 Bing. 170.

As to the evidence necessary to connect the defendant with the woman to whom the goods were delivered, *vide post*, p. 567.

Where a wife is living separate it lies on the plaintiff to show that she does so under circumstances which imply an authority to pledge her husband's credit. *Johnston v. Sumner*, 3 H. & N. 261; 27 L. J., Ex. 341. If the wife leave her husband without his consent there is no implied authority to bind him. If with his assent there is no necessary implication of authority, but it *may* be implied either by her destitution of adequate support *aliunde*, or inability to support herself. Thus, in the case of labouring



people both equally able to maintain themselves, an authority to bind the husband is not to be implied in the case of mere non-cohabitation. In those cases in which the husband would ordinarily support the wife, and she has no resources of her own, and he do not make her an adequate allowance, an authority to the wife to pledge her husband's credit for necessaries may be implied. S. C., *per Cur.*, explaining *Hodgkinson v. Fletcher*, 4 Camp. 70. "And, as in all cases, the creditor is to be considered as standing in the wife's place, it imports him, when the wife lives apart from her husband, to make strict inquiries as to the terms of the separation, for in such cases he must trust her at his peril." *Ozard v. Darnford*, 1 Selw. N. P., 13th ed. 229. Where the husband and wife had lived separate for many years, and the wife had adequate resources of her own of which the plaintiff had notice, it was held that he could not sue the husband. *Liddlow v. Wilmot*, 2 Stark. 88; see *Thompson v. Hervey*, 4 Burr. 2177. So, even without a knowledge of her being provided for, the creditor, if he give credit to her, and she is, in fact, adequately provided for *aliunde*, cannot sue the husband. *Clifford v. Laton*, M. & M. 101. And, generally, it is now settled that if the wife be living apart from her husband, and he, in fact, allow her a sufficient maintenance, he is not bound by her contracts; and it is immaterial whether the tradespeople had notice of that allowance or not. *Mizen v. Pick*, 3 M. & W. 481; in which case, at p. 483, Alderson, B., says, "I do not see how notice to the tradesman can be material. The question in all these cases is one of authority. If a wife, living separate from her husband, is supplied by him with sufficient funds to support herself, with everything proper for her maintenance and support, then she is not his agent to pledge his credit, and he is not liable." This rule applies equally where the husband is insane, and he therefore lives apart from his wife in a lunatic asylum. *Richardson v. Du Bois*, L. R., 5 Q. B. 51. And a wife, living apart from her husband with his consent, on the terms that she shall accept a certain allowance, which is paid, has no authority to pledge his credit, though the allowance is inadequate. *Eastland v. Burchell*, 3 Q. B. D. 432. See also *Biffin v. Bignell*, 7 H. & N. 877; 31 L. J., Ex. 189.

Where the separation is compulsory, and is the act of her husband, he is liable, although an implied authority, in the strict sense of the word, can hardly be the ground of obligation. Thus where a wife leaves her husband under a reasonable apprehension of personal violence, he continues liable for necessaries furnished to her; *Houlston v. Smyth*, 3 Bing. 127; and if living apart she obtain the custody of her infant child against her husband's will, by an order under 2 & 3 V. c. 54 (now replaced by 36 & 37 V. c. 12), the reasonable expenses of providing for it have been held to be part of the necessary expenses of the wife for which she had authority to pledge her husband's credit. *Bazeley v. Forder*, L. R., 3 Q. B. 559; *diss. Cockburn*, C. J. So, if he cruselessly turn away his wife or shuts his door against her. *Lungworthy v. Hockmore*, cited 1 Ld. Raym. 444; see also *Rawlyns v. Vandryke*, 3 Esp. 251. In such cases, even a notice by him that he will not be answerable for her debts, will not relieve him from liability. *Boulton v. Prentice*, 1 Selw. N. P., 13th ed. 233; S. C., 2 Str. 1214; *Harris v. Morris*, 4 Esp. 42; *Harrison v. Grady*, 13 L. T. 369, M. T. 1865, C. P. A husband ill-treated his wife, and was indicted by her for the assault; a person who advanced money, for the purposes of the prosecution, to the attorney, without which he could not have gone on, could not recover it from the husband as money supplied to procure her necessaries. *Grindell v. Godmond*, 5 Ad. & E. 755. But the husband is liable to the solicitor employed by the wife for legal expenses incidental to a suit brought by her for restitution of conjugal rights, and for obtaining legal advice as to her position. *Wilson v.*

*Ford*, L. R., 3 Ex. 63. So for the wife's extra costs of obtaining a divorce. *Ottaway v. Hamilton*, 3 C. P. D. 393, C. A., see further, *In re Wingfield and Blew*, *infra*. It lies upon the plaintiff to show, that under the circumstances of the separation, or from the conduct of the husband, the wife had authority to bind him, and this even in an action for necessaries. *Mainwaring v. Leslie*, M. & M. 18; 2 C. & P. 507; *Clifford v. Laton*, *ante*, p. 566. And where the plaintiff caused a letter to be sent to the defendant, reminding him of his liability for necessaries supplied to his wife, that she was getting into debt, and stating the wish of his wife to return to him, which the defendant received, but returned no answer, it was held some evidence, though slight, that the defendant had authorised his wife to pledge his credit for necessaries. *Edwards v. Towels*, 5 M. & Gr. 624. If the husband be a lunatic, and incapable of making contracts, then he is bound by the orders for necessaries given by his wife; for this is analogous to the case of an omission of the husband to supply necessaries, though the omission is involuntary. *Read v. Legard*, 6 Exch. 636; 20 L. J., Ex. 309.

A husband was liable for necessaries provided for his wife, pending a suit in the ecclesiastical court, and before alimony decreed, although a decree, afterwards made, directed the alimony to be paid from a date before the time when the necessaries were provided. *Keegan v. Smyth*, 5 B. & C. 375. A decree for alimony was, however, a bar to the husband's liability, if the alimony were duly paid, even though the decree had become inoperative through an appeal having been presented, it being shown that it might have been renewed on application to the court of appeal. *Willson v. Smyth*, 1 B. & Ad. 801. But after a divorce *à mensâ et thoro* for adultery in the husband, and a decree of alimony, the husband has been held liable for necessaries supplied to the wife, if he omitted to pay the alimony. *Hunt v. De Blaquiére*, 5 Bing. 550. After a decree of nullity, the liability of the husband for the debts of his pseudo-wife does not continue. *Anstey v. Manners*, Gow, 10. And after sentence of judicial separation (20 & 21 V. c. 85, s. 26), the wife is, whilst so separated, to be considered a *feme sole*, for the purposes of contract and wrongs, and civil suits, and her husband is not liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant; but if he shall not have duly paid the alimony (if any) decreed, he shall be liable for necessaries supplied for her use. And a wife, deserted by her husband, and obtaining protection under sect. 21, is during the protection and desertion, deemed to be in like position, with regard to property and contracts and suits, as if she had obtained a decree of judicial separation. And see also 21 & 22 V. c. 108, s. 8. See on these sections, *Ewart v. Chubb*, L. R., 20 Eq. 454; *Hill v. Cooper*, (1893) 2 Q. B. 85, C. A.; *In re Wingfield and Blew*, (1904) 2 Ch. 665, C. A.; *Sheppard v. Sheppard*, (1905) P. 185. So an order given to a wife under 58 & 59 V. c. 39, s. 5 (a), or to a husband under 2 E. 7, c. 28, s. 5 (2), has the same effect as a judicial separation. But such order is avoided on a resumption of cohabitation, see *Haddon v. Haddon*, 18 Q. B. D. 778, decided on, 41 & 42 V. c. 19, s. 4.

Where the wife has separated from her husband, without cause and without his consent, the husband is not liable even for necessaries supplied to her. *Child v. Hardyman*, 2 Stra. 875; *Hindley v. Westmeath*, *Ms. of*, 6 B. & C. 213, *per* Bayley, J. See also *Johuston v. Sumner*, 3 H. & N. 261; 27 L. J., Ex. 341, cited *ante*, p. 564. So, *a fortiori*, where the wife elopes from her husband and lives in adultery. *Morris v. Martin*, Stra. 647. And, in such case, the wife is a competent witness to prove the adultery; *Cooper v. Lloyd*, 6 C. B., N. S. 519; but the adultery cannot be proved by giving evidence of the proceedings for divorce, in which the jury found that the

wife had been guilty of adultery, unless a decree has been pronounced altering the *status* of the parties. *Needham v. Bremner*, L. R., 1 C. P. 583. Where the husband turns the wife out of doors on account of her having committed adultery under his roof, he is not liable for necessaries furnished to her afterwards. *Ham v. Toovey*, 1 Selw. N. P., 13th ed. 228. See also *Govier v. Hancock*, 6 T. R. 603. It is, however, otherwise if he connived at the adultery. *Wilson v. Glossop*, 20 Q. B. D. 354, C. A. So, if after an adulterous elopement, the husband take her back, he is liable for necessaries subsequently supplied. *Harris v. Morris*, 4 Esp. 41.

The plaintiff must prove, either that the defendant and the woman to whom the goods were delivered are married, of which it is sufficient *prima facie* evidence that they are living together; *Car v. King*, 12 Mod. 372; or that she and the defendant cohabited, and that she passed as his wife with his assent, assumed his name, and lived in his house as part of his family; *Watson v. Threlkeld*, 2 Esp. 637; *Robinson v. Nahon*, 1 Camp. 245; for the presumed authority arising from cohabitation in the character and position of a wife applies to such cases as well as to legal marriages, and is not rebutted by proving that the plaintiff knew the real position of the parties. *Watson v. Threlkeld*, *supra*. But when the defendant has separated from a woman with whom he has lived, not being his wife, he is not liable for necessaries supplied afterwards. *Munro v. De Chemant*, 4 Camp. 215. If, however, the separation be unknown to the plaintiff, and the goods have been supplied under circumstances which justify him in supposing that the authority of the defendant continued,—as where the defendant had authorised like orders before, and the woman continued to live in the same house where the former orders had been given,—it is a mere question of agency for the jury, and it is immaterial that the plaintiff knew that the parties were unmarried. *Ryan v. Sams*, 17 Q. B. 460.

Where the wife ordered goods to be delivered to *her mother*, saying her husband would pay for them, which he did; and she subsequently ordered other goods in like manner, it was held that there was evidence for the jury of the wife's authority to order the latter goods. *Filmer v. Lynn*, 4 Nev. & M. 569. The case is, in this respect, like that of a household servant. See *ante*, p. 553.

As to the liability of the wife under the Married Women's Property Acts, 1882, 1893, for goods delivered on her order, *vide post*, pp. 1171 *et seq.*

As to liability of wife for necessaries supplied to her after her husband's death, see *Smout v. Ilbery*, 10 M. & W. 1, cited *ante*, p. 555.

*Delivery to infant child.*] The father of an infant to whom goods are supplied is only liable where an authority from him to his child is proved, or circumstances appear from which such an authority can be implied. *Baker v. Keen*, 2 Stark. 501; *Rolfe v. Abbott*, 6 C. & P. 286. *Quære*, whether a father, deserting his infant child of tender years, be liable to a person who supplies the child with necessaries, no further proof of contract being given? Such action, at all events, cannot be maintained if the father had reasonable ground to suppose that the child was provided for. *Urnston v. Newcomen*, 4 Ad. & E. 899; see *Bazeley v. Forder*, L. R., 3 Q. B. 599, *ante*, p. 565. And the mere moral obligation arising from the relation of parent and child does not, *per se*, afford any legal inference of a promise on the part of a parent to pay a debt of the child, even for necessaries supplied to him, although he may, under certain circumstances, by proceedings under the 43 El. c. 2, s. 7, be compelled to support his children, under the age of 16, according to his ability. *Mortimore v. Wright*, 6 M. & W. 482; *Shelton v. Springett*, 11 C. B. 452. The mother T. of a bastard child C. is bound by the 4 & 5 W. 4, c. 76, s. 71, to maintain it till 16 years old, but

this is a mere personal liability; and on T.'s death, leaving assets, her administrator cannot be sued for necessities supplied to C. after the death. *Ruttiger v. Temple*, 4 B. & S. 491; 33 L. J., Q. B. 1. A contract between T. and another person P., for the transfer to P. of T.'s rights and liabilities in respect of C., is void. *Humphrys v. Polak*, (1901) 2 K. B. 385, C. A.

By the Prevention of Cruelty to Children, 1894 (57 & 58 V. c. 41), s. 1, any person, who having the custody of any child under the age of 16 years, wilfully neglects him in a manner likely to cause him unnecessary suffering, is guilty of a misdemeanor, and by sect. 23 (3) the parent is presumed to have the custody. Hence the parent's moral duty of providing necessities for his child is now an absolute one. *R. v. Senior*, (1899) 1 Q. B. 283. Therefore an express promise to pay for such necessities already supplied is sufficient, and the prior request will be implied. See note to *Wennall v. Adney*, 3 B. & P. 249, n.; *Flight v. Reed*, 1 H. & C. 703, 716; 32 L. J., Ex. 265, 269; and 1 Smith's L. C., 11th ed. 149, 150.

*Delivery to overseer.*] Where goods were supplied for the use of the poor of the parish on orders signed by some of the overseers separately, all of whom had, on different occasions, promised to pay, this was held evidence of a joint contract on which all the overseers were liable to be sued, including the assistant overseer who had signed. *Kirby v. Banister*, 5 B. & Ad. 1069; see *Euden v. Titchmarsh*, 1 Ad. & E. 691. And an express promise will make them liable for medicines, &c., already supplied to a pauper on sudden illness without previous request. *Watson v. Turner*, B. N. P. 147; *Wing v. Mill*, 1 B. & A. 104. But overseers are not generally legally bound by the contract of one or more of them; it is a question for the jury whether the parties sued did in fact join in it. *Marsh v. Davies*, 1 Exch. 668.

*Acceptance.*] As before mentioned, p. 527, the acceptance necessary to render the buyer liable to pay for the goods is not the same as that required by the S. of G. Act, 1893, s. 4, *ante*, p. 526, to make an enforceable contract of sale.

As to the former kind of acceptance it is provided by sect. 34 (1), "Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. (2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract."

By sect. 35, "the buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them." See *Warley v. Whipp*, (1900) 1 Q. B. 513.

By sect. 36, *ante*, p. 541, the buyer who rejects goods need only intimate to the seller his refusal to accept them; he need not return the goods.

*Value.*] By sect. 8 (1), "The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties. (2) Where the price is not determined in accordance with the foregoing provisions

the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case." When, therefore, the goods have been sold without any agreement as to the price, the value must be proved. If the vendor of goods be only able to prove the delivery of a package, without any evidence of the contents, it will be presumed as against him that it was filled with the cheapest commodity in which he deals. *Clunnes v. Pezzey*, 1 Camp. 8. If a seller agree to sell a machine at a certain price, and put in materials superior to those contracted for, the purchaser is neither bound to pay a higher price, nor to return the machine. *Wilmot v. Smith*, 3 C. & P. 455. Where goods have been sold and delivered, to be paid for by bill at a certain date, if the bill be not given, the plaintiff may recover, as part of the stipulated price, interest from the time the bill would have become due; the special agreement should, however, be stated in the claim. *Farr v. Ward*, 3 M. & W. 25; *Davis v. Smyth*, 8 M. & W. 399. See sect. 9, *ante*, p. 523, as to the effect of no valuation being made, when the contract is for sale at a valuation.

#### *Defence.*

By Rules, 1883, O. xxi. r. 3, *post*, p. 658, a defence in denial must deny the order or contract, the delivery, or the amount claimed. See also O. xix. rr. 15, 17, 20, *ante*, pp. 309, 310. Evidences of the various defences that may be set up to an action of this kind will be found under the general head of *Defences in actions on simple contract*, *post*, pp. 659 *et seq.*

*Reduction of damages.*] By sect. 53 (1), *ante*, p. 488, where there is a breach of warranty by the seller or the buyer treats a breach of a condition as a breach of warranty, the buyer "*(a)* set up against the seller the breach of warranty in diminution or extinction of the price." Any further damages sustained by the defendant beyond the difference of value must be recovered in a cross action; *Moulel v. Steel*, 8 M. & W. 858; or now by way of counter-claim. And it seems that the acceptance and non-return of the goods by the defendant will not preclude this defence, though it may be evidence in favour of the plaintiff of a fresh contract to pay on the footing of a *quantum valebant*. S. C.; *Grounsell v. Lamb*, 1 M. & W. 352. By sect. 53 (1, *b*), *ante*, p. 488, the buyer has the alternative course of suing the seller for the breach of warranty. "The defendant has the option, if he pleases, to divide the cause of action, and use it in diminution of damages, in which case he is concluded to the extent to which he obtained, or was capable of obtaining, a reduction; or he may" . . . "claim no reduction at all, and afterwards sue for his entire cause of action." *Davis v. Hedges*, L. R., 6 Q. B. 687, 692. Where plaintiff sold to the defendant cyder, warranted good, which was bad and unsaleable, whereof defendant gave the plaintiff notice, and said he would continue to try it; to which plaintiff made no reply: held, that the defendant was not liable, though he used more than was necessary to try it, and that there was evidence that the plaintiff acquiesced in the further trial, and that defendant was not bound to send back the cask with the remaining cyder. *Lucy v. Mouslet*, 5 H. & N. 229; 29 L. J. Ex. 110. And by sect. 36, *ante*, p. 541, the buyer is not bound to return rejected goods. A defence, relying upon a warranty of title, must be specially pleaded in cases where it is a defence at all, as to which see *ante*, p. 487. Where a patented machine for printing in two colours was bought by the defendant after seeing it, and it turned out to be incapable of so printing, from a defect in the principle of it, it was held that he could not resist an action for the price; for the

plaintiff complied with the order of the defendant, and sent him the very article which he bargained for, and (there being no fraud) the insufficiency of the alleged invention was no answer. *Ollivant v. Bayley*, 5 Q. B. 288. And in an action by the patentee of an alleged invention, against an assignee or vendee of the patent, the defendant cannot set up its invalidity for want of novelty, if there be no fraud or eviction; for there is no warranty on such sale. *Laves v. Parsler*, 6 E. & B. 930; 26 L. J., Q. B. 25; *Smith v. Neal*, 2 C. B., N. S. 67; 26 L. J., C. P. 143. Though it is otherwise where by the invalidity of the patent, there has been a total failure of the consideration. *Chanter v. Leese*, 5 M. & W. 698. See further *post*, p. 606. Where plaintiff sold to defendant by sample an article (*e.g.*, alkali) not manufactured by himself, which proved unfit for defendant's use, this is no defence if the sample was fairly taken, though much of the article did not correspond with it. *Sayers v. L. & Birmingham Glass Co.*, 27 L. J., Ex. 294. Where the contract contains a clause, releasing the plaintiff from all responsibility in respect of the goods supplied by him after a certain time of trial, the purchaser cannot, after the time is passed, prove a latent defect in them in reduction of the price; there being no fraud alleged. *Sharp v. Gt. W. Ry. Co.*, 9 M. & W. 7.

As to the defence of fraud on sales, see *ante*, pp. 326 *et seq.*, and *Defences to actions on simple contracts—Fraud*, *post*, p. 663.

[*Action brought before credit expired.*] In calculating the time of the credit, the day of the sale must be excluded; and, therefore, where goods were sold on the 5th of October, to be paid for in two calendar months, an action could not be commenced till after the expiration of the 5th of December, and a writ issued on that day was premature. *Webb v. Fairmaner*, 3 M. & W. 473. By sect. 10 (2), "in a contract of sale 'month' means *primâ facie* calendar month."

Where goods are fraudulently bought on credit, the seller cannot sue for goods sold and delivered before the credit has expired, though he may maintain trover. *Ferguson v. Carrington*, 9 B. & C. 59; *Strutt v. Smith*, 1 C. M. & R. 312. If by the contract it is agreed that a bill at a certain date shall be given, it operates as a giving of credit; and although no bill should be given, the seller cannot sue the purchaser for goods sold and delivered before the period when the bill, if given, would have become due. Therefore where a person purchased goods, and agreed to pay for them in three months by a bill at two months, which bill he afterwards refused to give, an action for goods sold was held not to lie before the expiration of five months. *Mussen v. Price*, 4 East, 147; *Lee v. Risdon*, 2 Marsh. 495. So when goods are sold at six months' credit, payment to be then made by a bill at two or three months at the purchaser's option, this is in effect a nine months' credit. *Helps v. Winterbottom*, 2 B. & Ad. 431; *Price v. Nixon*, 5 Taunt. 338. And where the goods are to be paid for partly in cash and partly by bills at three months, the payment of the money or delivery of bills does not constitute a condition to the credit, so as to enable the vendor to sue for goods sold before the expiration of the three months. *Paul v. Dod*, 2 C. B. 800. But where payment is to be "2½ per cent. or three months' bill," which is explained to mean cash, less discount, at the expiration of the month succeeding the current month, or at the buyer's option, a bill of three months from the same period, and the buyer refused to accept a bill at the end of the second month, the seller may sue at once for the price. *Rugg v. Weir*, 16 C. B., N. S. 471. Where the purchaser has such option, by paying part in cash he waives his right to pay by bill. *Schneider v. Foster*, 2 H. & N. 4. And if part only of the goods be supplied, and the defendant then refuses to take more, the plaintiff may immediately

sue for the goods delivered. *Bartholomew v. Markwick*, 15 C. B., N. S. 711; 33 L. J., C. P. 145. So where goods were sold at 3 months' credit, the vendor agreeing to take the vendee's bill at 3 months' date, at the end of the first 3 months, if he wished for further time, and the vendee, at the end of the 3 months, did not give such bill, *Ld. Ellenborough* held that the giving the bill was a condition to the further credit, and that the vendor might bring an action for goods sold and delivered immediately. *Nickson v. Jepson*, 2 Stark. 227.

Where bills, given for goods, are dishonoured, the vendor may sue for the price immediately; *Hickling v. Hardey*, 7 Taunt. 312; *Mussen v. Price*, 4 East, 151; provided the bills are in the hands of the seller; but if they are in the hands of third persons, that is a defence to the action; for the defendant may be called upon by those persons to pay the bills. *Burden v. Halton*, 4 Bing. 454, 455; and where the bills have been indorsed away for value it is not sufficient that they should have returned to the plaintiff's hands after writ, though before trial. *Davis v. Reilly*, (1898) 1 Q. B. 1. But if the bills were delivered at the plaintiff's request to C. as a trustee for the plaintiff, and they are still in the hands of C. as such trustee, and are dishonoured, there is no defence. *National Savings Bank Association v. Tranah*, L. R., 2 C. P. 566. When the buyer gives a promissory note of another person without indorsing it, the vendor may, on its dishonour, sue for the price of the goods without proving presentment to the maker, the note being produced by himself. *Goodwin v. Coates*, 1 M. & Rob. 221. So where the seller takes a bill, indorsed by the defendant, on a wrong stamp, in suing for the price of the goods he need not prove due notice of dishonour of the bill. *Cundy v. Marriott*, 1 B. & Ad. 696. But if he make a bill his own by laches, it operates in satisfaction of the preceding debt; so if he make it his own by altering it in a material part. *Alderson v. Langdale*, 3 B. & Ad. 660.

See further as to payment by bill or note, *post*, pp. 699 *et seq.*

## ACTION ON SALES OF STOCK, SHARES, AND SECURITIES.

Shares in the public funds, in commercial partnerships and companies, and like interests, are choses in action, and were not assignable at common law, so as to pass a legal interest in them except by statute, as in the case of stock, railway shares, &c.; or by ancient custom, as in the case of promissory notes and bills of exchange; *Crouch v. Crédit Foncier of England*, L. R., 8 Q. B. 374; or by modern usage, as in the case of bonds "to bearer" issued by companies. *Bechuanaland Exploration Co. v. L. Trading Co.*, (1898) 2 Q. B. 658; *Edelstein v. Schuler*, (1902) 2 K. B. 144. Such interests, however, are saleable, whether they be legal or equitable interests, and are the subject of contract which the law will recognise and enforce. *Humble v. Mitchell*, 11 Ad. & E. 205; *Tempest v. Kilner*, 2 C. B. 300. And the legal right therein is now assignable under J. Act, 1873, s. 25 (6), *ante*, pp. 307, 308. Such shares are not "goods" within the Sale of Goods Act, 1893, ss. 4, 62 (1), *ante*, pp. 526, 521, though they are "goods and chattels" within the meaning of a claim by the seller for the price of them, *ante*, p. 550.

A sale of such securities, which pass by delivery only, is not like a sale of specific goods; it passes no property till delivery, and, in effect, it means only a contract to deliver some stock. *Heseltine v. Siggers*, 1 Exch. 856, *per Cur.* The same held good in the case of all contracts for the sale and purchase of shares; for the sellers' contract was only to procure a transfer of some shares to the buyer; *Rudge v. Bowman*, L. R., 3 Q. B. 689; but contracts for the sale of shares in joint stock banking companies in the United Kingdom are now for the sale of specific shares, as such contracts are regulated by 30 & 31 V. c. 29, s. 1, which provides that all contracts for sale and purchase, made for the sale or transfer of any shares, stock, or other interest in any joint stock banking company in the United Kingdom (except the Bank of England or of Ireland, sect. 3), issuing shares or stock, transferable by any deed, &c., shall be null and void to all intents and purposes whatsoever, unless such contract shall designate in writing such shares, &c., by the respective numbers by which the same are distinguished on the register or books of such banking company, or where there is no such register of shares, &c., by distinguishing numbers, then, unless such contract shall set forth the person in whose name such shares shall, at the time of making such contract, stand as the registered proprietor thereof in the books of such banking company. See on this section *N. Mitchell's Case*, Ct. Sess. Cas. 4th ser. vi. 420; affirm. on another ground, 4 Ap. Ca. 624, D. P.

Where a broker, on behalf of A., entered into a contract for the sale of bank shares to B., without specifying therein the particulars required by this section, and the bank having stopped payment, and the shares became worthless, B. refused to accept them, the broker was held to be liable to A. in damages, at any rate equal to the contract price of the shares. *Neilson v. James*, 9 Q. B. D. 546, C. A. A custom of the Stock Exchange to disregard the statute is unreasonable as against a person ignorant of the custom. *S. C.*; *Perry v. Barnett*, 14 Q. B. D. 467; 15 *Id.* 388, C. A. *Secus*, as against a person who had notice of the custom. *Seymour v. Bridge*, 14 Q. B. D. 460, cited *post*, p. 591. And the buyer of shares bought under a contract void under the statute must repudiate it, or he will be bound thereby. *Loring v. Davis*, 32 Ch. D. 625.

A contract for the sale of shares in a company is not rescinded by the Companies Act, 1862, s. 153, if the company has commenced to be wound up under that Act, after the contract was made and before the transfer was executed. *Chapman v. Shepherd*, and *Whitehead v. Izod*, L. R. 2 C. P. 228. Nor is a contract for the sale of shares, entered into after the commencement of the winding-up, made illegal by that section; *Rudge v. Bowman*, *supra*; see *In re Onward Building Soc.*, (1891) 2 Q. B. 463, C. A.; nor where the winding-up is voluntary, by sect. 131. *Biederman v. Stone*, L. R., 2 C. P. 504.

As to time bargains and wagering contracts for sale and purchase of stock and shares, *vide post*, p. 577. As to an agreement with a broker, B., to buy shares in order fraudulently to inflate the price, &c., see *Scott v. Brown*; *Slaughter v. Brown*, cited *post*, p. 667.

A dividend declared after the contract of sale of shares and before completion belongs to the purchaser. *Black v. Homersham*, 4 Ex. D. 24.

*Sales on the Stock Exchange.*] Shares, stock, and other securities are usually bought and sold on the London or some local Stock Exchange, and the transactions are consequently regulated by the usage of that Exchange. *Grissell v. Bristowe*, L. R., 4 C. P. 49, Ex. Ch.; *Maxted v. Paine*, L. R., 6 Ex. 132, Ex. Ch.; *Merry v. Nickalls*, L. R., 7 H. L. 530; *vide ante*, p. 26. The usage of the London Stock Exchange is to be found fully set out in those cases, and the rules then in force will be found at L. R., 4 C. P. 53, n.



See also the evidence in *Ex pte. Grant*, 13 Ch. D. 667, C. A. As, however, these rules have undergone some modifications, and are very frequently referred to, it will be useful here briefly to describe how the transactions are carried out, and to state the most important of the printed "Rules and Regulations" (dated March 25th, 1906, and corrected up to June, 1907), which now govern them.

It must first be observed that the Stock Exchange only recognises dealings with its own members, and consequently all members, whether dealers on their own account, called "jobbers," or brokers acting for a principal, contract with each other as principals (r. 66). Hence the term member, hereafter employed, will include both jobbers and brokers. Every calendar month is divided into two nearly equal periods, each called "the ordinary account," and, when no time is specified, it is with reference to one or other of these accounts that contracts for sale or purchase of stocks and shares, other than new securities for which a special settlement has not been appointed, are in general made (r. 81), *vide post*, pp. 576, 577. The last four days of each account are called the ordinary settlement, and are known respectively as—1st, the mining contango or making-up day; 2nd, the general contango or making-up day, (and mining ticket or name day, see r. 104, *infra*); 3rd, the ticket or name day; 4th, the account or pay-day. The account-days are fixed by the Committee of the Stock Exchange (r. 80), at about the middle and end of each month.

Taking first the case of shares, &c., transferable by deed of transfer. The buying member, to whom the shares have been sold, is at liberty by the name-day to substitute, if he be able to do so, another person as buyer, and so relieve himself from further liability on the contract, provided that to such person the seller cannot reasonably except, and that such person accept the transfer of the shares, and pay the price agreed on between the seller and the buyer; in other words, become the buyer of the shares at the price originally agreed on. *Grissell v. Bristowe*, L. R., 4 C. P. 36, 45, Ex. Ch.; *Coles v. Bristowe*, L. R., 4 Ch. 3; *Torrington, Vt. v. Lowe*, L. R., 4 C. P. 26; *Macted v. Paine*, L. R., 4 Ex. 203; Ex. Ch., L. R., 6 Ex. 132; and *Macted v. Morris*, 21 L. T. 535, M. T. 1869, Ex. When the seller has accepted the nominee of the original buyer, the contract with the latter and his liability is at an end; the seller by transferring the shares to the nominee, and so putting it out of his power to transfer the shares to the original buyer, irrevocably declares his acceptance of the nominee. S. CC. This, of course, assumes that the nominee is a person legally capable of entering into the contract with the seller; where this is not so, as where he is an infant, the original buyer remains liable. *Merry v. Nickalls*, L. R., 7 H. L. 530, *post*, p. 575.

This process of substituting another name for that of the original buyer is carried on by means of tickets, in the following manner: the buyer, B., who takes up securities deliverable by deed of transfer, before noon on the ticket-day (or, in the case of securities dealt in in the mining markets, before 2 p.m. on the day before the ticket-day), issues a ticket with his own name, as payer of the purchase-money, which ticket contains—the amount and denomination of the security to be transferred, the name, address, and description of the ultimate transferee, A., in full, the price, the date, and the name of the member to whom the ticket is issued. This ticket is passed through the hands of all the intermediate sellers, C., D., E., . . . W., in succession, each of them indorsing thereon the name of his immediate seller, D., E., F., . . . X. (r. 104), till it ultimately reaches the member Y., who is actually to procure the transfer of the security; the result is that Y. is brought into contact with B. Y. is then bound within ten days to deliver to B. an instrument of transfer of the security to

A. executed by Z., the ultimate seller, the person in whose name they are registered, together with the coupons or certificates showing Z.'s title to the security, or a certificate on the transfer deed that they have been deposited with the Secretary of the Stock Exchange, or with the company whose security is being transferred.\* B., on receiving the transfers and certificates from Y., pays him the price named on the ticket and the stamp duty on the transfer (rr. 108, 110, 111). Where B. and Y. are acting as brokers for A. and Z. respectively, the delivery of the ticket to Y., which was issued by B., establishes privity of contract between A. and Z. See judgment of Blackburn, J., in *Moxted v. Paine*, L. R., 6 Ex. 162; also *Merry v. Nickalls*, L. R., 7 H. L. 530.

Members set off their transactions as much as possible between each other, and deliver tickets for the balance of the security, and of this only they require to take delivery at the account. When the amount of the security on the ticket delivered to a member is greater than that which he wishes to pass on to one single member, he may "split" the ticket or divide the security between other similar tickets, which he passes on, retaining the original ticket (see r. 105).

It is the duty of the seller to deliver genuine transfers and certificates (r. 102), and it is the duty of the purchaser thereupon to execute those transfers, and to procure their registration at the office of the company; *Wynne v. Price*, 3 De G. & Sm. 310; *Biederman v. Stone*, L. R., 2 C. P. 504; *Stray v. Russell*, 1 E. & E. 888; 28 L. J., Q. B. 279; 1 E. & E. 916; 29 L. J., Q. B. 115, Ex. Ch.; the seller does not contract to obtain the consent of the directors to the transfer; S. C.; *L. Founders' Assoc. v. Clarke*, 20 Q. B. D. 576, C. A.; but he must not interfere with the registration. *Hooper v. Herts*, (1906) 1 Ch. 549, C. A., cited *post*, p. 1099. A special action lies at the suit of the seller against the buyer on an implied indemnity, if by reason of the buyer allowing the seller's name to remain on the register of shareholders, the latter is obliged to pay subsequent calls; *Walker v. Bartlett*, 18 C. B. 845; 25 L. J., C. P. 263, Ex. Ch.; and in such case the transferor may also sue the transferee for not registering the transfer of the shares to him. See judgment in *Grissell v. Bristowe*, L. R., 3 C. P. 112; not affected on this point by judgment of Ex. Ch. So, when the seller S. has adopted the nominee N. as the buyer, and the price has been paid by the one, and the property transferred by the other, a contract, and the relation of vendor and vendee, immediately arises between them (see judgment of Ex. Ch., in *Grissell v. Bristowe*, L. R., 4 C. P. 36, 51), and this brings the case within the principle of *Walker v. Bartlett*, *ante*, p. 574, so that N. is liable to indemnify S. for loss if N. do not register the shares in his name; *Bowring v. Shepherd*, L. R., 6 Q. B. 309, Ex. Ch.; *Hawkins v. Maltby*, L. R., 6 Eq. 505; L. R., 4 Ch. 200. And where the name of N. has been given by H., the real buyer of the shares, and they are held by N. as trustee for H., H. is liable to indemnify S. *Castellan v. Hobson*, L. R. 10 Eq. 47. See *Hardoon v. Belilios*, *post*, p. 593. This right to indemnity is not affected by the transferee not having executed the transfer to himself. *Coles v. Bristowe*, L. R., 4 Ch. 3; *Loring v. Davis*, 32 Ch. D. 625.

Until the delivery by the member X., who entered into the contract with the broker Y. of the seller Z. of the shares, of the name of a proper nominee, X. remains liable to carry out his contract. *Moxted v. Paine* (1st action); *Merry v. Nickalls*, *post*, p. 575. And where the contract is made "with registration guaranteed," X. is liable to indemnify Z. if the nominee do not

\* The entry of this certificate is known as "certification." As to its effect, see *Bishop v. Balkis Consolidated Co.*, 25 Q. B. D. 512, C.A., and *George Whitechurch v. Caranagh*, (1902) A. C. 117, D. P., cited *post*, p. 1120.

register the transfer executed to him by Z. *Cruse v. Paine*, L. R., 6 Eq. 641; L. R., 4 Ch. 441.

The nominee must have agreed to buy the shares, and where he agreed to buy for one account, and his broker, without his consent, carried over the sale to the next account (as to which *vide infra*), the original buyer was held to remain liable to carry out his contract, and to indemnify the seller; *Masted v. Paine* (1st action), L. R., 4 Ex. 81; *Masted v. Morris*, 21 L. T. 535, M. T. 1869, Ex.; so, the buyer was held liable to indemnify the seller, where the former passed the name of an infant, L., as the transferee; L. being incapable of entering into a valid contract. *Merry v. Nickalls*, L. R., 7 H. L. 530. In this case a transfer had been executed by the seller to L., and objection was not taken to L. within ten days under the rule below mentioned, as neither the seller nor buyer knew of L.'s infancy. Where, however, the infant transferee sued the vendor to set aside the contract on the ground of fraud, and the vendor compromised the action by repaying the purchase-money, it was held that he was bound by this compromise, and could not afterwards sue the real purchaser. *Maynard v. Eaton*, L. R., 9 Ch. 414.

The nominee must, in any case, at least, in which there is any existing liability on the shares to be transferred, be a person open to no reasonable objection, and, by the usage of the Stock Exchange, the seller has ten days from the account day during which he may object to him. If an objection be made, it is referred to the Committee of the Stock Exchange, and admitted or overruled by them, according to the merits of the case, and, if admitted, the member P., who entered into the contract, is bound to find another nominee free from objection, or to perform the contract himself. *Masted v. Paine*, L. R., 4 Ex. 203, 220, *per Kelly*, C.B.; *Merry v. Nickalls*, L. R., 7 H. L. 539, 540. This usage does not appear in the printed Stock Exchange rules, but there seems no ground for the doubt expressed by Blackburn, J. (see L. R., 6 Ex. 179), as to its existence. The seller is not bound to accept the name of a foreigner resident abroad. *Goldschmidt v. Jones*, 22 L. T. 220, M. R.; *Allen v. Graves*, L. R., 5 Q. B. 478. Nor that of an infant, *vide supra*.

Where K. the holder of shares transferred them to E., who transferred them to M., who was registered in respect of them, and the company was wound up and K. and E. were settled on the list of contributories as past members; E. was held liable to indemnify K. against calls. *Kellock v. Enthoven*, L. R., 9 Q. B. 241, Ex. Ch.

Where a member who has agreed to buy or sell shares, does not desire to take up or deliver them at the account for which they were bought, the contract is frequently "carried over" or "continued" to the next account; this is arranged on the making-up day, and on the morning of the account-day all unsettled bargains are brought down, and temporarily adjusted at the making-up price of the ticket-day, except bargains in securities subject to arrangement by the settlement department of the Stock Exchange, which are adjusted at the making-up price (*vide infra*), of the contango day (r. 112). Continuations are "effected at the making-up price, or at the then existing market price;" (r. 88). The "difference" payable on such "continuation" is paid on that, and each subsequent account-day, until the closing of the transaction. The Clerk of the Stock Exchange fixes the making-up prices of all securities, by taking the actual price on each of the two days preceding the account-day, and in the case of securities dealt in in the mining markets on the mining contango day (r. 89). In other words, the shares are re-sold to the vendor, at the making-up price, and bought back from him at the same price, the difference between that price and the contract price, being paid on the account-day of that account. If this continuation be arranged for the accommodation of the buyer, as is

usually the case on a "bull" \* account, he pays the seller "contango" †; if for the accommodation of the seller, as is usually the case on a "bear" \* account, he pays the buyer "backwardation." † The contango or backwardation is paid on the settling-day of the next account. The carrying over is often effected by means of similar contracts of sale and re-purchase made for this purpose with a person other than the original vendor. *Bongiovanni v. Société General*, 54 L. T. 320, C. A. In law a "continuation" is a sale and re-purchase and not a loan. *S. C. Accord. Bentinck v. L. Joint Stock Bank*, (1893) 2 Ch. 130, 131. This agrees with r. 88.

When the member buying securities does not carry out his contract, and the securities have not been carried over as above mentioned, they may be sold out against him. The seller not receiving a ticket in due course on the ticket-day may, within a limited time, sell out the securities and charge the loss on the member who was in default (r. 133), where the ticket has been passed, the seller having transferred the stock has a right to demand payment from the member who passed him the ticket; so also where the seller has applied to the issuer of the ticket and failed to obtain payment, or has received a cheque which has been dishonoured (r. 86). Where a selling member does not deliver the securities he has agreed to sell, they may within a limited time be bought in against him by the issuer of the ticket (rr. 126, 127). Buying-in or selling-out is effected publicly by the officials of the Stock Exchange, who will trace the transaction to the responsible party and claim the difference thereon (r. 123).

In the case of bargains in securities passing to bearer without deed of transfer, the transactions are carried on in a similar manner with some modifications arising from the difference in the mode of transfer. The tickets are passed on the ticket-day between 10 and 1 o'clock at the making-up price of the day before; the tickets must bear distinctive numbers and be of certain amounts specified in the rules and may not be split, except in the settlement department of the Stock Exchange; smaller amounts are settled without tickets (r. 117). On account-days unsettled bargains are brought down and temporarily adjusted at the making-up price (*vide ante*, p. 575) of the ticket-day (r. 121). These securities, if not taken up by 2.30 p.m. (noon on Saturdays) on the day for which they are sold, may be sold out by the seller, and the buyer charged with the loss (r. 136); so if not delivered by 2.30 p.m. (noon on Saturdays), they may within a limited time be bought in by the buyer, and the seller charged with the loss (rr. 129, 130). Buyers are to pay for such portions of securities as may be delivered within the prescribed time (r. 122). The deliverer is responsible for the genuineness of securities delivered (r. 114). English and Indian Government and Corporation securities to bearer must be delivered before 3 p.m. or noon on Saturdays (r. 98).

The Consols settlement is monthly only, and consists of contango, making-up and account-days (r. 80); the latter is usually about the 3rd or 4th day of each calendar month. This settlement, however, relates chiefly to speculative dealing in government and corporation inscribed or registered stocks, &c.; *bonâ fide* sales and purchases are made for any specified

\* A person who buys shares on speculation for the mere purpose of re-sale on a rise is called a "bull," as he tosses up the market. So, one who sells shares he has not got, and therefore seeks to lower the price that he may purchase them at a profit, and so fulfil his contract by delivery, is called a "bear," as he hugs down the market.

† It thus appears that "contango" is, in effect, though not strictly in law (*vide supra*), a sum paid for the loan of money, and "backwardation" for the loan of stock, and the rate of continuation, therefore, depends on the relative scarcity of money and stock in the market. Occasionally the rate is "even," i.e., neither contango nor backwardation is payable.

day in such securities. The buyer for the ordinary account (*vide ante*, p. 573) must issue tickets before 2 p.m. on the ticket day (r. 97). Stock receipts (which are evidence that the stock has been transferred in the bank books) for stock bought for a specified day must be delivered before 3.30 p.m. or 12.30 p.m. on Saturdays (r. 98). If the member selling stock does not receive a transfer-ticket before 1.30 p.m. (12.15 p.m. on Saturdays) on the day upon which it was contracted to deliver the stock, he may sell out the same, and claim of the person who at 1.30 p.m. held the ticket any loss hereby occasioned (r. 131). Stock bought for a specified day and not then delivered, may be bought in on the following day at 11 a.m., and the member causing the default shall pay any loss incurred (r. 126).

When no time is specified, bargains in new securities, for which a special settlement has not been appointed under rr. 137, 138, are for that settlement (r. 81). Where the appointment of such settling-day has been obtained by the fraud of persons not parties to the bargain, the bargain is good. *Ex pte. Ward*, 20 Ch. D. 356, C. A.

A member of the Stock Exchange unable to fulfil his engagements is publicly declared a defaulter, [otherwise "is hammered,"] and he then ceases to be a member (r. 148). In every case of failure the official assignees (who are members appointed by the Stock Exchange Committee under r. 147) "shall publicly fix the prices current in the market immediately before the declaration, at which prices" [known as "the hammer prices"] "all persons having accounts open with the defaulter shall close their transactions by buying of or selling to him such securities as he may have contracted to take or deliver, the differences arising from the defaulter's transactions being paid to or claimed from the official assignees" (r. 152); the assignees shall collect the assets and distribute them as soon as possible (r. 153). No claim not arising from a Stock Exchange transaction can be proved against a defaulter's estate (r. 157), but non-members may be admitted to participate in the estate on certain conditions (r. 162).

Time bargains for the sale of stock or shares of which the seller is not possessed at the time, but which are to be transferred at a future time, may be void under stat. 8 & 9 V. c. 109, s. 18, *post*, p. 617, as a wager, *e.g.*, where the real bargain is that differences only shall be paid at the time of completion. *Grizewood v. Blaine*, 11 C. B. 538; 24 L. J., C. P. 46; *Cooper v. Neil*, W. N., 1878, p. 128, T. Sit. C. A.; *Universal Stock Exchange v. Strachan*, (1896) A. C. 166, D. P. And money paid for the defendant in respect of such a contract cannot now be recovered; see 55 & 56 V. c. 9, s. 1, cited *post*, p. 591. A contract of this nature is, however, unusual on the Stock Exchange, and the general course of speculation is as follows (see *Ex pte. Grant*, 13 Ch. D. 667, 670 *et seq.*): A. employs B., a broker, to speculate for him; B. to carry out the speculation enters into contracts to buy or sell stock or shares for A., and in order to protect himself B. subsequently enters into contracts to sell or buy respectively similar amounts of stocks or shares (*vide ante*, pp. 575, 576), as A. knows that B. must. A. never intends to take delivery of or deliver the stock bought or sold for him, as B. knows, but is content to run the risk of having to accept or deliver, in the hope B. will be able to arrange matters so that differences only shall be payable, and B. knows A. could not pay for stock bought or deliver that sold for him. In such a case B. having entered into real contracts on behalf of A., the transactions between them are not of a wagering nature, and B. is entitled to be indemnified by A. and to recover commission on the sales or purchases. *Thacker v. Hardy*, 4 Q. B. D. 685, C. A.; *Knight v. Fitch*, 15 C. B. 566; 24 L. J., C. P. 122; see also *Forget v. Ostigny*, (1895) A. C. 318, J. C. In such cases B. can recover from A. differences he has paid for A., although he has not entered into separate contracts on A.'s behalf, but has appropriated

to A. parts of larger amounts of stocks which he has bought as principal, in view of dividing them among A. and other clients. *Ex pte. Rogers*, 15 Ch. D. 207, C. A. By so doing, B., at any rate by the usage of the Stock Exchange, creates privity of contract between C., from whom he bought the shares, and A.; *Scott & Horton v. Godfrey*, (1901) 2 K. B. 726; explaining *Beckhuson v. Hamblett*, *Id.* 73, C. A.; C. can therefore, on B. being declared a defaulter, and his accounts closed under rr. 148, 152 (*ante*, p. 577), sue A. for not accepting the stock; for the contract between A. and C. is not affected by the domestic procedure of the Stock Exchange under those rules. *Levitt v. Hamblett*, *infra*; *Anderson v. Beard*, (1900) 2 Q. B. 260. So A. may take up the shares in accordance with the contract, although B. has become a defaulter, or he may appoint another broker in the place of B. to carry on the transaction. *Id.* 264. But A. has no right to close his purchase at the "hammer price" (*vide ante*, p. 577), as against C. *Levitt v. Hamblett*, (1901) 2 K. B. 53, C. A., correcting *dictum* of Matthew, J., S. C. (1900) 1 Q. B. 264. If A., after B. has become a defaulter, repudiate the contract with C., before the account-day, C. may at once sell the shares and sue A. for the difference. *Anderson v. Beard*, and *Scott & Horton v. Godfrey*, *supra*. See further as to the usage of the Stock Exchange in the event of a member becoming a defaulter, *Ex pte. Grant*, 13 Ch. D. 673 *et seq.* As to B.'s rights of indemnity against A., see *Ex pte. Rogers*, *supra*, and *post*, pp. 592, 593.

Where a member D. of the Stock Exchange becomes a defaulter, and under r. 153 (*ante*, p. 577) the official assignee O. collects D.'s assets, this creates an assignment of *all* D.'s assets to O. *Richardson v. Stormont, Todd & Co.*, (1900) 1 Q. B. 701, C. A.; *Lomas v. Graves*, (1904) 2 K. B. 557. This assignment, unless invalidated in bankruptcy proceedings against D., is valid even against non-members of the Stock Exchange. S. CC. The assignment and distribution of the assets under r. 153 are not, however, an accord and satisfaction of the defaulter's debts, and his creditors may sue him for the balance due after deducting the dividends received by them. *Mendelssohn v. Ratcliffe*, (1904) A. C. 456, D. P. See further as to the effect of such liquidation by the official assignees, *Tomkins v. Suffery*, 3 Ap. Ca. 213, D. P.; *King v. Hutton*, (1900) 2 Q. B. 504, C. A.

As to the ostensible authority of the clerk of a broker B. to bind B. by accepting orders for him, see *Spooner v. Browning*, (1898) 1 Q. B. 528, C. A.

The actions of ordinary occurrence are—for not accepting stock or shares; for not delivering or replacing them; and for not paying for them when transferred.

[*Action for not accepting.*] The plaintiff in order to prove his alleged tender of or readiness to transfer stock, if denied, must show his attendance at the time or latest office hour of the day fixed for transfer, and the non-attendance of the defendant; or an actual tender and refusal to accept by the defendant; or that defendant in some way dispensed with such tender or attendance of the plaintiff; *Bordenave v. Gregory*, 5 East, 107; and on such sales the facts proved may warrant a finding of readiness to transfer, though no transfer be actually tendered. *Humble v. Langston*, 7 M. & W. 517; see *ante*, pp. 537, 545, 546, and *Shaw v. Rowley*, 16 M. & W. 810. Although the court gave no decision on the point, it was intimated in *Hibblewhite v. M'Morine*, 6 M. & W. 200, that such readiness was disproved by showing that the plaintiff had no stock or shares to transfer at the time for completion. As, however, it was decided in *Rudge v. Bowman*, L. R., 3 Q. B. 689, that the seller does not contract that he

will himself transfer the shares, for the contract is merely to procure a transfer of shares into the defendant's name, it seems immaterial whether the plaintiff have the stock standing in his own name or not, provided he has the requisite amount of shares under his control. In a contract to deliver shares on a certain day, time is of the essence of the contract both at law; *Fletcher v. Marshall*, 15 M. & W. 755, 763; see also *Maxted v. Paine*, and *Maxted v. Morris*, ante, p. 575; and in equity; *Doloret v. Rothschild*, 1 Sim. & St. 590. Where no time is named the delivery must be within a reasonable time. *De Waal v. Adler*, 12 Ap. Ca. 141, J. C. The reasonableness of the time is not affected by circumstances unknown to the buyer, and not disclosed to him by the seller. S. C.

The plaintiff must of course be prepared to prove the title, if in issue, but the title to shares in commercial companies, in which no documentary evidence of title is provided, does not stand on the same footing as the title to land, and requires no such strict proof. On the sale of a share in a cost-book mine, proof of the existence of the mine and of the authorised entry of the plaintiff's name in the cost-book of the mine as an adventurer will be evidence of title. The contract of sale in such adventures seems indeed to amount to nothing more than an agreement to substitute the defendant for the plaintiff in the possession of such interest as the plaintiff, in common with the other shareholders, can lawfully claim in the subject of the adventure. See *Curling v. Flight*, 6 Hare, 41; S. C. cor. Ld. Cottenham, C., 2 Phill. 613. Where the question was whether there was a proper conveyance by deed, a written transfer by a foreigner of a foreign mine is evidence of it, though not under seal; it not appearing by any evidence that a seal was necessary abroad. *Steigenberger v. Carr*, 3 M. & Gr. 191. See further as to the proof of the title to shares, Part III., *Actions by and against companies*, post, pp. 1098, 1118.

It was held that, in the absence of usage to the contrary, where the assent of directors was necessary for a transfer, the vendor must procure and show such assent; *Wilkinson v. Lloyd*, 7 Q. B. 27; and that it was the business of the purchaser to prepare and tender the written transfer to the seller for his execution. *Stephens v. De Medina*, 4 Q. B. 422. But where, as is commonly the case, the sale takes place on the Stock Exchange, the contract is regulated by the usage of that market; by that usage, it is the duty of the vendee to pass the name of a person to whom the vendor is to transfer the shares, and the latter is to tender certificates and transfers of them, duly executed, to the vendee, and it is thereupon the duty of the vendee to execute those transfers, and to register them at the offices of the Company (ante, pp. 573, 574). By the Companies Clauses Consolidation Act, 1845, s. 12, the want of the certificate of shares in a company constituted under that Act shall not prevent the holder from disposing of the shares.

Where the company is not completely constituted, a contract for the sale of shares will be satisfied by the tender of the letter of allotment made out to the seller; for that is all which could have been contemplated by the parties. *Tempest v. Kilner*, 3 C. B. 249. As to contracts on the Stock Exchange for shares of a new company, vide ante, p. 577.

Where bought and sold notes for the sale of mining shares named the time for payment, but were silent as to the time of delivery, oral evidence was held admissible to show that, by custom, the shares were not deliverable till the time named for payment. *Field v. Lelean*, 6 H. & N. 617; 30 L. J., Ex. 168.

*Damages.*] The measure of damages for not accepting stock sold is the difference between the contract price and the market price on the day of

the breach of contract. *Boorman v. Nash*, 9 B. & C. 145. The measure of damage in the case of railway or other shares in companies is the difference between the contract price and the market value on the day of breach, or earliest day afterwards on which they could be sold. *Pott v. Fluther*, 16 L. J., Q. B. 366.

*Action for not delivering or replacing.*] The vendee, in the absence of usage or express agreement on the point, must show a tender to the defendant of a written transfer for execution by him, in cases where such formal instrument is necessary, as in railway shares; *Stephens v. De Medina*, *ante*, p. 579; unless the defendant has, by his conduct, dispensed with such tender. See cases *ante*, p. 579. In a sale on the Stock Exchange the tender is unnecessary, as it is there the duty of the transferor to deliver a transfer to the transferee, together with certificates of the shares, but he must show that the name of the transferee was duly passed. *Vide ante*, pp. 573, 574. A tender of payment by the plaintiff is not necessary. *Stephens v. De Medina*, *ante*, p. 579. It is only necessary that he should be ready and willing and able to pay. A contract to deliver shares in a company does not require the actual delivery of the scrip certificates, but it is sufficiently performed when the vendor has put the vendee in the position of legal owner of the shares. *Hunt v. Gunn*, 13 C. B., N. S. 226. Where, after the contract for the sale of shares, and before transfer, new shares are allotted to the vendor in right of the shares he has sold, the purchaser is entitled to these shares. *Stewart v. Lupton*, (1874) W. N., 171, V.-C. M.; *Id.* 178, L.J.J. See Rules of the Stock Exchange, 1906, r. 94. In a contract to deliver shares on a certain day, time is of the essence of the contract. *Vide ante*, pp. 323, 579.

*Damages.*] When the action is for non-delivery, and the plaintiff had not paid the price, the measure of damage is the difference between the contract price and the market value on or about the day of breach; for the plaintiff might have bought other stock immediately; and the same rule applies to shares in a company. *Shaw v. Holland*, 15 M. & W. 136; *Tempest v. Kilner*, 3 C. B. 253.

In an action for not replacing stock or shares, lent by the plaintiff to the defendant, a different measure is adopted. There the plaintiff may have been prevented from replacing them himself, for he may not have had, and is not bound to have, funds in his hands to do so. He is therefore entitled to damages sufficient to enable him to buy other stock or shares, at the current price at the time of the trial, if that be larger than the price at the time fixed for replacing. *Shepherd v. Johnson*, 2 East, 211; *M'Arthur v. Seaforth, Ltd.*, 2 Taunt. 257; *Owen v. Routh*, 14 C. B. 327; 23 L. J., C. P. 105. Any other special damage arising from the breach of contract, such as the loss of dividends, &c., must be alleged in the claim if sought to be recovered.

*Action for price of shares, &c., sold.*] In a sale on the Stock Exchange the transferor must prove a tender of the transfer and of the certificates of the shares to the buyer, or his broker, unless such tender has been waived. *Vide ante*, pp. 573, 574. Where shares in a company are not legally saleable for want of registration of the company under an Act of Parliament, this may be pleaded as a defence. *Semb.*, *Lawton v. Hickman*, 9 Q. B. 563.

In the sale of shares or securities there is generally no implied warranty; but it is implied that they are really what they purport to be, and what the buyer means to purchase. Where, for instance, scrip is known in the market as "Kentish Railway Scrip," though informally issued by a railway



company, the buyer cannot treat the sale as a nullity on that ground, if the jury find that it was what he contracted to buy. *Lambert v. Heath*, 15 M. & W. 486.

Where R., a member of the Stock Exchange, has become a defaulter, and thereupon, by the direction of the official assignees, sells shares standing in his name, in order to realise the estate (*vide ante*, p. 577), the buyer who knows all the circumstances cannot set off against the price a debt due to him from R. *Richardson v. Stormont, Todd & Co.*, (1900) 1 Q. B. 701, C. A. See *Lomas v. Graves & Co.*, (1904) 20 K. B. 557, C. A. See further as to the effect of R.'s failure as to purchases made by him as H.'s broker, *Beckhouson v. Humble*, *Levitt v. Id.* and *Anderson v. Beard*, cited *ante*, p. 578.

### ACTION FOR WORK AND MATERIALS.

In an action for work done, the plaintiff's proofs are, 1. The contract, express or implied; 2. The performance of the work and supply of materials, if any; and 3. The value, if the remuneration be not ascertained by the contract.

*The contract.*] Where there was a special agreement, the terms of which had been performed, it raised a duty for which an *indebitatus assumpsit* or the common counts lay. B. N. P. 139; cited by Holroyd, J., in *Studdy v. Sanders*, 5 B. & C. 638; *Robson v. Godfrey*, Holt, N. P. 236. And this principle still holds good although the Rules, 1883, O. xix. rr. 4, 5, 6, 15, *vide ante*, p. 309, require a more specific statement of the plaintiff's claim.

If the contract have not been executed, but the plaintiff have been prevented from executing it by the absolute refusal of the defendant to perform his part of it, or by an act done by the defendant which has incapacitated the plaintiff from performing it, the plaintiff may rescind the contract, and sue on a *quantum meruit* for past services. *Planché v. Colburn*, 8 Bing. 14; *Lodder v. Slowey*, (1904) A. C. 442, J. C.; 2 Smith's Lead. Cas., notes to *Cutter v. Powell*. So, where the plaintiff was to have certain goods for his services, and the defendant sold them, or caused them to be sold, by his own default, this action lies for the money value. *Keys v. Harwood*, 2 C. B. 905. Where the plaintiff agreed to print a work, but refused to print a libellous dedication to it, and the author thereupon refused to accept or pay for the rest, he was held liable to pay for printing the body of the work. *Clay v. Yates*, 1 H. & N. 73; 25 L. J., Ex. 237.

Where A. agrees to build a house on B.'s land for a lump sum, and after doing part of the work abandons the contract and B. completes the house, A. cannot recover for the work done on a *quantum meruit*, there being no evidence of a fresh contract. *Sumpter v. Hedges*, (1898) 1 Q. B. 673. So where the house was built but it deviated from the special contract. *Ellis v. Hamlen*, 3 Taunt. 52. Where, however, the work has been done and been adopted by B., though not strictly pursuant to the contract, the plaintiff may recover upon a *quantum meruit*. B. N. P. 139; *Burn v. Miller*, 4 Taunt. 745. So where the plaintiff having contracted to build cottages by Oct. 10th, did not finish them until the 15th, and the defendant accepted them. *Lucas v. Godwin*, 3 N. C. 737. See *Gray v. Hill*, Ry. & M. 420; and *Savage v. Canning*, I. R., 1 C. L. 431, C. P., cited *ante*, p. 526, and *infra*.

An implied promise to pay for work done *extra*, and not under the contract, can only arise in cases where the defendant is competent to contract by parol.

*Lamprell v. Billericay Union*, 3 Exch. 283. As to the liability of a corporation for work done, see Part III., *Actions by Companies—Contracts by Corporations*, *post*, pp. 1092, 1093.

To fix a defendant with extras, the *acceptance* and *adoption* ought to be under circumstances which imply approval and waiver of the deviation, and make it practicable to repudiate; for a defendant cannot be expected to refuse a house built on his own land, or to repudiate materials and labour worked into the *corpus* of his own property. In such cases the decisions in *Sinclair v. Bowles*, 8 B. & C. 92, *post*, p. 589, and *Ellis v. Hamlen*, *ante*, p. 581, seem to apply. In *Lucas v. Godwin*, *ante*, p. 581, the stipulation as to time was held not to be a condition precedent; and there was also extra work done. The rule with regard to additions or alterations, in the case of a special contract, must be taken with this limitation, that the workman cannot charge for them unless his employer is expressly informed, or must necessarily from the nature of the work be aware, that they will increase the expense. *Lovelock v. King*, 1 M. & Rob. 60. Where the special contract is so entirely abandoned by consent that it is impossible to trace it, the workman will be permitted to charge by measure and value, as if no contract had ever been made; but if not wholly abandoned, the contract will operate as far as it can be traced, and the excess only shall be paid for according to the usual rate of charging. *Pepper v. Burland*, Peake, 103. Where there is a written contract it must be produced, although the plaintiff seeks only to recover for *extras* not included in it; *Vincent v. Cole*, M. & M. 257: for the contract is the proper evidence to show what are *extras*; *Jones v. Howell*, 4 Dowl. 176; *Buxton v. Cornish*, 12 M. & W. 426; and, if unstamped, the judge cannot look at it to see whether it extends to the work claimed as *extras*. S. CC.; and see *Edie v. Kingsford*, 14 C. B. 759; 23 L. J., C. P. 123. In *Vincent v. Cole*, *supra*, it was held that even a distinct promise by the defendant to pay for the work would not supersede the production of the contract; but it was not held (though so stated in the marginal note) that an admission by the defendant that it was *extra* the contract, was insufficient to fix him without producing it. Yet, *semble*, as a building contract usually contains general provisions as to extra works, even this admission may not dispense with the production, unless the defendant has also admitted that it contains no such provisions. Where a man is employed to do work under a written contract, and a separate order for other work is afterwards given orally during the continuance of the first employment, the written contract need not be produced in an action for the second work. *Reid v. Batte*, M. & M. 413.

Where A. contracts with B. to do work for A. which involves B.'s individual responsibility or skill, personal performance by B. is of the essence of the contract. *Robson v. Drummond*, 2 B. & Ad. 303. Where, however, that is not involved, B. may assign his interest in the contract to C., and performance by C. is sufficient. *British Waggon Co. v. Lea*, 5 Q. B. D. 149. As to the effect of the death of a partner in the firm with whom the plaintiffs had contracted personally to do work, see *Phillips v. Alhambra Palace Co.*, (1901) 1 K. B. 59, and other cases cited *ante*, p. 519.

An action will lie against the employer for preventing work being done under a contract, *e.g.*, by not supplying plans and setting out the work; *Roberts v. Bury Commissioners*, L. R., 5 C. P. 310, Ex. Ch.; or not giving the contractor possession of the site for the work. *Lawson v. Wallasey Local Board*, 11 Q. B. D. 229; affirm. in C. A. on other grounds; 48 L. T. 507, E. Sit. 1883. And where a contract for the execution of certain works by a named day provided for the payment, by the contractor D., of liquidated damages for non-completion by that day, and also that additional work might be ordered; additional work was ordered which necessarily delayed

the completion of the contract, it was held that in the absence of agreement that the additional work should not extend the time for completion, D. was exonerated from paying the damages. *Dodd v. Churton*, (1897) 1 Q. B. 562, C. A.

As to warranty with respect to plans, specifications, and quantities, *vide ante*, p. 486.

*Conditions precedent—Architect's certificate.*] In *Morgan v. Birnie*, 9 Bing. 672, the surveyor's certificate, required by the contract, was held a condition precedent to the plaintiff's right to sue in respect of work done under it; and a letter inclosing the bills, with an approval of the charges, is not equivalent to a certificate of approval of the work done. S. C. And it is no dispensation of the condition that it is withheld by fraud or collusion with the defendant; *Milner v. Field*, 5 Exch. 829; but an action is maintainable, alleging that the architect withholds the certificate in collusion with, and by the procurement of the defendant; for such an action is based on fraud. *Batterbury v. Vyse*, 2 H. & C. 42; 32 L. J., Ex. 177. But apart from fraud, the wrongful withholding by the surveyor of the certificate affords no ground of action. *Clarke v. Watson*, 18 C. B., N. S. 278; 34 L. J., C. P. 148. The principle of *Morgan v. Birnie*, and *Milner v. Field*, *supra*, is supported by *Grafton v. E. Counties Ry. Co.*, 8 Exch. 699; *Pashley v. Birmingham*, 18 C. B. 2; *Ranger Gt. W. Ry. Co.*, 5 H. L. C. 72; *Goodyear v. Weymouth, Mayor, &c., of*, H. & R. 67; 35 L. J., C. P. 12; and see *Scott v. Liverpool Corporation*, 3 De G. & J. 334; 28 L. J., Ch. 230; *Russell v. Sa Da Bandeira, Vt.*, 13 C. B., N. S. 149; 32 L. J., C. P. 68. Where the surveyor is to give certificates and fix the price of extras and additions, his certificate conclusively determines what are extras and additions. *Richards v. May*, 10 Q. B. D. 400. The surveyor or architect need not certify in writing, unless expressly required by the contract. *Roberts v. Watkins*, 14 C. B., N. S. 592; 32 L. J., C. P. 291. Where the contract required the work to be done to the satisfaction of the *other party*, his approval was held not to be a condition precedent. *Dallman v. King*, 4 N. C. 106. But if the parties have clearly left it to the employer to decide as to the sufficiency of the compliance with the contract, his decision is conclusive as long as he acts *bonâ fide*. *Stadhard v. Lee*, 3 B. & S. 364; 32 L. J., Q. B. 75. In building contracts, payments on architect's certificates during the work are considered as payments on account of the sum eventually found due; and the time of completion is not generally of the essence of the contract. *Lamprell v. Billericay Union*, 3 Exch. 283. An alteration made by the defendant in the written conditions will not enable the plaintiff to dispense with them, and sue on a *quantum meruit*. *Pattinson v. Luckley*, L. R., 10 Ex. 330. As to the effect of such certificate under a contract in the R. I. B. A. form, see *Robins v. Goddard*, (1905) 1 K. B. 294, C. A.

An architect's certificate for work done does not dispense with the necessity for a previous written order where required by the contract. *Tharsis Sulphur and Copper Co. v. McElroy*, 3 Ap. Ca. 1040, D. P.

It may be here noticed that, in the absence of fraud, no action will lie against an architect, either by the builder for refusing to certify; *Stevenson v. Watson*, 4 C. P. D. 148; or by the building owner for improperly certifying; *Chambers v. Goldthorpe*, and *Restell v. Nye*, (1901) 1 K. B. 624, C. A.

*Liability of defendant.*] Where the defendant had contributed to the funds of a building society, and had been party to a resolution that certain houses should be built, it was held that this made him liable to an action for work done in building those houses, without proof of his interest in them, or in the land. *Braithwaite v. Skofield*, 9 B. & C. 401. So a

subscriber, who is one of a committee for managing the affairs of a hospital, is personally liable to the creditors of the hospital, for goods supplied with the sanction of the committee. *Burls v. Smith*, 7 Bing. 705. For cases on the personal liability of partners, members of clubs, of mining and inchoate companies, &c., see *ante*, pp. 553, 561 *et seq.*

As to the liability of a company after its incorporation for preliminary expenses incurred by the promoters in its establishment, see *Melhado v. Porto Alegre Ry. Co.*, L. R., 9 C. P. 505; *In re English, &c., Produce Co.*, (1906) 2 Ch. 435; and other cases cited Part III., *Actions by and against Companies*, *post*, pp. 1111, 1112.

Where orders are given by a public officer, acting on behalf of a public body, or of a known department of the State, and in discharge of his duty as such, it is to be presumed that personal credit is not given to him, and he is not liable. *Macheath v. Haldimand*, 1 T. R. 172; *Goodwin v. Roberts*, L. R., 10 Ex. 344, 345, *per* Cockburn, C. J. See *Dunn v. Macdonald*, *ante*, p. 494. This rule applies to such officers as a colonial governor, commissary, commanding officer of a regiment or of a king's ship, justices contracting to build a county bridge, &c. *Allen v. Waldegrave*, 2 B. Moore, 621; *Myrtle v. Beaver*, 1 East, 135; *Unwin v. Wolsley*, 1 T. R. 674; *Palmer v. Hutchinson*, 6 Ap. Ca. 619, J. C. This principle is applied by the Public Health Act, 1875 (38 & 39 V. c. 55), s. 265, to contracts entered into by the local authority, &c., for carrying out the act. But where navigation commissioners employed the plaintiff to do certain of the works, all the acting commissioners were held personally liable. *Horsley v. Bell*, Ambler, 770. So, where the defendant, the clerk of a county court, ordered the plaintiff to fit up the court, and the bill was allowed by the county court judge, it is for the jury to say whether the work was not done on the clerk's personal credit; for it was no part of his official duty to give such an order, nor did the facts exclude the presumption of personal credit. *Auty v. Hutchinson*, 6 C. B. 266. An action will lie against H. M. Comrs. of Public Works and Buildings for damages for breach of a contract between them and a builder for the erection of a public building. *Graham v. Public Works Comrs.*, (1901) 2 K. B. 781.

The defendant requested the plaintiff to take care of and show his (the defendant's) house, and promised to make him a "handsome present;" it was held that this was evidence on which the plaintiff might recover a reasonable recompense for work and labour. *Jewry v. Busk*, 5 Taunt. 302. But where a person performed work for a committee, under a resolution entered into by them, "that any service rendered by him should be taken into consideration, and such remuneration be made as should be deemed right," it was held that an action would not lie to recover a recompense. *Taylor v. Brewer*, 1 M. & S. 290; see *Roberts v. Smith*, 4 H. & N. 315; 28 L. J., Ex. 164. It was held by Ld. Kenyon, C. J., that there is no implied promise to pay an arbitrator for his trouble. *Virany v. Warne*, 4 Esp. 47; *sed secus Swinford v. Burn*, Gow, 8, *cor.* Dallas, C. J., and *Crompton v. Ridley*, 20 Q. B. D. 48, *per* Smith, J. See also *In re Coombs*, 4 Exch. 839; *Hoggins v. Gordon*, 3 Q. B. 466. A master may sue for the work and labour of his apprentice, against a person who harbours him after his desertion; for he may waive the tort. *Foster v. Stewart*, 3 M. & S. 191. A barrister cannot recover, even on an express contract to remunerate him for professional services rendered as a barrister; *Kennedy v. Broun*, 13 C. B., N. S. 677; 32 L. J., C. P. 137; *In re Le Basseur*, (1896) 2 Ch. 487, C. A.; see also *Broun v. Kennedy*, 33 Beav. 133; 33 L. J., Ch. 71; but he may recover on an express contract for services rendered to the guardians of a union as returning officer. *Egan v. Kensington Union*, 3 Q. B. 935, n., Ld. Denman, C. J. A physician might, at common law, recover his fees, on

an express contract to remunerate him. *Veitch v. Russell*, 3 Q. B. 928; and see, since the Medical Act, *ante*, p. 515. Where A., who was employed by the defendant to transport goods to a foreign market, delegated the entire employment to the plaintiff, who performed it, it was held that the plaintiff could not recover from the defendant a compensation for such services; for there was no privity between them. *Schmaling v. Thomson*, 9 Taunt. 147. See further, cases cited, *post*, p. 605. Where the plaintiff, having a contract jointly with A. to do certain work for a company, assigned the contract to A. with the company's consent, on a promise by A. to pay plaintiff a certain sum when the contract was completed, and the contract was afterwards abandoned as between A. and the company, and replaced by another; held that the plaintiff could not sue A. for the money upon the completion of the substituted contract. *Humphreys v. Jones*, 5 Exch. 952.

The sheriff's officer cannot, but the sheriff can, sue the execution creditor, B., for fees payable by B. under the Sheriff's Act, 1887, s. 20 (2), and the table of fees made thereunder dated August 31st, 1888 (see W. N. (1888) Part II. p. 441); *Smith v. Broadbent*, (1892) 1 Q. B. 551; *Glasbrook v. David*, (1905) 1 K. B. 615. The fees are meant, however, only to cover the sheriff's out-of-pocket expenses, and where he has recovered possession money from one creditor, he cannot recover a second 5s. a day from another creditor in respect of the same possession. S. C. The earlier cases are no longer applicable.

Where an architect is employed by the owner to draw plans, and obtain tenders for the execution of works, it is usual for him to employ a surveyor to take out the quantities, who is to be paid by the builder whose tender is accepted; *North v. Bassett*, (1892) 1 Q. B. 333; *Moon v. Witney Union*, 3 N. C. 814; if, however, by the act of the owner the work does not proceed, the latter is bound to pay the surveyor for taking out the quantities. S. C. When the architect has completed his work and been paid, the plans are the property of the owner. *Gibbon v. Pease*, (1905) 1 K. B. 810, C. A.

As to when a claim for work and labour, and when one for goods sold and delivered is applicable, the rule is thus laid down: "If you employ a man to build a house on your land, or to make a chattel with your materials, the party who does the work has no power to appropriate the produce of his labour and your materials to any other person. Having bestowed his labour at your request on your materials he may maintain an action against you for work and labour. But if you employ another to work up his own materials in making a chattel, then he may appropriate the produce of that labour and materials to any other person. No right to maintain any action vests in him during the progress of the work: but when the chattel has assumed the character bargained for, and the employer accepted it, the party employed may maintain an action for *goods sold and delivered*, or (if the employer refuses to accept) a special action on the case for such refusal; but he cannot maintain an action for work and labour." *Per Bayley, J.*, in *Atkinson v. Bell*, 8 B. & C. 227, 283. See also *Cotterell v. Apsey*, 6 Taunt. 322; *Heath v. Ireland*, 1 M. & W. 543; and cases cited, *ante*, p. 527. The power of amendment renders these distinctions less material than they were formerly; it must, however, be remembered that if the claim is not properly made for work and materials, but for not accepting a chattel, it may be defeated by a defence under the Sale of Goods Act, 1893, s. 4, *vide ante*, p. 527.

A contract for work and *materials supplied* in and about the work is not within that section. It may be within the Stat. of Frauds, sect. 4, *ante*, p. 525, if it must continue beyond a year; but not if it will not necessarily continue beyond the year. See cases cited, *ante*, pp. 525, 526.

*Liability of defendant—Repairs of ships.*] The owner is liable for necessary repairs done, or supplies provided for a ship by the master's order; *Webster v. Seekamp*, 4 B. & A. 352; those are necessary which the owner, as a prudent man, would have himself ordered, although not *absolutely* necessary. S. C.; *The Riga*, L. R., 3 Adm. 516. The plaintiff must prove that the goods supplied are necessaries; *Mackintosh v. Mitcheson*, 4 Exch. 175; *Gunn v. Roberts*, L. R., 9 C. P. 331; and that neither the owner nor his recognised agent, able to obtain supplies, was present at the port. S. C. Where the master dies during the voyage the mate becomes master, and is consequently invested with the incidents of the post. *Hanson v. Royden*, L. R., 3 C. P. 47. Registered ownership, that is, proof of registration (see 57 & 58 V. c. 60, ss. 14, 64 (2)) is *prima facie* evidence of the liability of those parties for the repairs of the ship. *Cox v. Reid*, Ry. & M. 199; and see *Hibbs v. Ross*, L. R., 1 Q. B. 534, where the earlier cases are considered. Such evidence may be rebutted by proof of the beneficial interest having been parted with, and of the legal owner having ceased to interfere with the management of the ship. *Young v. Brander*, 8 East, 10; *Jennings v. Griffiths*, Ry. & M. 42. The true question in cases of this description is, "Upon whose credit was the work done?" S. C., *Id.* 43, *per* Abbott, C. J. Even although the order was given by a person, who without the defendant's knowledge or authority was registered under 57 & 58 V. c. 60, s. 59, as managing owner. *Frazer v. Cuthbertson*, 6 Q. B. D. 93. See also *Baumvoll Manufactur, &c., v. Furness*, (1893) A. C. 8. But where a managing owner is such with the consent of his co-owners, he has authority to give orders for the necessary repair, fitting, and outfit of the vessel. *The Huntsman*, (1894) P. 214. Where the owner, A., agreed to sell to B., who appointed T. to be master, and he was registered as such, and plaintiff did repairs on the order of T., A. was held not liable, he not having done anything to sanction T. appearing as *his* master. *Mitcheson v. Oliver*, 5 E. & B. 419; 25 L. J., Q. B. 39, Ex. Ch. See *Frost v. Oliver*, 2 E. & B. 301; 22 L. J., Q. B. 353; *Preston v. Tamplin*, 2 H. & N. 684; 27 L. J., Ex. 192; *The Gt. Eastern*, L. R., 2 Adm. 88; *Burdick v. Lordan*, W. N. 1878, p. 129, C. A.; and *Baumvoll Manufactur, &c., v. Gilchrist*, *supra*. A person who takes share in a ship under a void conveyance is not liable for articles furnished to the ship, unless credit be given to him individually, or he holds himself out as (that is, by acts or words assumes the character of) owner. *Harrington v. Fry*, 2 Bing. 179. An undertaking by the defendant's solicitor "to appear for Messrs. T. & M., joint owners of the sloop A.," is evidence against the defendants of the joint ownership. *Marshall v. Cliff*, 4 Camp. 133. A part owner of a ship is not necessarily a partner; and if, as ship's husband, he have fitted her out, he may sue the other part owners separately for their shares of the expense. *Helme v. Smith*, 7 Bing. 709.

Whether a mortgagee of a ship, before possession, was liable to repairs was formerly much doubted; *Briggs v. Wilkinson*, 7 B. & C. 33; but now when a transfer is made only by way of mortgage in the manner specified in stat. 57 & 58 V. c. 60, ss. 31 *et seq.*, the mortgagor continues owner except so far as may be necessary for making the ship available as a security for the mortgage debt. And when a mortgagor has been allowed by the mortgagee to continue in possession and to use and navigate the ship, and the mortgagor orders necessary repairs to be done, the shipwright has a lien as against the mortgagee for his work and labour. *Williams v. Allsup*, 10 C. B., N. S. 417; 30 L. J., C. P. 353; see *Johnson v. R. Mail S. Packet Co.*, L. R., 3 C. P. 38.

Where the repairs were done by F., under a contract with C., on behalf of the owner M., but without his authority, it was held that M. did not, by taking the ship as repaired, and selling her, ratify the contract or become

liable for the repairs. *Forman & Co. Proprietary v. Ship "Liddesdale,"* (1900) A. C. 190, J. C.

*Work as agents.*] Generally a commission to sell may be revoked, and the death of the principal is a revocation; *Campanari v. Woodburn*, 15 C. B. 400; 24 L. J., C. P. 13; and the agent is not necessarily entitled to any remuneration, unless he can show that he has been put to expense or trouble before the revocation, from which a contract to pay on a *quantum meruit* may be implied; and a private sale by the principal without his agent's instrumentality, will not entitle him to his commission on the price. *Simpson v. Lamb*, 17 C. B. 603; 25 L. J., C. P. 113. And where an estate agent is to receive a certain percentage for finding a purchaser, he is entitled to nothing if he fail to find one before his authority is revoked; but if he find one, and the seller is unable or unwilling to complete the sale, the agent may recover on a *quantum meruit* at least for his labour, if not the whole stipulated percentage; *Prickett v. Badger*, 1 C. B., N. S. 296; 26 L. J., C. P. 33; and in such a case the title to remuneration is not a question for the jury, but of law. S. C. But where the defendant contracted with the plaintiff to sell tickets for the defendant at a certain percentage, and the defendant afterwards revoked the plaintiff's authority before any were sold, but after some trouble had been taken and expense incurred by him, and the plaintiff acquiesced in the revocation, it may be left to the jury whether there was a rescission by consent, and a new contract to pay for past labour on a *quantum meruit*. *De Bernardy v. Harding*, 8 Exch. 822; 22 L. J., Ex. 340. As to the right of an auctioneer to remuneration where his authority has been revoked before the auction, see *Rainy v. Vernon*, 9 C. & P. 559, *cor.* Lord Denman, C. J. The plaintiff was to place the shares of the defendant's company for 100*l.* down and 400*l.* when they had been allotted; before they were all allotted the directors caused the company to be wound up; held, that the plaintiff was entitled to remuneration for the work he had done, he having been prevented completing it by the act of the defendants, and the Court, acting as a jury, awarded him 250*l.* *Inchbald v. W. Neilgherry Coffee, &c., Co.*, 17 C. B., N. S. 733; 34 L. J., C. P. 15. See further *Moffat v. Laurie*, 15 C. B. 583; 24 L. J., C. P. 56.

Where a broker is employed to find a buyer, he is entitled to his commission if he introduced the parties, though the principals eventually settled the term; and, *semble*, if several brokers are employed separately, the one who first introduces the parties is entitled. *Cunard v. Van Oppen*, 1 F. & F. 716. The above was a case of shipbrokers, and was perhaps governed by the proof of custom at the trial; but in the absence of express stipulation, or of fraud, the rule seems reasonable in other like cases. A broker or other agents finds a buyer, if he introduce a buyer to the seller, or to the premises for sale, or call the premises to the notice of a buyer; introduction to the agent of the buyer is sufficient. *Wilkinson v. Alston*, 48 L. J., Q. B. 733, C. A. The plaintiff was employed by the defendant to sell an estate for him, upon the terms of being paid commission if the estate were sold, and a fixed sum if not sold. The estate was sold by the defendant himself to a person, who had first heard of the estate being in the market from the plaintiff's advertisement. It was held that the plaintiff was entitled to the commission, the relation of buyer and seller having been brought about by what the plaintiff had done. *Green v. Bartlett*, 14 C. B., N. S. 681; 32 L. J., C. P. 261. See also *Bayley v. Chadwick*, 39 L. T. 429, D. P., and *Mansell v. Clements*, L. R., 9 C. P. 139. It seems that the purchaser may be asked "whether, but for the plaintiff's intervention, he would have bought the property?" S. C. See further *Tribe v. Taylor*, 1 C. P. D. 505.

Where A. employed B. to procure a loan on mortgage of A.'s property,

for a certain commission, and B. has procured a person, C., willing to make the advance, B. is entitled to the whole of the commission, although the advance was not made, because A. was either unable to give a good security; *Green v. Lucas*, 33 L. T. 584, Mich. S. 1875, C. A.; or refused to give it; *Fisher v. Drewitt*, 48 L. J., Ex. 32, C. A.; for agents "who bargain to receive commission on introduction, have a right to their commission as soon as they have completed their portion of the bargain, irrespective of what may take place subsequently between the parties introduced." *Id.* 33, 34, per Bramwell, L. J.; *Lockwood v. Levick*, 8 C. B., N. S. 603; 29 L. J., C. P. 340.

As to the effect in a contract of agency of the determination or transfer of the business of the principal, thereby determining the agency, see *Ogdens v. Nelson*, and other cases cited, *ante*, p. 519.

*Performance.*] The plaintiff must prove a performance of the work and labour according to the terms of the contract; or if there be a deviation from those terms, an assent of the defendant to the deviation. *Vide ante*, p. 581. Thus in an action to recover the value of a riding habit, for which the defendant's wife had been measured, but which was returned to the plaintiff on the day on which it was delivered, it was ruled to be incumbent on the plaintiff to prove that the habit was made agreeably to the order. *Hayden v. Hayward*, 1 Camp. 180. So, a herald who sues for making out a pedigree, is bound to give some general evidence of the truth of the pedigree. *Townsend v. Neale*, 2 Camp. 191.

Where an agent, A., has, without the knowledge of his principal, B., agreed to receive from C. 3,000*l.* as profit to himself, out of a purchase by A. on behalf of B. from C.; B. on knowing of the agreement, before A. has received the 3,000*l.*, may adopt A.'s agreement and sue C. for the 3,000*l.* *Whaley Bridge, &c., Co. v. Green*, 5 Q. B. D. 109. See also cases cited, *post*, p. 603.

*Value.*] In what manner the value of the work done is to be calculated where there is a special contract and deviations from it has been already mentioned, pp. 569, 581, 582. Where a tradesman finishes work differing from the specification agreed on, he is not entitled to recover the actual value of the work done; but (if anything) only the stipulated price, *minus* the sum necessary to complete the work according to the specification. *Thornton v. Place*, 1 M. & Rob. 218; *Chapel v. Hickes*, 2 Cr. & M. 214. In an action for work and labour as a surveyor or architect, in the absence of express agreement, it is a question for the jury whether the commission charged is, under the circumstances, a reasonable or unreasonable charge. *Chapman v. De Tastet*, 2 Stark. 294; *Upsdell v. Stewart, Peake*, 193.

#### *Defence.*

By Rules, 1883, O. xxi. r. 3, "a defence in denial must deny such matters of fact from which the liability of the defendant is alleged to arise, as are disputed." See also O. xix. r. 17, *ante*, p. 310. By r. 15, *ante*, p. 309, the defendant must plead specially all facts, not previously stated, on which he relies, and must raise all such grounds of defence as if not pleaded would be likely to take the plaintiff by surprise. And by r. 20, *ante*, p. 310, a bare denial denies the making of the contract in point of fact only, and not its sufficiency in point of law. It is a good defence that the work was done under a special contract not executed. *Jones v. Nanney*, 1 M. & W. 333. Or, that the defendants, being a corporation, did not contract under seal, or with the formalities required by the act of incorporation. *Cope v. Thames*



*Haven Ry. Co.*, 3 Exch. 841. So, that the defendants, guardians of a union, are charged for work done by a surveyor, which it was no part of their duty to order. *Paine v. Strand Union*, 8 Q. B. 326. If the defendant have received no benefit from the work, it having been improperly executed by the plaintiff, the latter cannot recover anything. *Farnsworth v. Garrard*, 1 Camp. 38; *Montriuou v. Jefferys*, Ry. & M. 317. Thus an auctioneer, through whose gross negligence the sale becomes nugatory, can recover nothing for his services. *Dencw v. Daverell*, 3 Camp. 451; see *ante*, pp. 507, 508, 514. Where the plaintiff had contracted to repair completely some chandeliers for 10*l.*, and returned them incompletely repaired, in an action for work and labour it was held that the plaintiff could not recover anything, at least in this form of action, though the jury found that the repairs were worth 5*l.* *Sinclair v. Bowles*, 9 B. & C. 92, and *vide ante*, pp. 581, 582. So, where A. contracts to do work and supply materials, to the ship, or upon the land of B. for a specific sum, to be paid on the completion of the whole, A. is not entitled to recover anything until the whole work is completed, unless it is shown that the performance of the contract was prevented by the default of B., or there are facts from which it may be inferred that the parties have entered into a fresh contract; *Forman & Co. Proprietary v. Ship "Liddesdale," ante*, p. 587; *Appleby v. Myers*, L. R., 2 C. P. 651, Ex. Ch. In the last case the completion of the work on the defendant's premises was prevented by a fire there, and the court held that by the contract the work to be done was entire, and that the defendant did not warrant that his premises should continue in such a state as to enable the plaintiff to do the work, and that both parties were therefore excused from the further performance of the contract. For instances of the excepted cases see *O'Neil v. Armstrong*, (1895) 2 Q. B. 70, 418, C. A.; and *Austin Friars S.S. Co. v. Struck*, (1905) 2 K. B. 315. See further as to the completion of a contract being rendered impossible by reason of an unforeseen accident, *Taylor v. Caldwell*, 3 B. & S. 326; 32 L. J., C. P. 104; *Herne Bay S. Boat Co. v. Hulton*, (1903) 2 K. B. 683, C. A.; *Krell v. Henry* and *Chandler v. Webster*, *ante*, p. 340; *Civil Service Co-operative Soc. v. Gen. S. Nav. Co.*, *post*, p. 606, and *Caine v. Palace S.S. Co.*, (1907) 1 K. B. 670, C. A.; in D. P., *c. a. v.*, June 5th, 1907. In *Elliott v. Crutchley*, (1906) A. C. 7, D. P.; the contract contained a special provision in case of the occurrence of the accident. Where the contract is not entire, the defendant must pay *pro tanto* for the work done by the plaintiff. As where a shipwright undertook to put a ship into thorough repair, and, before the work was finished, required payment for the portion done, without which he refused to proceed, and the ship thereby lost her voyage, it was held that he was nevertheless entitled to recover for the work done. *Roberts v. Havelock*, 3 B. & Ad. 404. So, where the ship was burnt in the plaintiff's dockyard before the repairs were completed, the plaintiff was held entitled to recover for the work done. *Menctone v. Athawes*, 3 Burr. 1592. And the same principle applies where the work has been badly done. *Farnsworth v. Garrard*, *supra*.

Where A. engaged with defendant's landlord to build a house on land occupied by the defendant, and A. made a sub-contract with the plaintiff to do part of the work, and defendant separately agreed to pay over to the plaintiff directly all money due for such part of the work upon a discharge from A., it was held that the defendant's agreement did not make him liable to the plaintiff for work and labour, but only on the special agreement. *Sweeting v. Asplin*, 7 M. & W. 165. Where the plaintiff agrees to do work for a certain sum on a false representation by defendant of the quantity of work to be done, he may repudiate the contract; but if he perform it, he can only recover the stipulated sum in this action. *Selway v. Fogg*, 5 M. & W. 38.

As to defence to action by a builder, that the work was done under a contract, which entitled him to payment by his employer, out of a special fund only, see *Williams v. Hathaway*, 6 Ch. D. 544.

An agent entrusted to sell land for his principal on commission is disentitled to any remuneration if he became himself the purchaser. *Salomons v. Peader*, 3 H. & C. 639; 34 L. J., Ex. 95, citing Story on Agency, § 210. Or if he have received a secret profit from the purchaser. *Andrews v. Ramsay*, (1903) 2 K. B. 635. But a merely collateral profit received without fraud or dishonesty will not so disentitle him. *Hippisley v. Knee Bros.*, (1905) 1 K. B. 1.

An agent cannot recover a bribe promised to induce him to enter into a contract on behalf of his principal, even though the promise did not affect his mind, and his principal was not prejudiced. *Harrington v. Victoria Graving Dock Co.*, 3 Q. B. D. 549.

As to the defence arising under the Stamp Acts to a claim for brokerage, *vide ante*, pp. 248, 267.

*Election expenses.*] By stat. 38 & 39 V. c. 84, s. 5, a person having a claim against a Parliamentary returning officer for work and labour, &c., in respect of an election (except publication of the accounts), must, within 14 days after the return, send to him the particulars of the claim in writing, and he is liable only in respect of claims included in such particulars; such claims are liable to a taxation by the Mayor's Court, London, or by the County Court, which is final for all purposes.

By stat. 46 & 47 V. c. 51, s. 29 (2, 3), every claim against a candidate at a Parliamentary election in respect of any expenses incurred on account or in respect of the conduct or management of such election, which is not sent in to the election agent within 14 days after the return, shall be barred. By sect. 30, in the case of an action in a disputed claim for such expenses, where the defendant admits his liability, but disputes the amount, the amount is to be referred for taxation, unless the court on the application of the plaintiff otherwise directs.

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## ACTION FOR MONEY PAID.

The plaintiff, in an action for money paid, must prove, if denied by the defendant, 1. The payment of money by the plaintiff; 2. That it was paid at the request of the defendant, and to his use.

*The payment of money.*] The payment must be proved as a *fact*; the admission of the payee is not admissible against the defendant, *vide ante*, p. 69. To prove, as against C., payment by A. to B. for work done by B. for A., for which C. is ultimately liable, it is sufficient to show that A. received from B. an invoice of the work done, that on Feb. 25th he sent B. a cheque for the amount, and on the next day received back the invoice from B. with a receipt, and that B. received the cheque on the 26th, at 9 a.m., and sent the receipt: the receipt is then admissible as a link in the evidence. This was held to be evidence of payment at 9 a.m. on the 26th, without producing the cheque or showing that it was honoured. *Carmarthen & Cardigan Ry. Co. v. Manchester & Milford Ry. Co.*, L. R., 8 C. P. 685.

The plaintiff must prove that *money* was paid; giving a security, as a bond or warrant of attorney is not sufficient; *Taylor v. Higgins*, 3 East, 169; *Maxwell v. Jameson*, 2 B. & A. 51; unless, perhaps, where a bill or note is

taken from the plaintiff by a creditor as payment of the defendant's debt. *Barclay v. Gooch*, 2 Esp. 571. So, stock cannot be considered as money: *Nightingale v. Devisme*, 5 Burr. 2589; unless it be so treated by the parties, as where it was transferred to the defendant with the view to sale for defendant's use. *Howard v. Danbury*, 2 C. B. 803.

The plaintiff must prove that the money paid was *his* money. Thus, an under-tenant, whose goods had been distrained and sold to strangers by the original landlord for rent due from his immediate tenant, cannot maintain an action for money paid to the use of the latter; for immediately on the sale under the distress, the money paid by the purchaser vested in the landlord in satisfaction of the rent, and never was the money of the under-tenant; *Moore v. Pyrke*, 11 East, 52; but it is otherwise where the under-tenant, or a stranger, redeems his goods with his own money. *Exall v. Partridge*, 8 T. R. 308. See *post*, pp. 596, 597, and other cases there cited.

*Defendant's request.*] The plaintiff must prove a request by the defendant, express or implied. *Alexander v. Vane*, 1 M. & W. 511. Thus, where the lessee is to pay the lessor's expenses of granting a lease, and the lease has been granted, the lessor may recover his own solicitor's bill as money paid to the use of the lessee. *Grissell v. Robinson*, 3 N. C. 10. A subsequent assent to the payment will be evidence of a previous request; 1 Wms. Saund. 264 b, (2); and if there be a request to pay, the plaintiff may recover the money, though paid on a contract that could not be enforced. Thus, where a broker, C., bought for D. on his order bank shares on the Stock Exchange according to the custom there, under a contract void by 30 & 31 V. c. 29, s. 1, *ante*, p. 572, C. is entitled to recover the price from D., provided D. knew of the custom; *Scynmour v. Bridge*, 14 Q. B. D. 460; but not otherwise; *Perry v. Barnett*, *Id.* 467; 15 Q. B. D. 388, C. A. So formerly the plaintiff might recover the money paid on a time bargain which, as a wager, is void by the Gaming Act, 1845 (8 & 9 V. c. 109), s. 18, *post*, p. 617. *Knight v. Cambers*, 15 C. B. 562; 24 L. J., C. P. 121; *Rosewarne v. Billing*, 15 C. B., N. S. 316; 33 L. J., C. P. 55. See also *Thacker v. Hardy*, 4 Q. B. D. 685, C. A., cited, *ante*, p. 578. And where A., at B.'s request, had made bets for him, in A.'s name, and would incur disqualification, and sustain injury, if he did not pay the losses consequent on such bets, A. had, on the bet being made, an irrevocable authority from B. to pay such losses. *Read v. Anderson*, 10 Q. B. D. 100; 13 *Id.* 779, C. A., *diss.* Brett, M. R.

Now, however, by the Gaming Act, 1892 (55 & 56 V. c. 9), s. 1, "Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the" Gaming Act, 1845, *vide post*, p. 617, "or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money." Hence A. is now no longer entitled to an indemnity from B. against liability to pay the loser. *Levy v. Warburton*, 70 L. J., K. B. 708.

The defendant, R., asked the plaintiff, T., to pay to various persons debts due from R. to them: the debts were, as T. knew, bets lost by R.; T. paid the debts: it was held that the above section prevented T. recovering from R. the amount he had so paid. *Tatam v. Reeve*, (1893) 1 Q. B. 44. So where V. advanced money to M. for the purpose of making bets on their joint account, and it was lost on such bets, V. cannot sue M. for half the amount. *Saffery v. Mayer*, (1901) 1 K. B. 11, C. A.

If there be no request, plaintiff cannot recover, though he has paid a legal debt of the defendant. *Stokes v. Lewis*, 1 T. R. 20. Costs and expenses, incurred by the mortgagee, in relation to the mortgaged property, cannot be recovered from the mortgagor, as money paid. *Ex pte. Fewings*, 25 Ch. D. 338, C. A.

Where, in the absence of usage, a broker purchases stock to fulfil a contract entered into by him for his principal, but which his principal refuses to make good, he cannot sue his principal in this action. *Child v. Morley*, 8 T. R. 614. So where the party to whom the stock was contracted to be sold, on the defendant's refusal to transfer, bought the stock himself, and sued for money paid, to recover the difference in the price of the stock, it was held that this action could not be sustained. *Lightfoot v. Creed*, 8 Taunt. 268. But where there is a usage of the Stock Exchange that brokers should be responsible to each other on their contracts (*vide ante*, p. 573), and the seller's broker is obliged to pay money in consequence of his principal's default, he may reimburse himself in this form of action. *Sutton v. Tatham*, 10 Ad. & E. 27; *Bayliffe v. Butterworth*, 1 Exch. 425; *Pollock v. Stables*, 12 Q. B. 765; *Smith v. Lindo*, 4 C. B., N. S. 395; 27 L. J., C. P. 196; 5 C. B., N. S. 587; 27 L. J., C. P. 335, Ex. Ch. See *Westropp v. Solomon*, 8 C. B. 345. In such cases it is immaterial whether or not the principal knew of the usage. S. CC.; *Grissell v. Bristowe*, L. R., 4 C. P. 36, 49. It makes no difference to the broker's right to recover, that the company, in which the shares had been bought, is being wound up, and therefore the shares cannot be transferred to his principal. *Taylor v. Stray*, 2 C. B., N. S. 175, 197; 26 L. J., C. P. 185, 287; *Chapman v. Shepherd*, and *Whitehead v. Izod*, L. R., 2 C. P. 228. Where the broker, who had been authorized to buy shares at a certain price, was called upon by the seller (see Rules of the Stock Exchange, 1906, r. 109) to repay him a call due after the sale, and paid by the seller in order to enable him to transfer the shares, the principal was held liable over to the broker in this action. *Bayley v. Wilkins*, 7 C. B. 886. Where the principal, P., has instructed his broker, B., to carry over (*vide ante*, p. 575) stock to the next settlement, B. may, by the usage of the Stock Exchange, close P.'s account, if the balance of differences, due from P. to B., have not been paid on the account-day of the current settlement, provided B. gave P. notice of the amount due to him before that day, and P. have not paid or secured the amount, and B. may sue P. for any balance due. *Davis v. Howard*, 24 Q. B. D. 691. The account may be closed by the sale by B. of the stock bought to S., and a re-purchase thereof by B. from J., for the next account at fair market prices, and B. may sue P. for the difference and commission. *Macoun v. Erskine & Co.*, (1901) 2 K. B. 493, C. A. If, however, the sale and re-purchase be part of the same transaction, B. must credit P. with any profit resulting therefrom. *Erskine & Co. v. Sachs*, *Id.* 504, C. A. In the event of the death, bankruptcy, or insolvency of the principal, P., whereby he will be unable to take up the stock, which the broker has bought for him on his own credit, the broker, B., is justified in immediately selling the stock, and claiming the difference against the bankrupt's estate, subject to a set-off for any loss arising to the estate from such sale being made before the account-day, the customary time for selling out stock, on default of P. to take it up (*vide ante*, p. 576). *Scrimgeour's Claim*, L. R., 8 Ch. 921; see also *Crowley's Claim*, L. R., 18 Eq. 182. If in any other case B. sell the stock before the account-day without P.'s consent, B. cannot claim indemnity against P. for any loss he may thereby sustain. *Ellis v. Pond*, (1898) 1 Q. B. 426, C. A. And if on P.'s death, B., of his own authority, carry over stock he bought for P. on a continuation account, and ultimately sell it at a loss, he is liable for such loss. *In re Overwey*, (1900) 1 Ch. 209. Where

the broker is, otherwise than through the fault of his principal, P., unable to meet his engagements, and thereby becomes a defaulter under the Stock Exchange rules (r. 152 of 1906, *ante*, p. 577), and his contracts are closed in accordance with those rules, P. is not bound to indemnify him against the loss thereby occasioned to him. *Duncan v. Hill*, L. R., 8 Ex. 242, Ex. Ch. *Secus*, where P. has assented to the closing of the contract made for him, and has declined to exercise his right of taking it up himself, or of having it transferred to another broker. *Hartas v. Ribbons*, 22 Q. B. D. 251, C. A. Where a broker, B., holds stock for his principal, P., which he has taken up with his own money, and has agreed not to sell before a certain day, if B. sell before that day he may sue P. for money paid, subject to P.'s right to counterclaim for damages occasioned by the premature sale. *Ellis v. Pond*, *ante*, p. 592. As to the measure of such damages see *Michael v. Hart*, (1901) 2 K. B. 867; (1902) 1 K. B. 482, C. A. See further as to the recovery by a broker of differences paid by him, *ante*, pp. 577, 578. Where B. being *sui juris* is the beneficial owner of shares, which he cannot disclaim, registered in the name of H., he must in equity indemnify H. against calls made on them. *Hardoon v. Belilios*, (1901) A. C. 118, J. C.

There is an implied agreement between the original lessee and each successive assignee of a term, that the latter shall indemnify the former from liability on breaches of the covenants of the lease during the possession of the assignee; such agreement is implied, although each assignee expressly covenants to indemnify his immediate assignor against all subsequent breaches; the lessee is in the position of a surety to the lessor for the assignee. *Moule v. Garrett*, L. R., 5 Ex. 132; L. R., 7 Ex. 101, Ex. Ch.; and see *Roberts v. Crowe*, L. R., 7 C. P. 636, *per* Willes, J.; and *Crouch v. Tregonning*, L. R., 7 Ex. 88. The damages recoverable are the actual loss sustained. *In re Russell*, 29 Ch. D. 254, C. A. As to recovery by lessee against the assignee under this indemnity, of costs, to which he has been put by the action against him, by the lessor for breaches of covenant, see *Howard v. Lovegrove*, L. R., 6 Ex. 43. The mortgagee, T., by sub-demise of an assignee, P., is not bound to indemnify the original lessee although T. had covenanted with P. to apply the rent he received in paying the rent due under the original lease. *Bonner v. Tottenham, &c. Building Soc.*, (1899) 1 Q. B. 161, C. A. Trustees of a club who are lessees of the club premises, are not, in the absence of a club rule to that effect, entitled to indemnity from the club members against their liability as such lessees. *Wise v. Perpetual Trustee Co.*, (1903) A. C. 139, J. C. As to indemnity against liability under the Directors' Liability Act, 1890, see sect. 4, *post*, p. 846.

A legal obligation to pay for another's benefit will be equivalent to a previous request; as where one person is surety for another and is called on to pay, the money paid may be recovered, though not paid by the desire of the principal. *Per* Ld. Kenyon, *Exall v. Partridge*, 9 T. R. 310. See also *Johnson v. R. Mail S. Packet Co.*, L. R., 3 C. P. 38. So if one co-bail pay the whole debt. *Belldon v. Tankard*, 1 Marsh. 6. So if an accommodation acceptor be sued on default of the drawer to pay, the acceptor may recover in this action; and he may sue alone though the loan was in fact advanced on account of the plaintiff and his partner, and paid out of their joint funds. *Driver v. Burton*, 17 Q. B. 989; 21 L. J., Q. B. 157. So the indorser of a bill who has been sued by the holder and paid him part of the amount of the bill, may recover that amount in an action for money paid against the acceptor. *Pownal v. Ferrand*, 6 B. & C. 439. See also *Ex pte. Bishop*, 15 Ch. D. 400, C. A., whence it appears that the indorser may also recover the interest which he has been compelled to pay. But if the drawer voluntarily pay the holder of a bill which he had drawn and indorsed for the accommodation of the acceptor without having received any notice of dishonour or any

request from the acceptor to pay it, he cannot sue the latter for money paid; for there must be either legal obligation or request. *Sleigh v. Sleigh*, 5 Exch. 514. A person who pays a bill for the honour of one of the parties to it may sue him for money paid. But he must prove noting or protest before the payment. *Vandewall v. Tyrrell*, M. & M. 87, as explained in *Gerulopulo v. Wieler*, ante, p. 387. When an executor has paid legacies in full and is afterwards obliged to pay the legacy duty, it was held, in *Foster v. Ley*, 2 N. C. 269, that he might recover the amount paid for duty in an action for money paid against the legatee. See *Bate v. Payne*, 13 Q. B. 900.

Where several are sureties, and one is compelled to pay the whole, he may recover in this action from each of his co-sureties a rateable proportion of the money so paid. *Cowell v. Edwards*, 2 B. & P. 268; *Deering v. Winchelsea*, *El.*, *Id.* 270. A co-surety might sue as soon as he had paid more than his rateable share, but not at law till then. *Davies v. Humphreys*, 6 M. & W. 153, 168, 169; *Ex pte. Snowdon*, 17 Ch. D. 44, C. A. He may pay the debt when due without waiting for a demand or an action, and may then sue for contribution. *Pitt v. Purssord*, 8 M. & W. 538. But a surety, W., against whom judgment has been obtained by the principal creditor, B., for the full amount of the guarantee, may sue his co-surety, G., for contribution, before making any payment, and obtain a prospective order under which, when W. shall have paid his own share, G. shall indemnify him from further liability, or if B. be a party to the action, W. may obtain an order on G. to pay his proportion to B. *Wolmershausen v. Gallick*, (1893) 2 Ch. 514. The allowance of a claim by B. in an action for the administration of the estate of a deceased co-surety, D., is equivalent to a judgment against D. S. C. See further *In re Parker*, (1894) 3 Ch. 400, C. A. The amount recoverable from each co-surety is ascertained by reference not to the number of principals but to the number of sureties; *Kemp v. Finden*, 12 M. & W. 421; who are solvent only. *Peter v. Rich*, 1 Ch. Rep. 19; *Hole v. Harrison*, 1 Ch. Cas. 246; *Dallas v. Walls*, 29 L. T. 599, L. C. & L. J.J., M. T. 1873; see notes to *Deering v. Winchelsea*, *El.*, supra, and in 2 White and Tudor's L. C. in Equity. See *Low v. Dixon*, 16 Q. B. D. 455 post, p. 595. Where A., B. and C. became sureties for D. by three separate bonds, and one of them was compelled to pay D.'s debt, each of the others must contribute in proportion to the amount in their respective bonds. *Deering v. Winchelsea*, *El. of, supra*; *Ellesmere Brewery Co. v. Cooper*, (1896) 1 Q. B. 75. And even although A. did not know when he became surety that B. and C. were also sureties. *Craythorne v. Swinburne*, 14 Ves. 160, 165, per Ld. Eldon, C. It seems that the right is not affected by the plaintiff surety having given time to the principal debtor. *Greenwood v. Francis*, (1899) 1 Q. B. 312, 320, 322, per A. L. Smith, L. J. A surety, A., is entitled to the benefit of any security his co-surety, B., has taken from the principal debtor, C., although B. consented to be surety only on the terms of having the security, and A. when he became surety did not know of the agreement for security. *Steel v. Dixon*, 17 Ch. D. 825. See also *In re Arcedeckne*, 24 Ch. D. 709. The division of the security is to be continued until it is exhausted or the co-sureties have been repaid. *Berridge v. Berridge*, 44 Ch. D. 168. In these cases the true nature of the transaction itself is to be considered without regard to the form of the instrument by which the relation is created. *Reynolds v. Wheeler*, 10 C. B., N. S. 561, 566; 30 L. J., C. P. 350, 351, per Williams, J. Thus, where the plaintiff had drawn a bill which C. accepted, and the defendant indorsed (both plaintiff and defendant putting their names for C.'s accommodation), the plaintiff having been obliged to pay the bill, was held entitled to recover contribution against the defendant as co-surety. S. C. So where the defendant and plaintiff both indorsed a promissory note of C. as sureties for

him, the defendant signing first. *Macdonald v. Whitfield*, 8 Ap. Ca. 733, J. C., *ante*, p. 393. By 6 E. 7, c. 41, s. 80 (2), *ante*, p. 449*d*, the principle of contribution is applied to co-insurers on a marine policy. Where two are jointly liable for the expenses incurred for their common benefit, and one dies, the survivor who pays the whole may sue the executor of the deceased for money paid for the defendant as executor. *Prior v. Iembrow*, 8 M. & W. 873; *semb. accord.* *Batard v. Hawes*, 2 E. & B. 287; 22 L. J., Q. B. 443. See also *Ramskill v. Edwards*, *infra*. If premises are let to several persons for the use of a company or partnership of which the lessees are members, and one of them is called upon to pay rent, he may sue the co-lessees for contribution. *Boulter v. Peplow*, 9 C. B. 493; 19 L. J., C. P. 190. So if one of a managing committee is obliged to repay a loan borrowed for a club by authority of the committee, he may recover contributions from each of the others. *Mountcashel, El. of v. Barber*, 14 C. B. 53; 23 L. J., C. P. 43. If one partner advance to another the capital which the latter is to contribute to the joint capital, he may sue for the amount. *French v. Styling*, 2 C. B., N. S. 357; 26 L. J., C. P. 181. A partner who pays a note in which he has joined some of the other partners, may sue them for contribution in this action, though the money raised on it was for partnership purposes. *Sedgwick v. Daniell*, 2 H. & N. 319; 27 L. J., Ex. 116. And see the Partnership Act, 1890 (53 & 54 V. c. 39), s. 24 (2). In calculating the amount of contribution the number of solvent partners only is to be considered. *Lowe v. Dixon*, 16 Q. B. D. 455, *vide ante*, p. 594. One partner cannot, however, in general sue another in this form of action for contribution to a joint partnership liability. *Brown v. Tapscott*, 6 M. & W. 119, 123; *Worrall v. Grayson*, 1 M. & W. 166. The partnership account must first be taken. It must be observed "that there is no principle of law which requires that a person should contribute to an outlay merely because he has derived a material benefit from it;" *Ruabon SS. Co. v. L. Assur.*, (1901) A. C. 6, 10, 15; *The Acanthus*, (1902) P. 17. Thus one tenant in common of a house, who expends money on repairs thereon, cannot sue his co-tenant for contribution. *Leigh v. Dickeson*, 15 Q. B. D. 60, C. A.

As a general rule this action does not lie on an implied contract for contribution or indemnity against a person jointly engaged with the plaintiff in doing a wrongful act by which the plaintiff is put to expense; *Merryweather v. Nixan*, 8 T. R. 186; or where money is paid in furtherance of an illegal transaction. *Mitchell v. Cockburne*, 2 H. Bl. 379; *Aubert v. Maze*, 2 B. & P. 371. But where the plaintiff was not aware that the transaction was illegal, or where its nature is doubtful, he may sue on the implied contract to indemnify. *Betts v. Gibbins*, 2 Ad. & E. 57; *Pearson v. Skelton*, 1 M. & W. 504; and see *Dixon v. Fawcus*, 30 L. J., Q. B. 137; *Burrows v. Rhodes*, (1899) 1 Q. B. 816; 1 Smith's Lead Cas., notes to *Lumpleigh v. Braithwait*; and *post*, pp. 618, 619. So a trustee, A., is entitled to contribution from his co-trustee, B., in respect of liability arising from a joint breach of trust in making an unauthorized investment; *Ramskill v. Edwards*, 31 Ch. D. 100; *Jackson v. Dickinson*, (1903) 1 Ch. 947; and in the event of B.'s death his executors are liable. S. C. See further *Chillingworth v. Chambers*, (1896) 1 Ch. 685, and *Fletcher v. Collis*, (1905) 2 Ch. 211, C. A. So directors of a company who have been compelled to replace its capital illegally distributed by them among the shareholders, with notice to the latter that the distribution was of capital, may recover from each shareholder the amount returned to him. *Mosham v. Grant*, (1900) 1 Q. B. 88, C. A. And a director liable under the Director's Liability Act, 1890, s. 3, is entitled, under sect. 5, to contribution from his co-directors; *vide post*, p. 846. See as to indemnity to executors or trustees properly carrying on a

trust business, against liability arising in contract, *Dowse v. Gorton*, (1891) A. C. 191, D. P.; or tort, *Benett v. Wyndham*, 4 D. G. & J. 259; *In re Raybould*, (1900) 1 Ch. 199. The right to the indemnity may be subrogated to the person injured by the tort. S. C.

A notice to the party by whom an indemnity is given is not necessary before defending an action; but if such notice be given, and he refuse to defend the action, he is estopped from saying that the person indemnified was not bound to pay the money. *Duffield v. Scott*, 3 T. R. 374; and see *Jones v. Williams*, 7 M. & W. 493. The only effect of want of such notice is to let in proof that the course pursued was not justified under the circumstances, but the onus lies on the person indemnifying. *Smith v. Compton*, 3 B. & Ad. 408. And if knowledge of an action be brought home to the party indemnifying, and he leave the defence to the party indemnified, the latter is not bound to defend, but may compromise the action to the best of his judgment, and sue for money paid, though the action might perhaps have been defended with success. *Pettman v. Keble*, 9 C. B. 701; 19 L. J., C. P. 325. A *cestui que trust* cannot, however, recover against his trustee what he alleges he has been compelled to pay through a breach of trust by the trustee, without showing that the loss was in fact occasioned by such breach of trust. *Parker v. Lewis*, L. R., 8 Ch. 1035, 1056. Where an action is brought against a surety who lets judgment go by default, there being no good defence, he cannot recover the costs, unless the writ was the first notice of default, in which case the costs of the writ can be recovered. *Pierce v. Williams*, 23 L. J., Ex. 322. But where A., who is indemnified by B., reasonably defends an action, he may recover against B. the costs of such action. *Hornby v. Cardwell*, 8 Q. B. D. 329, *per Brett and Cotton, L. JJ.*

Under a promise by the defendant to insure a tug against damage, and to "indemnify the plaintiffs in respect of all such damage to the extent of all moneys received by him under such insurance," the defendant having effected the insurance, is not bound to sue the underwriters thereon without an indemnity from the plaintiff. *The Lord of the Isles*, (1894) P. 342. As to the indemnity arising under the Workmen's Compensation Act, 1906 (6 E. 7, c. 58), s. 6, *vide post*, p. 809.

To support this action, it must appear either that the defendant was primarily liable to the third party to pay the money, or that it was paid, or the liability incurred, by the plaintiff at his express or implied request, or on his guarantee. See *Brittain v. Lloyd*, 14 M. & W. 762; *Lewis v. Campbell*, 8 C. B. 541, and 1 Smith's L. C. 11th ed. 146 *et seq.* "Where a person's goods are lawfully seized for another's debt, the owner of the goods is entitled to redeem them and to be reimbursed by the debtor against the money paid to redeem them, and in the event of the goods being sold to satisfy the debt, the owner is entitled to recover the value of them from the debtor." *Edmunds v. Wallingford*, 14 Q. B. D. 811, 814, C. A. See *The Orchis*, 15 P. D. 38. Therefore where the goods of A. on the premises of B. are distrained for rent, and A. is obliged to pay the rent to redeem them, B. is liable to A. in this form of action, for the sum so paid; *Exall v. Partridge*, 8 T. R. 308; so where the tenant is compelled to pay landlord's tax by distress, the action lies. *Dawson v. Linton*, 5 B. & A. 521. So, too, when the tenant of land, liable by prescription to repair a public bridge, is fined for non-repair on indictment, he may reimburse himself by this action against his landlord; *per cur.*, *Baker v. Greenhill*, 3 Q. B. 163. So in cases of rates levied on the lessee in respect of such liability, if he has not covenanted to pay them. *Id.*

But where, before the Tithe Act, 1891, A.'s goods were seized on the land of B. for a tithe rent-charge, B. was not liable to indemnify A., for the rent-charge issued only out of the land, and was not a personal charge on B.



*Griffinhoofe v. Daubuz*, 5 E. & B. 746; 25 L. J., Q. B. 237, Ex. Ch. explained in *Edmunds v. Wallingford*, *ante*, p. 596. So where A. and B. were under-tenants of adjoining houses which were held of the freeholder under one lease, and A. was compelled to pay the whole rent reserved by that lease, he could not sue B. at law for a contribution as money paid to his use. *Hunter v. Hunt*, 1 C. B. 300. Tindal, C. J., suggested that A. might have a remedy in equity. *Id.* 305. Where, however, A. let land to B., who assigned the lease as to part thereof to C. at an apportioned rent, and underlet the residue to D., and C., under threat of distress from A., paid him the whole rent reserved by the lease: it was held that C. had no right of contribution against D., as they were under no common obligation. *Johnson v. Wild*, 44 Ch. D. 146. In *England v. Marsden*, L. R., 1 C. P. 529, it was held that if the plaintiff allowed his goods to remain on the defendant's premises with his knowledge, but without his express request, until rent became due, and the landlord distrained, he could not recover from the defendant the rent and expenses he so paid; this decision was, however, virtually overruled by the C. A. in *Edmunds v. Wallingford*, *ante*, p. 596.

Where A. paid the funeral expenses of his deceased daughter during her husband's absence, the husband was held liable to A. *Jenkins v. Tucker*, 1 H. Bl. 90; *accord. Ambrose v. Kerrison*, 10 C. B. 776; 20 L. J., C. P. 135. So where the wife was living apart from her husband, and the plaintiff, in whose house she died, knew where he was and did not apply to him before burying her. *Bradshaw v. Beard*, 12 C. B., N. S. 344; 31 L. J., C. P. 273.

But it is not sufficient that the defendant has agreed with the plaintiff to pay the money to the third party. Thus where the landlord is called upon to pay the taxes, to which a landlord is primarily liable, but which his tenant is by special agreement bound to pay, he cannot sue the tenant for money paid. *Spencer v. Parry*, 3 Ad. & E. 331; and see *Lubbock v. Tribe*, 3 M. & W. 607. So where the transferee of shares in a company omits to register the transfer, and the transferor is consequently obliged to pay calls subsequent to the sale, he cannot recover the amount from the transferee as money paid; but a special action for not registering is the proper remedy; *Sayles v. Blane*, 14 Q. B. 205; *aliter*, if the defendant have requested the plaintiff to pay. See *ante*, p. 574.

An accommodation acceptor, who has defended an action on the bill at the request of the drawer, may recover the costs of such action as money paid. *Howes v. Martin*, 1 Esp. 162; *accord. Garrard v. Cottrell*, 10 Q. B. 679. And such request is, it seems, implied. See *Stratton v. Mathews*, 3 Exch. 48, following *Jones v. Brooke*, 4 Taunt. 464. But the indorser of a bill who has been sued by the holder and paid the amount, cannot recover the costs of the former action; for the custom of merchants does not make an acceptor liable for the costs of actions against subsequent holders. *Dawson v. Morgan*, 9 B. & C. 618. Bail may recover, as money paid, the expenses incurred by them in taking their principal; but not the costs of an action against them to recover these expenses unadvisedly defended. *Fisher v. Fullows*, 5 Esp. 171. If one of two parties to an award take it up and pays the whole expense of it, the award directing each party to pay only one half, he cannot, unless the amount due has been ascertained by the award or by taxation, recover half from the other as money paid. *Bates v. Townley*, 2 Exch. 152. *Secus* when it has been so ascertained. *Semble*, S. C. Even though the submission is silent as to costs. 2 Chitty, 157, n.; 2 Tidd, 9th ed. 831; *Grove v. Cor*, 1 Taunt. 165.

Money paid lies against a shipowner for money supplied to the captain, either in a foreign or English port, for the necessary repairs or use of the ship. *Robinson v. Lyall*, 7 Price, 592. But only where the necessity is so

pressing that the owner himself cannot be consulted without prejudice and delay. *Johns v. Simons*, 2 Q. B. 425. See further, *ante*, p. 586.

Where a carrier, by mistake, delivered to B. goods consigned to C., and B. appropriated them, and the carrier on demand without action, paid C. the value, it was held that the carrier might recover from B. the sum so paid, as money paid to his use. *Brown v. Hodgson*, 4 Taunt. 189. See *Sills v. Laing*, 4 Camp. 81; *Spencer v. Parry*, 3 Ad. & E. 331, 338; and *Coles v. Bulman*, 6 C. B. 184.

Generally, if a party be compelled to pay money in consequence of his own neglect; *Cupp v. Topham*, 6 East, 392; or breach of duty; *Pitcher v. Bailey*, 8 East, 171; though for the benefit of another, the law implies no promise on the part of the other to repay him.

### ACTION FOR MONEY LENT.

*Evidence of loan.*] In an action for money lent, the plaintiff will have to prove the loan of his money. Of this a promissory note given by the defendant to the plaintiff is not alone evidence. *Cary v. Gerrish*, *infra*. It is not sufficient merely to prove the payment of money to the defendant, for in such case the presumption is that the money is paid in liquidation of an antecedent debt. *Welch v. Seaborn*, 1 Stark. 474. But if the plaintiff can show any money transactions between the defendant and himself from which a loan may be inferred, or any application by the defendant to borrow money at the time, this, coupled with the payment, will be evidence of a loan. *Cary v. Gerrish*, 4 Esp. 9. When a parent advances money to a child, it is presumed to be by way of gift. *Per* Bailey, J., *Hick v. Keats*, 4 B. & C. 71. Where money is advanced by A. to B. as a gift, B.'s assent will be assumed, but if B. decline to accept the money except as a loan, the advance becomes one of loan. *Hill v. Wilson*, L. R., 8 Ch. 888. A transfer of stock may be evidence of a loan of money. *Howard v. Danbury*, 2 C. B. 803. Where the defendant was heard to ask for a loan, and the plaintiff then handed him a banknote, of which the amount was not shown, the plaintiff cannot recover more than 5*l.* as principal, for that is the smallest note in circulation. *Lawton v. Sweeney*, 8 Jur. 964, M. T. 1844, Ex. An I O U is not evidence of money lent. *Semble per Cur.* in *Fesenmayer v. Adcock*, 16 M. & W. 449. *Contra*, *Douglas v. Holme*, 12 Ad. & E. 641, but *quare*, see 10 L. J., Q. B. 43. If A. lend money to B., who contracts "to repay on demand or to execute a mortgage," A. may recover for money lent on B.'s refusal to execute. *Bristowe v. Needham*, 9 M. & W. 729. Where the plaintiff advances money to the defendant, for which the defendant deposits a security which is to be returned "upon repayment," a return, or offer to return, is not a condition precedent to the right of recovery for money lent. *Scott v. Parker*, 1 Q. B. 809; *Lawton v. Newland*, 2 Stark. 73. Where A., at the request of B., agreed to lend C. money on D.'s guarantee, and did so, receiving the following memorandum signed by C. and D.: "We jointly and severally owe you 60*l.*;" it was held that there was evidence of a loan to C. and D. jointly, or of an account stated with them. *Buck v. Hurst*, L. R., 1 C. P. 297. On a declaration containing special counts on debentures, and counts for money lent, and interest, the debentures were rejected as evidence on the special counts for want of proper stamps, but were held admissible to show that they were void as debentures; and the plaintiff was therefore entitled to recover, on the common counts, the loan with interest, for which the debentures had been given as collateral securities. *Enthoven v. Hoyle*, 13 C. B. 373; 21 L. J., C. P. 100. A

promissory note, stamped as a receipt only, is inadmissible to prove the loan of money. *Ashling v. Boon*, (1891) 1 Ch. 568. See as to interest, *Action for interest*, *post*, p. 622.

Where a married woman is entitled to pledge her husband's credit for necessaries, money advanced her to procure such necessaries may, on equitable principles, be recovered from her husband by the person who advanced it. *Jenner v. Morris*, 3 D. F. & J. 45; 30 L. J., Ch. 361; *Davidson v. Wood*, 1 D. J. & S. 465; 32 L. J., Ch. 400. So, money lent to an infant to buy necessaries, or to pay a debt incurred for them, and so applied by him, is recoverable. *Ellis v. Ellis*, 12 Mod. 197; 3 Salk. 197. *Marlow v. Pitfield*, 1 P. Wms. 558, cited in *Ex pte. Williamson*, L. R. 5, Ch. 313; see further, *post*, p. 674. So where H. was carrying on M.'s business as his agent, and borrowed money of B. for the business, B. erroneously believing that H. had M.'s authority to borrow, M. was held liable for so much of the loan as had been applied in payment of M.'s debts. *Bannatyne v. MacIver*, (1906) 1 K. B. 103, C. A. In these cases, the person lending the money is entitled in equity to stand in the same position as if the defendants had originally borrowed the money from them. S. C., see further *In re Wrexham, &c. Ry. Co.*, and other cases cited, *post*, p. 1127.

In ordinary trading partnerships, one partner is presumed to have authority to bind the rest, by borrowing money for partnership purposes, and the other partners will be liable to pay. *Fisher v. Tayler*, 2 Hare, 218; *Rothwell v. Humphreys*, 1 Esp. 406; Story on Partnership, p. 102. But, if one partner open a banking account on behalf of the firm in his own name, this presumption will not extend so as to bind the other partners. *Alliance Bank v. Kearsley*, L. R., 6 C. P. 433. In the case of a mining concern, carried on by a company, no such authority to borrow is to be presumed; the power must be given by the original settlement, or by the consent of every shareholder. *Ricketts v. Bennett*, 4 C. B. 686; *Brown v. Byers*, 16 M. & W. 252; *Burmester v. Norris*, 6 Exch. 796; 21 L. J., Ex. 43. If, however, mining be carried on as a trade by an ordinary private partnership under a deed of partnership, the ordinary authority to bind each other exists. *Brown v. Kidger*, 3 H. & N. 853; 28 L. J., Ex. 66. As to authority of agent to borrow, see *Montaignac v. Shitta*, 15 Ap. Ca. 357, J. C.

A loan of money secured by a mortgage is recoverable as money lent, if there be no covenant to pay the amount. *Yates v. Aston*, 4 Q. B. 182. But where a simple loan of money is secured by a covenant to repay the money, the creditor's only remedy is on the covenant. *Edwards v. Bates*, 7 M. & Gr. 590; *Baber v. Harris*, 9 Ad. & E. 532; *Mathew v. Blackmore*, 1 H. & N. 762; 26 L. J., Ex. 150. And a mere acknowledgment, in a deed, of a debt being due will amount to a covenant to pay it, if such an intention to enter into a covenant appear on the deed; *Saunders v. Milsome*, L. R., 2 Eq. 573; *Courtney v. Taylor*, 6 M. & Gr. 851; but this is not the case where the acknowledgment is made for a collateral purpose. S. C.; *Marryat v. Marryat*, 28 Beav. 224; 29 L. J., Ch. 665. *Holland v. Holland*, and *Jackson v. N. E. Ry. Co.*, cited *post*, p. 716. It is a defence that a simple contract has been subsequently merged by a security of a higher nature. *Vide Meyer*, *post*, p. 692. In each of the above cases an amendment would now, no doubt, be readily allowed, *vide ante*, p. 291, and these decisions are, therefore, of much less importance than they formerly were. The defendant authorized S., his solicitor, to borrow 100*l.* on mortgage, giving him the title-deeds for the purpose. S. borrowed 400*l.* of the plaintiff, forging the defendant's signature to a mortgage deed for that amount, and appropriated the money to his own use, but afterwards advanced 190*l.* to the defendant, taking from him a mortgage to a third person; and it was

held that the plaintiff had no cause of action against the defendant, even to the extent of 100*l.* *Painter v. Abel*, 2 H. & C. 113; 33 L. J., Ex. 60. The common law right of a pawnbroker to recover the balance due to him after the sale of a pledge, is not affected by a special pawn-ticket given under the Pawnbrokers Act, 1872 (35 & 36 V. c. 93), s. 24. *Jones v. Marshall*, 24 Q. B. D. 269.

Money of a customer at a banker's on an ordinary banking account, is money lent, and if left for six years without acknowledgment the right to recover it may be barred. *Pott v. Clegg*, 16 M. & W. 321; see *Pollard v. Ogden*, 2 E. & B. 459; 22 L. J., Q. B. 439. As to a deposit account, see *Atkinson v. Bradford, &c., Building Soc.*, cited *post*, p. 682. If notes be left by the customer, and the banker give a receipt for the amount as cash, and the notes turn out to be worthless, the customer cannot claim credit for the amount as money lent, or had and received, unless the banker has bought the notes or committed laches. *Timmins v. Gibbins*, 18 Q. B. 722; 21 L. J., Q. B. 403. But where C., the agent of a banker, B., to whom B. sent the bills of his customer, A., for collection, received the amount, but failed before he remitted the proceeds to B., B. was held liable for the amount to A. *Mackersy v. Ramsays*, 9 Cl. & F. 818.

For the breach of a contract to lend money, damages only, and not the sum agreed to be advanced, are recoverable. *S. African Territories v. Wallington*, (1898) A. C. 309, D. P.

As to a loan made in respect of a wagering contract, see *Carney v. Plimmer*, *post*, p. 618.

By the Money-Lenders Act, 1900, 63 & 64 V. c. 51, s. 1 (1), in an action for money lent by a money-lender after Aug. 8th, 1900, or for the enforcement of any agreement or security made or taken after that date, in respect of money lent before or after it, where there is evidence to satisfy the Court that the interest charged on the amount actually lent, or the amounts charged for expenses, premiums, &c., are excessive, and that in either case the transaction is harsh and unconscionable or is otherwise such that a Court of Equity would give relief, the Court may, notwithstanding any statement or settlement of account or agreement to close previous dealings and create a new obligation, re-open the transaction and relieve the person sued from payment of any sum in excess of that adjudged by the Court to be fairly due in respect of such principal, &c., as the Court, having regard to the risk and all the circumstances, may adjudge to be reasonable, and if any such excess has been paid by the debtor may order the creditor to repay it; and may set aside or alter any security, &c., given in respect of the money lent, and if the money-lender has parted with the security may order him to indemnify the borrower. By sect. 1 (2) any Court in which a money-lender may proceed to recover money lent shall have, at the instance of the borrower, all the powers given by sub-sect. 1, and notwithstanding the time for the repayment of the loan or any instalment thereof may not have arrived. By sect. 6, money-lender includes "every person whose business is that of money lending, or who advertises or announces himself or holds himself out in any way as carrying on that business," but not (a) any pawnbroker in respect of his business under the Pawnbrokers Acts; (b) certain registered friendly and other societies; (c) body corporate incorporated or empowered by special Act of Parliament to lend money; (d) any persons *bonâ fide* carrying on the business of banking or insurance, or any business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends money, or (e) any body corporate exempted by the Board of Trade from registration under this Act. See *Bonnard v. Dott*, (1906) 1 Ch. 740, C. A., *post*, p. 669. As to a defence arising under sect. 2 which requires the registration of money-lenders, *vide post*, p. 669. Relief may be given under

sect. 1, although the case is not one in which it would have been given in equity prior to the Act. *Saunders v. Newbold*, (1905) 1 Ch. 260, C. A.; affirm. *sub nom. Samuel v. Newbold*, (1906) A. C. 461, D. P. Interest that is excessive, having regard to the known risk and the surrounding circumstances, is sufficient to render the transaction "harsh and unconscionable," S. C. So the existence, in the agreement for payment of the loan by instalments, of a default clause making the whole sum then due become payable on default of paying any instalment, when that clause was not understood by the borrower. *Levene v. Greenwood*, 20 T. L. R. 389, H. S., 1904, *cor. Channell, J. Secus* where the borrower, an intelligent man of business, understood the clause. *Carringtons v. Smith*, (1906) 1 K. B. 79, *cor. Id.* In the case of such a borrower it seems that interest however high would not be "excessive," nor the transaction "harsh or unconscionable," unless perhaps security was given for the loan, or the borrower's necessities are such that he has practically no free will. S. C. *Id.* pp. 90, 92. See further the judgment in this case where all the earlier cases are reviewed. Where excessive interest is apparently established, the burthen of showing that such excess does not render the contract "harsh and unconscionable" is on the lender. *Samuel v. Newbold*, (1906) A. C. 473, 474, *per Ld. James*. Any account re-opened under sect. 1 (1) must be relevant to the transaction on which the action is brought. *Saunders v. Newbold*, *supra*. As to obtaining relief by the borrower by proceedings initiated by himself, *vide* S. C., and see further as to relief *Bonnard v. Dott*, *ante*, p. 600. For the form of judgment where relief is given under sect. 1, see (1905) 1 Ch. 263. For an instance of a business falling within the exception in sect. 6 (*d*), although, in the course of it, bills were given discounted and renewed, see *Litchfield v. Dreyfus*, (1906) 1 K. B. 584.

## ACTION FOR MONEY HAD AND RECEIVED.

In an action for money had and received, the plaintiff may be compelled by a proper defence to prove the receipt of the money by the defendant, and his own title to recover it as received for him.

This action has always been regarded as an equitable action, and was formerly held to lie whenever the defendant was "obliged by the ties of natural justice and equity to refund the money." *Moses v. Macferlan*, 2 Burr. 1012, *per Ld. Mansfield*; see *Rogers v. Ingham*, 3 Ch. D. 351. This definition was, however, found too vague, and the following cases will show the conditions necessary to sustain a claim for money had and received.

*Receipt of money.*] The plaintiff must prove that money has been received; and therefore an action for money had and received will not lie to recover *stock*. *Nightingal v. Devisme*, 5 Burr. 2589. See *ante*, p. 590. And it has been held that it will not lie against a *finder* of bank-notes to recover their value; *Noyes v. Price*, MS. Select Ca. 242; Chitty on Bills, 11th ed. 368, 369; unless it can be shown that they have been cashed, or circumstances justify the presumption. Chitty, *ubi sup.*, citing *Loughcamp v. Kenny*, 1 Doug. 138. And the value even of provincial notes, if received as money, may be recovered in this action. *Pickard v. Bankes*, 13 East, 90; *Fox v. Cutworth*, cited 4 Bing. 179. The principle of the cases is, that if a thing be received as money it may be treated and recovered as such. *Per Best, C.J.*, *Spratt v. Hobhouse*, 4 Bing. 179. So the action is maintainable where the defendant has received foreign money for the plaintiff's use. See *Ehrenspenger v. Anderson*, 3 Exch. 148, 156. Where a sheriff seized goods in

execution at the suit and by order of A., who took by bill of sale for 256*l.*, and the debtor's assignees afterwards recovered their value from the sheriff, it was held that though no money passed as between the sheriff and A., the sheriff might recover from A., 256*l.* as money had and received, and that the return of *feri feci* was no estoppel against setting up the right of the assignees. *Standish v. Ross*, 3 Exch. 427. And money allowed in account, under circumstances which would have entitled the party allowing it to recover it back if he had actually paid it, may be treated as paid, and may be recovered in this form of action. *Gingell v. Purkins*, 4 Exch. 720. The last two cases, however, seem to be at variance with *Lee v. Merrett*, 8 Q. B. 820. The vendee of an estate agreed with the vendor, after conveyance, to give up his claim to a moiety of the expenses in consideration of the vendor paying some other charges. Held, that the vendee's attorney, who had agreed to charge the vendee nothing if the vendor refused to pay his share, might recover the amount set off, as money had and received by the vendee to his use. *Noy v. Reynolds*, 1 Ad. & E. 159. If an agent refuse to account for goods delivered to him for sale, it shall be presumed, after a reasonable time, that he has sold them and received the proceeds in money. *Hunter v. Welsh*, 1 Stark. 224. Where goods are given to an agent for a particular purpose, as to sell them, there is an implied promise to account for the proceeds, in respect of which this action lies. *Wilkin v. Wilkin*, 1 Salk. 9. Where a banker, A., at whose bank a bill of exchange is accepted payable, by mistake cancels the acceptance, this does not give the holder a right to sue A. for the amount of the bill as money had and received. *Warwick v. Rogers*, 5 M. & Gr. 340; *Prince v. Oriental Bank Corporation*, 3 Ap. Ca. 325, J. C.

It seems that the plaintiff must give evidence of some particular sum, otherwise he will fail. *Harvey v. Archbold*, 3 B. & C. 626; *Bernasconi v. Anderson*, M. & M. 183; see *Baxendale v. G. W. Rail. Co.*, 14 C. B., N. S. 1, 42, 44; 32 L. J., C. P. 225, 239.

*Receipt by the defendant for the plaintiff.]* The plaintiff must prove that it was *his* money which the defendant received. *Scarfe v. Hallifax*, 7 M. & W. 288. Or that the money had been received to *his* (the plaintiff's) use by the defendant. *Kelly v. Curzon*, 4 Ad. & E. 622. The mere bearer of money from one person to another cannot be sued. *Coles v. Wright*, 4 Taunt. 198. And a mere agent who has paid money over, pursuant to the directions of the party depositing it with him, and without notice of the plaintiff's title, cannot be sued; *Horsfall v. Handley*, 8 Taunt. 136; but merely passing it in account, without new credit given, is not such a payment; *Buller v. Harrison*, Cowp. 565; and until there has been a change of circumstances by his having paid over the money to his principal, or done something equivalent to it, he remains liable to the true owner. *Cox v. Prentice*, 3 M. & S. 344. As to recovery of deposits on the non-completion of a sale of real property, *vide ante*, p. 330. If the deposit money be paid to D. the solicitor of the vendor E. as his agent, D. must on demand hand it over to E., although the question as to the title has not been settled; and if he do not, interest may be recovered from the demand. *Edgell v. Day*, L. R., 1 C. P. 80. Where money in litigation between two parties has by consent been paid over to a stakeholder, in trust for the party entitled, it can only be recovered from the stakeholder, and not from the original debtor. *Ker v. Osborne*, 9 East, 378. And where money has been paid to a stakeholder, A., to abide the decision of B. as to a certain event, the amount is not recoverable until the decision of B. has been communicated to A. *Wilkinson v. Godefroy*, 9 Ad. & E. 536. The decision of the umpire of a race, as to the winner, is conclusive. *Parr v. Winteringham*, 1 E. & E. 394; 28 L. J., Q. B. 123; see *Dines v. Wolfe*, L. R., 2 P. C. 280. But the jurisdiction of the umpire

does not arise until the race has been run. *Carr v. Martinson*, 1 E. & E. 456; 28 L. J., Q. B. 126; *Sadler v. Smith*, L. R., 4 Q. B. 214; Ex. Ch., L. R., 5 Q. B. 40. Where money is paid to a sheriff L., by a claimant D. under an interpleader order, to abide the order of a County Court, to which the proceedings had been transferred, in which D. is successful; D. cannot recover the money from L. without an order of the County Court. *Discount Banking Co., &c., v. Lambarde*, (1893) 2 Q. B. 329. A mere contract between A. and B., to which C. is not a party, that B. shall pay C. a sum of money, does not enable C. to sue B. therefor. *In re Empress Engineering Co.*, 16 Ch. D. 125, C. A.

In general, an agent must account to his principal, and cannot set up the *jus tertii* to an action brought by the principal. *Nickolson v. Knowles*, 5 Mad. 47; *Crosskey v. Mills*, 1 C. M. & R. 298; *White v. Bartlett*, 9 Bing. 378. Thus, if the master of a ship employ B. to sell a ship on an occasion that justifies the sale (as in case of irreparable damage on a voyage), the owner of the ship cannot sue B. for the proceeds after he has paid them over to the master; nor even *ut semble*, before such payment over. *Ireland v. Thomson*, 4 C. B. 149, 171.

All secret profits, commissions or bonuses made by an agent, A., in the course of his employment, when received by him, belong absolutely to his principal, P., who may maintain this action against A. for their recovery; *Morison v. Thompson*, L. R., 9 Q. B. 480; *De Bussche v. Alt*, 8 Ch. D. 286, C. A.; *Williamson v. Hine*, (1891) 1 Ch. 390; with interest from the time of their receipt by A.; *Boston Deep Sea, &c., Co. v. Ansell*, 39 Ch. D. 339, C. A.; and P. may recover, although he was not entitled to recover the bonuses from the person who paid A. S. C. See also *Whaley Bridge Calico Printing Co. v. Green*, *ante*, p. 588; and *Salford, Mayor, &c., of v. Lever*, (1891) 1 Q. B. 168, C. A., cited *post*, p. 849. And P. is also entitled to a declaration that A. shall be indebted to him in any such further profits, &c., when received. *Powell v. Evan Jones*, (1905) 1 K. B. 11, C. A. The profits, if secret, must be paid over to P. although received without fraud. *Hippisley v. Knee Brothers*, (1905) 1 K. B. 1. So the promoter of a company is liable to the company for all profits made by him in the formation of the company, which he did not disclose to the company. *Erlanger v. New Sombbrero Phosphate Co.*, 3 Ap. Ca. 1218, D. P.; *Bagnall v. Charlton*, 6 Ch. D. 371, C. A.; *Emma Silver Mining Co. v. Grant*, 11 Ch. D. 918; *Id. v. Lewis*, 4 C. P. D. 396; *Lydney, &c., Iron Ore Co. v. Bird*, 33 Ch. D. 85, C. A.; *Gluckstein v. Barnes*, (1900) A. C. 240, D. P. See also *In re Leeds & Hanley Theatres, &c.*, cited *post*, p. 850. And a director is liable to the company for any consideration he received from the promoter to induce him to become a director; *Nant-y-glo, &c., Ironworks Co. v. Grave*, 12 Ch. D. 738; or received subsequently, if any question be then open between the promoter and the company. *Eden v. Ridsdale's Ry. Lamp, &c., Co.*, 23 Q. B. D. 368, C. A. See *Archer's case*, (1892) 1 Ch. 322, C. A. But the liability is one of debtor and creditor, and the principal cannot follow the money which the agent has invested. *Lister v. Stubbs*, 45 Ch. D. 1, C. A.; *Powell v. Evan Jones*, *supra*. A director is not liable for profit made by the sale by him of his property to the company. *Ladywell Mining Co. v. Brookes*, 34 Ch. D. 398; 35 Ch. D. 400, C. A., following *In re Cape Breton Co.*, 29 Ch. D. 795, C. A., which was affirmed in D. P. *sub. nom. Cavendish Bentinck v. Penn*, 12 Ap. Ca. 652, on the ground of insufficient evidence. See also *In re Lady Forrest, &c., Gold Mine*, (1901) 1 Ch. 582. As to the exoneration of a director of a company, under its articles of association, from liability, on the ground of interest conflicting with his duty to the company, to account for profits made by him, see *Costa Rica Ry. Co. v. Formod*, (1901) 1 Ch. 746. As to damages recoverable by the company from a

director who has improperly received or obtained its shares, see *Eden v. Ridsdale's Ry. Lamp, &c., Co.*, *ante*, p. 603, and *Shaw v. Holland*, (1900) 2 Ch. 305. By the Partnership Act, 1890, 53 & 54 V. c. 39, s. 29—(1). "Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property name or business connexion. (2). This section applies to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner."

An agent is in general estopped from denying the accuracy of accounts rendered by him to his principal, except in the case of an error arising by mistake. *Skyring v. Greenwood*, 4 B. & C. 281; *Shore v. Picton*, *Id.* 715; *Cave v. Mills*, 7 H. & N. 913; 31 L. J., Ex. 265. Where an agent receives money to pay over to a third person, although he assent to hold it for that purpose, he continues to be accountable to his principal alone, until he has entered into some binding engagement with that third person to hold the money to his use; and not until then will he be liable to the third person in an action for money had and received. *Baron v. Husband*, 4 B. & Ad. 611; *Williams v. Everett*, 14 East, 582; *Wedlake v. Hurley*, 1 C. & J. 83; *Scott v. Porcher*, 3 Mer. 652; *Briud v. Hampshire*, 1 M. & W. 365. Where money is *bonâ fide* received from an agent under a binding contract, it cannot in general be recovered by the principal. *Foster v. Green*, 7 H. & N. 881; 31 L. J., Ex. 158. But if A., the clerk of B., without B.'s authority, pay money into the bank of C., having previously made an arrangement with D., the clerk of C., for some application of that money which neither A. nor D. had authority from their masters to make, C. must refund to B. *British and American Telegraph Co. v. Albion Bank*, L. R., 7 Ex. 119, 122. Where money, paid by A. to an agent B., to be remitted to C., is by mistake remitted to D., it may, if D. have not in the meantime changed his position, be recovered by B. from D. *Colonial Bank v. Exchange Bank of Yarmouth, Nova Scotia*, 11 Ap. Ca. 84, J. C.

The holder of a bill cannot sue the acceptor's bank for money had and received, though the acceptor has put funds into his hands for payment on the bill. *Moore v. Bushell*, 27 L. J., Ex. 3; *Hill v. Royds*, L. R., 8 Eq. 290. But if A. send money to B. to discharge a debt owing from A. to C., and B. assent to hold the money for that purpose, and *allows C. to be told this*, C. can maintain an action against B. for money had and received. *Lilly v. Hays*, 5 Ad. & E. 548. See *Noble v. National Discount Co.*, 5 H. & N. 225; 29 L. J., Ex. 210.

A receipt signed by an agent for his principal is not *per se* evidence to support an action for money had and received against the agent. *Edden v. Read*, 3 Camp. 339. So, where an attorney's clerk, B., in the absence of his master, J., received money due to the plaintiff, one of his master's clients, and gave a receipt, "B. for J.," and his master never returning, the clerk refused to pay over the money to the plaintiff, it was held that no action lay against the clerk, there being no privity between him and the plaintiff, and the money being rightfully received on behalf of J., who was accountable to the plaintiff for it. *Stephens v. Badcock*, 3 B. & Ad. 354. But where the defendant is a wrongdoer, as where he took money of the plaintiff found in the house of a deceased person, by direction of the executor, to whom he paid it over, he is liable, and such payment is no defence. *Tugman v. Hopkins*, 4 M. & Gr. 389. So, where the defendants *bonâ fide* received money from the plaintiff's wife, but without his assent, to keep for her infant child, the plaintiff can recover it. *Calland v. Loyd*, 6 M. & W. 96. In *Stead v. Thoruton*, 3 B. & Ad. 357, n., the defendant received money on



behalf of the assignee of a bankrupt, who was, however, insane at the time, and on his being afterwards removed, and the plaintiff appointed assignee in his stead, it was held that the plaintiff could maintain money had and received against the defendant, for he was a mere stranger, as he could not be the agent of an insane person. See further, *Ex parte Edwards*, 13 Q. B. D. 747, C. A.; and *Sharlaud v. Mildon*, 5 Ilare, 469, cited *post*, p. 1158. The directors of a company stand in the relation of agents to the company, but there is no such relation between them and persons contracting with the company. *Wilson v. Ld. Bury*, 5 Q. B. D. 518, C. A.

As to the liability of a firm for money received by a partner and misapplied, see the Partnership Act, 1890, ss. 11 and 13, cited *ante*, p. 511. As to the particular case of a firm of solicitors, *vide ante*, p. 511.

Money received by a sub-agent for an agent is not in general received for the use of the principal. See *Prince v. Oriental Bank Cor.*, 3 Ap. Ca. 325, 334, following *Maekersy v. Ramsays*, 9 Cl. & F. 818, cited *ante*, p. 600. Thus, there is no such privity between the client of a country solicitor and his London agent, as will support an action by the client for money had and received against the agent, for the proceeds of a judgment recovered in the ordinary course of business. *Robbins v. Fennell*, 11 Q. B. 248; *Robbins v. Heath*, *Id.* 257, n.; *Cobbe v. Becke*, 6 Q. B. 930. See also *Peatfield v. Barlow*, L. R., 8 Eq. 61. But the circumstances of the agency may be such, that it involves an authority to the agent to appoint a sub-agent or substitute, who shall be in direct privity with the principal. *De Bussche v. Alt*, 8 Ch. D. 286, C. A. Thus, where B. the agent for sale of A. has employed, in his own name, a broker, C., to sell A.'s goods, and after C. had sold the goods for B. and before delivery or payment B. died, and after the sale, but before receiving the proceeds, C. had notice that A. claimed the proceeds, it was held that A. might recover them from C., either on the ground of privity of contract, or of property. *Kaltenbach v. Lewis*, 10 Ap. Ca. 617, D. P., explaining *New Zealand Land Co. v. Watson*, 7 Q. B. D. 374, C. A., cited *post*, p. 708. So where B. as agent for A. consigned goods to C., and by B.'s direction, C. insured them, after notice that B. had an undisclosed principal, and received the policy moneys after a claim therefor by A.; A. was held entitled to recover the moneys from B. by reason of his property in the goods, *less the cost of insurance only*. *Mildred v. Maspons*, 8 Ap. Ca. 874, D. P. With regard to the right to follow moneys received by an agent, it has been held that where A. intrusts a specific chattel to B. for safe custody or sale for A.'s benefit, then the chattel or its proceeds, whether rightfully or wrongfully disposed of, may be followed at any time, though the chattel or the money representing its proceeds may have been mixed and confounded with the mass of like material. *In re Hallett's Estate*, 13 Ch. D. 697, 723, C. A. But it is otherwise where although there may have been a trust with reference to the disposition of the chattel, there is none with respect to the money itself, beyond the ordinary duty of a man to pay his debts; *S. C.*, *Id.* 723, 724; as in the case of a commission agent who was in the habit of receiving goods generally for sale, and of trading on his own account, to whom the owner has consigned goods for sale. *Kirkham v. Peel*, 43 L. T. 171, T. S. 1880, M. R.; *affirm.* in C. A., (1880) W. N. 168, M. Sit. So where a broker B. sold securities for T. by T.'s order, and in the ordinary course of business paid the cheque he received for the price to his account with his banker C., which account was then overdrawn beyond the amount of the cheque; C. knew that B. was a broker, and that the cheque was the proceeds of the sale of securities, but did not enquire whether the money it represented was in D.'s hand as agent or otherwise; it was held that C. was entitled to retain the money; *Thomson v. Clydesdale Bank*, (1893) A. C. 282, D. P.; and that T. could not recover it from C., unless C. knew that B.

was misapplying the fund in violation of his duty. *Id.* 289, 293. In order to follow money which an agent has been entrusted to receive for the plaintiff, the money must be capable of identification. *Ex parte Blane*, (1894) 2 Q. B. 237, C. A. See further, *Persian Investment Cor. v. Malcolm Khan (Prince)*, (1893) W. N. 49, H. S. Chitty, J. Where one of two tenants in common receives the whole rents of the property, the co-tenant must sue for his moiety in account, and cannot maintain money had and received. *Thomas v. Thomas*, 5 Exch. 28.

A strict trustee, who receives rents, &c., which he is bound by the trust deed to pay over to his *cestui que trust*, could not formerly be sued in this form of action by the latter for non-payment over, the plaintiff's remedy being by bill in equity; but this objection will no longer prevail. See J. Act, 1873, s. 24 (1), cited *ante*, p. 306.

*Failure, or want of consideration.*] Where money has been paid on a consideration which has wholly failed, it may be recovered in this action by the party who has paid it. Thus, if an annuity be defective, and the deeds are set aside, the consideration money may be thus recovered. *Shove v. Webb*, 1 T. R. 732. So if one of several securities for the annuity fails. *Scurfield v. Gowland*, 6 East, 241. So if an annuity be purchased at a time when the annuitant is in fact dead, but neither buyer nor seller knows of this at the time, the buyer may recover back his money. *Strickland v. Turner*, 7 Exch. 208; 22 L. J., Ex. 115. But where an annuity for A.'s life was regularly paid up to the time of A.'s death, but no memorial of the grant of the annuity was enrolled, it was held that although the contract was void, A.'s executor could not, on that ground, recover back the consideration money as money had and received. *Davis v. Bryan*, 6 B. & C. 651. Where the annuity is set aside, and the grantee brings an action to recover the consideration money, the defendant may, on a plea of set-off, deduct the payments made by him within six years in respect of the annuity. *Hicks v. Hicks*, 3 East, 12. So there may be a total failure of part only of the consideration, as where the plaintiff has paid for a parcel of goods of 150 tons at 18s. per cwt., and on delivery, it is found to be of 133 tons only, in such case the plaintiff may recover the difference of value. *Devaux v. Conolly*, 8 C. B. 640. But where the contract is entire and the consideration has only partially failed, the action is not maintainable. As where the plaintiff bought 25 sacks of flour, and used 2½ sacks of it, although he had objected that it was not equal to sample, it was held he could not rescind the contract and recover the price paid. *Harnor v. Groves*, 15 C. B. 667; 24 L. J., C. P. 53. So where the thing sold is not severable, and the buyer has enjoyed any part of the consideration for which he paid, he cannot rescind and recover the price. Thus where B. paid A. an annuity for licence to use a patent, which after some years was found to be bad, it was held B. could not recover what he had paid. *Taylor v. Hare*, 1 N. R. 260, followed in *Lawes v. Purser*, *ante*, p. 570. So where a premium was paid to the defendant's testator to instruct an apprentice for six years, and the testator died at the end of one year, it was held that no part of the premium was recoverable from the executor. *Whincup v. Hughes*, L. R., 6 C. P. 78; *vide ante*, p. 519. Where money had been paid as the consideration under a contract, the completion of which afterwards became impossible by reason of an event not within the contemplation of the parties, they are both discharged from further performance of the contract, but it is not rescinded *ab initio*, and therefore the money paid is not recoverable back. *Civil Service Co-operative Socy. v. General S. Nav. Co.*, (1903) 2 K. B. 756, C. A. A broker at A.'s request bought railway scrip for him; before the day of account the company converted the scrip into shares, and made a call; held, that A. was bound to

accept the shares and pay the call, and could not repudiate the contract and recover back the price. *M'Ewen v. Woods*, 17 Q. B. 13. As to the recovery of freight, paid under a divisible contract for carriage, the goods having been lost, see *Greeves W. India, &c., S. Ship Co.*, cited *post*, p. 635.

If A. sell to B. a bill as a foreign bill of exchange, which turns out to be an English bill and unavailable for want of a stamp, B. may recover the price in this action, both being ignorant of the defect; but if it had really been a foreign bill, with some latent defect which made it worthless, B. could not have recovered, unless there was a warranty or fraud. *Gompertz v. Bartlett*, 2 E. & B. 849; 23 L. J., Q. B. 65. So if A. sell to B. a bar of brass as gold, B. may recover the price, though A. was ignorant of the fact. *Per* Ld. Campbell, C.J., *Id.* 854. So where the plaintiff bought of defendant a bill, purporting to be an acceptance of A., but which was in fact forged, he was held entitled to recover back the money paid, although there was one genuine though worthless indorsement. *Gurney v. Womersley*, 4 E. & B. 133; 24 L. J., Q. B. 46. Where plaintiff, a stockbroker, sold for defendant foreign bonds, which proved to be defective for want of a foreign stamp, and the bonds were afterwards returned on that account by the purchaser, whereupon plaintiff took them back and reimbursed the purchaser, it was held that money had and received was maintainable against the defendant for the amount of purchase-money paid over to him by the plaintiff. *Young v. Cole*, 3 N. C. 724. The defendant, a broker, received 800*l.* from the plaintiffs to purchase a certain number of bales of cotton, and he made a contract in his own name for a larger number, it was held that as the defendant had not made a contract upon which the plaintiffs could sue, they could recover the money back. *Bostock v. Jardine*, 34 L. J., Ex. 142, misreported in 3 H. & C. 700; see L. R., 7 C. P. 101, *per* Mellor, J. Where A. has conveyed land on sale to B., and B. is evicted by C. owing to a defect in A.'s title, B.'s only remedy against A. is on A.'s covenants. *Clare v. Lamb*, L. R., 10 C. P. 334. As to action after conveyance, for damages on the original contract of sale, *vide ante*, p. 330.

Where shares in a company have been applied for and allotted, but the allottee has subsequently repudiated the shares, and his name has been removed from the register, it seems that the action lies for the deposit paid. *Stewart v. Austin*, L. R., 3 Eq. 299. See also *Ship v. Crosskill*, L. R., 10 Eq. 73; *Alison's case*, L. R., 9 Ch. 1, 26. So where an infant on attaining majority repudiates shares previously allotted him, from which he has derived no benefit. *Hamilton v. Vaughan-Sherwin, &c., Co.*, (1894) 3 Ch. 589. Where a scheme for establishing a tontine was put forth, stating that the money subscribed was to be laid out at interest; and after some subscriptions had been paid to the directors in whom the management of the concern was vested, but before any part of the money was laid out at interest, the directors resolved to abandon the project, it was held that each subscriber might, in this action, recover the whole of the money advanced by him without any deduction for expenses. *Nockels v. Crosby*, 3 B. & C. 814. So the money paid for the purchase of shares in a joint-stock company may, under similar circumstances, be recovered from the person of whom the shares were bought. *Kempson v. Saunders*, 4 Bing. 5. So a deposit on shares in a projected company, subsequently abandoned, may be recovered from one of the acting committee. *Wulstun v. Spottiswoode*, 15 M. & W. 501. But the action must be against a party, or one of the parties, who received the money or sanctioned the application of it. Payment to the bankers named in a letter of allotment "to the credit of the company," of which the defendant is an active managing director, is a payment to him. *Moore v. Garwood*, 4 Exch. 681. It is not enough to show that the defendant was a provisional committee-man and chairman of the managing

committee, if he never in fact concurred in their acts, though he may have been present at a meeting of them, from whose proceedings, however, he dissented. *Burnside v. Dayrell*, 3 Exch. 224. But on a failure of the project, a deposit applied to expenses actually incurred, with the plaintiff's authority, cannot be recovered. *Willey v. Parratt*, *Id.* 211. It is otherwise if paid without his authority. *Moore v. Garwood*, 4 Exch. 681, 690. Where payment of the deposit by the plaintiff was made "subject to the provisions of the subscriber's agreement," and no such agreement was then in existence; but one was subsequently made, which improperly authorized payment of expenses out of the deposits, and which was not signed by the plaintiff, the plaintiff may recover back the deposit in full, on proof of failure of the projected company; for he neither assented, nor could be required to assent, to such an agreement. *Ashpittel v. Sercombe*, 5 Exch. 147. Inability to establish the company after a reasonable lapse of time, is evidence of an abandonment of the scheme. *Chaplin v. Clarke*, 4 Exch. 404. It is no answer to the action that the plaintiff signed the parliamentary and subscription contracts, if his signature were obtained by suppressing the fact that the scheme had been abandoned. *Jarrett v. Kennedy*, 6 C. B. 319; *vide post*, p. 613. Where the deposit was paid to the credit of certain persons in trust for the company, it cannot be recovered from other, though active, members of the company. *Watson v. Charlemont*, *El. of*, 12 Q. B. 856. Where all, or substantially all, of the shares in a cost-book mine are not subscribed for, and the directors are obliged to relinquish the mine for want of funds, they are liable to refund to allottees who have not authorized the working or other expenditure; and the deposits are recoverable from the directors, though they were, in fact, paid to their bankers, who were authorized to receive them, and though entered to the credit of some of the directors only. *Johnson v. Goslett*, 3 C. B., N. S. 569; 27 L. J., C. P. 122, Ex. Ch. See *Blackmore v. N. Australasian Co.*, L. R., 5 P. C. 24. The defendant sold, and the plaintiff bought, shares in a banking company through brokers on the Stock Exchange in the usual way (*vide ante*, pp. 572 *et seq.*); the defendant executed a transfer, but the requisite consent by the company to the transfer not having been given, and the company having stopped payment, and ultimately become bankrupt, the plaintiff directed his broker not to pay for the shares or accept the transfer; in obedience, however, to the decision of the Stock Exchange, the broker paid the money to the defendant's broker, who handed it over to the defendant. The plaintiff afterwards paid the money to his broker, under a threat of legal proceedings, and then sued the defendant for money had and received; it was held that the action did not lie, as there was no proof of a total failure of consideration. *Remfry v. Butler*, E. B. & E. 887, Ex. Ch.; *Stray v. Russell*, 1 E. & E. 888; 29 L. J., Q. B. 115, Ex. Ch. Money paid by the plaintiff, as the price of a grant of a patent right which he knew did not exist, cannot be recovered back, as the plaintiff obtained that for which he paid the price. *Begbie v. Phosphate Sewage Co.*, L. R., 10 Q. B. 491; 1 Q. B. D. 679, C. A.

Where a fixed sum has been paid to the parish by the putative father of a bastard in discharge of further liability, and the child dies, the unexpended residue may be recovered in this action. *Watkins v. Hewlett*, 1 B. & B. 1. And in *Clappell v. Poles*, 2 M. & W. 867, the balance was held recoverable, though the defendants (the overseers who had received the money) had handed over the money to their successors, the child having died during the defendants' year of office; and *semble*, the whole sum paid was money had and received to the plaintiff's use from the time it was so paid; such contract being illegal and void. S. C.

If A. pay B., a gratuitous bailee, money to be employed to a particular

purpose, which B. neglects to do, A. may recover it back in this form of action; but *semble*, it will be otherwise, if B. have lost it by gross negligence; for this is the subject of a special action for such negligence. *Parry v. Roberts*, 3 Ad. & E. 118. Where the plaintiff abandons the purpose for which money was deposited with the defendant; *Baird v. Robertson*, 1 M. & Gr. 981; or countermands a direction to the defendant to pay over the money, before the defendant has paid it over or entered into a binding contract to do so; *Taylor v. Lendey*, 9 East, 49; *Fletcher v. Marshall*, 15 M. & W. 755; he may sue for money had and received. But where money has been paid to an agent to apply in a particular manner, the principal cannot sue the agent in this form of action, for neglecting his instructions, before he has countermanded the agent's authority; *Ehrensperger v. Anderson*, 3 Exch. 148; unless there has been a total refusal on the part of the agent to perform his part of the contract. *Id.* 158. If A. give a letter of credit to B. to apply the proceeds to a specific purpose, and B. is persuaded by C., who is cognizant of the facts, to lend the money to him, and he fails to repay it, A. may sue C. in this form of action. *Litt v. Martindale*, 18 C. B. 314.

Conduct money received with a subpoena may be recovered back by the party who paid it, where the attendance of the witness has been countermanded, and he has incurred no expense. *Martin v. Andrews*, 7 E. & B. 1; 26 L. J., Q. B. 39.

*In cases of forgery.*] Where a party paying money upon a forged instrument, has not been guilty of any want of that caution which, in consequence of the character which he fills, he is bound to exercise, and has not by his conduct affected the rights of any other parties to the instrument, he may in general recover back the money as money paid under a mistake. Thus a person who discounts a forged navy bill, may recover back the money as money had and received to his use. *Jones v. Ryde*, 5 Taunt. 488; 1 Marsh. 157. So in the case of forged bank-notes; *per Gibbs, C.J., S. C.*; and of Bank of England notes, the numbers of which had been altered, and payment was in consequence refused. *Leeds Bank v. Walker*, 11 Q. B. D. 84; *vide ante*, p. 395. So where a banker by mistake paid a bill for the honour of a customer whose name was forged, but, discovering the mistake, gave notice thereof the same morning to the holder in time to enable him to give notice of non-payment to the indorsers, it was held that the money was recoverable from the holder. *Wilkinson v. Johnson*, 3 B. & C. 428; and see *Gompertz v. Bartlett*, and cases cited *ante*, p. 607. So where the plaintiffs discounted for the defendants a bill of exchange, which the latter did not indorse, and the signatures of the drawer and acceptor (the latter of whom kept an account with the plaintiffs) were forged, it was ruled that the defendants were liable to refund the money. *Fuller v. Smith, Ry. & M.* 49.

But where the party paying the money so conducted himself as to lead the holder of the bill to believe that he considered the signature genuine he cannot afterwards withdraw from that position and be allowed to recover. *L. & River Plate Bank v. Bank of Liverpool*, (1896) 1 Q. B. 7, 10, *per Mathew, J.* Thus, where two bills were drawn upon the plaintiff, one of which he accepted, and both of which he paid, and it appeared that the handwriting of the drawer was forged, but the plaintiff gave no notice thereof for a long time to the payee, it was held that he could not recover the amount from the payee. *Price v. Neale*, 3 Burr. 1354; 1 W. Bl. 390. So where a banker paid a bill to a *bonâ fide* holder, which purported to be accepted payable at his house by one of his customers, and the forgery of the acceptor's name was not discovered until the end of a week, it was held that

the money could not be recovered from the holder; *Smith v. Mercer*, 6 Taunt. 76; and the banker in such a case cannot recover, though he give notice of the forgery on the day after he has paid it; for the holder is entitled to know whether it is to be dishonoured on the very day it becomes due. *Cocks v. Masterman*, 9 B. & C. 902; *Accord. L. & River Plate Bank v. Bank of Liverpool*, *ante*, p. 609. Where a cheque, drawn by a customer upon his banker, for a sum of money, described in the body of the cheque in words and figures, was afterwards altered by the holder, who substituted a large sum for that mentioned in the cheque, in such a manner that no person in the ordinary course of business could observe it, and the banker paid to the holder this larger sum, it was held that the banker could not charge his customer for anything beyond the original sum. *Hall v. Fuller*, 5 B. & C. 750. But where the customer drew a number of cheques in blank and delivered them to his wife to be filled up with such sums as might from time to time be required, and his wife filled up one for 50*l.*, and left a space on the line before the fifty and also a space between the £ and the 50, so that the person to whom it was delivered was enabled to insert *three hundred* and before the fifty, and the figure 3 between the £ and the 50, it was held that the forgery and payment were from the customer's negligence, and he must bear the loss. *Young v. Grote*, 4 Bing. 253. This case has been supported on the ground either that, 1st, the customer by drawing a blank cheque impliedly authorizes any person in whose hands it may come to fill it up as his agent, or 2ndly, the customer in filling up the cheque through his wife as his agent, failed in the duty he owed his banker by giving facilities for the subsequent alteration. *Scholfield v. Earl of Londesborough*, (1896) A. C. 514, cited *ante*, p. 395. See also *Union Credit Bank v. Mersey Docks, &c., Beard*, (1899) 2 Q. B. 205, 210, 211, and *Imperial Bank of Canada v. Bank of Hamilton*, (1903) A. C. 49, 54, J. C. Where a cheque for \$5 certified by the H. bank stamp was fraudulently altered by B. the drawer, to \$500, and paid by H. to the bank C., a holder for value, under a mistake of fact not discovered till the next day, it was held that H. could recover back the \$495 from C., for the cheque for \$5 was not dishonoured, and no notice of dishonour of the cheque for \$500 to B. the forger, was necessary, hence the rule in *Cocks v. Easterman*, *supra*, did not apply, notice of the mistake having been given within a reasonable time, and no loss having been occasioned by delay. S. C. The documents described in *Bank of England v. Vagliano*, (1891) A. C. 170, D. P., cited *ante*, p. 361, having been accepted by V., payable at the banking house of his bankers, were paid over their counter to G. *bonâ fide*, and in pursuance of letters of advice signed by V., his signature thereto having been fraudulently obtained by G., it was held that the bankers were entitled to charge V. with the amount of the bills. See further, *ante*, p. 76. The executor of A. recovered from the maker of a note, purporting to be payable to A. and B., of whom A. survived B. It afterwards appeared that A.'s name had been added by forgery, and B.'s executor thereupon sued A.'s executor for money received to plaintiff's use; held, that he could not recover, for it was not money paid on a note to which, if genuine, the plaintiff would have been entitled. *Vaughan v. Matthews*, 13 Q. B. 187. As to the liability of a banker for the amount paid or received in respect of a cheque payable to order, the indorsement of which has been forged, *vide ante*, pp. 406, 407.

As to the recovery of money obtained under a forged power of attorney, see *Stone v. Marsh*, 6 B. & C. 551; and *Marsh v. Keating*, 1 N. C. 198, cited *post*, pp. 616, 617.

*Money paid under ignorance or mistake of facts or of law.*] Money paid with a knowledge of all the facts, but under a mistake of *the law*, cannot in

general be recovered back, there being nothing against conscience in the other retaining it. *Bilbie v. Lumley*, 2 East, 469; *Brisbane v. Dacres*, 5 Taunt. 143; *Barber v. Pott*, 4 H. & N. 759; 28 L. J., Ex. 381; *Rogers v. Ingham*, 3 Ch. D. 351. Thus, where the plaintiff has suffered the defendant to sell some of his property under an impression that it had passed to the defendant by deed of assignment, which was, in fact, inoperative, he cannot recover the price as money received to his use. *Platt v. Bromage*, 24 L. J., Ex. 63. But money paid under a mistake of facts, and which the party receiving it has no claim in conscience to retain, is recoverable as money paid without consideration. *Bize v. Dickason*, 1 T. R. 285; *Milnes v. Duncan*, 6 B. & C. 671. And money so paid in ignorance may be recovered back, although the defendant cannot be put *in statu quo*. *Standish v. Ross*, 3 Exch. 537. Where money was paid on account, and a dispute afterwards occurred between the parties, and a balance was struck omitting to notice the sums paid, and the plaintiff paid the whole balance, he was permitted to recover the sum paid on account, as money paid under a mistake in the hurry of business. *Lucas v. Worswick*, 1 M. & Rob. 293. And a payment, made in *bonâ fide* forgetfulness of a fact formerly known to the plaintiff, may be recovered back. *Kelly v. Solari*, 9 M. & W. 54. And it is not enough to disentitle the plaintiff that he *might* have learnt the real fact upon inquiry, unless he has voluntarily waived all inquiry into the truth. S. C.; *Imperial Bank of Canada v. Bank of Hamilton*, *ante*, p. 611. Thus where, on the dissolution of a partnership, the plaintiff paid the defendant a sum for a share therein, on the footing of an investigation of the partnership accounts which he had made, and on further investigation he found that the profits were less than he had first estimated, so that a smaller sum than he had paid was payable to the defendant under the agreement for sale; held that the plaintiff could recover from the defendant the sum paid in excess. *Townsend v. Crowdy*, 8 C. B., N. S. 477; 29 L. J., C. P. 300. The action will lie, although the position of the defendant has been altered since the payment was made, unless there is some mutual relation between the parties creating a duty on the plaintiff, breach of which disentitles him to recover. *Durant v. Eccl. Comrs.*, 5 Q. B. D. 234.

It has been said that, before commencing the action on the ground of mistake, it is necessary to give the defendant notice of the mistake, and to demand the money. *Freeman v. Jeffries*, L. R., 4 Ex. 189, *per* Martin and Bramwell, BB. Where a bill was given by one partner for the balance of an account, alleged to be due from the partnership to the defendant, and he afterwards found that this account included a separate debt due from his co-partner, and then paid the amount of the bill to the holder, under protest, to save the drawer's credit; it was held this was not a voluntary payment, and that the plaintiff might recover from the defendant the amount of the private debt. *Kendal v. Wood*, L. R., 6 Ex. 213, Ex. Ch.

Money paid with full knowledge of facts by a person who might have resisted payment cannot be recovered back. Thus where a discharged insolvent, being lawfully arrested by one of his creditors, pays the debt; he cannot get it back in this action; and *semble*, if he had given a security for it (which would itself have been void as against the statute), and paid the amount when due, he could not have recovered it back. *Viner v. Hawkins*, 9 Exch. 266; 23 L. J., Ex., 38. Where a mortgagee gave notice of the mortgage to a tenant and demanded the rent, and the tenant chose to pay it to his landlord, the mortgagor, on an indemnity which proved to be bad, it was held that he could not recover the rent back from his lessor after he had been obliged by distress to pay it over again to the mortgagee. *Higgs v. Scott*, 7 C. B. 63. The rule in equity is in general the same as at law. *Rogers v. Ingham*, 3 Ch. D. 351; and see *Id.* 356, 357. But in

the case of a common mistake of both the payer and the payee, relief may sometimes be given; see *Daniell v. Sinclair*, 6 Ap. Ca. 181, J. C., cited *post*, p. 625. Not every mistake of fact will enable the party to recover money paid in ignorance. Thus, where A. conveyed to his bankers by way of security all his interest in a supposed devise to him, subject to a charge on it of a debt due from A. to B., and the bankers afterwards voluntarily paid to B. the debt at A.'s request, it was held that they could not recover back the money from B. upon discovering that the will had been revoked and the security was worthless. In this case the debt paid was really due to B., and the only mistake of the bankers was in supposing that they held a good security against A. for the advance. *Aiken v. Short*, 1 H. & N. 210; 25 L. J., Ex. 321. So where bankers cash a customer's cheque and afterwards discover that they have no assets of his, they cannot recover the money back from the person to whom they paid it. *Chambers v. Miller*, 13 C. B., N. S. 125; 32 L. J., C. P. 30; see also *Pollard v. Bank of England*, L. R., 6 Q. B. 623. See further the notes to *Marriot v. Hampton*, 2 Smith's L. C., 11th ed. 440 *et seq.*

Where money had been paid to the defendant by the plaintiffs on an insurance on a ship effected by the defendant, as the agent of a foreign principal, and the defendant, when effecting the insurance, had suppressed a material fact which if known to the plaintiffs would have enabled them to resist the payment, and on discovering the fact the plaintiffs brought an action against the defendant to recover the money; it was held that the defendant having suppressed the fact with no intention to defraud, and having paid the money over to his principals, or settled it in account with them, before demand by the plaintiffs, was not liable to refund it. *Holland v. Russell*, 1 B. & S. 424; 30 L. J., Q. B. 308; 4 B. & S. 14; 32 L. J., Q. B. 297, Ex. Ch.; *accord.* *Shand v. Grant*, 15 C. B., N. S. 324. Where, however, the defendant has, as principal, so received the money to which he is not entitled, it is no answer that he has paid it over to another person for whom he was acting. *Newall v. Tomlinson*, L. R., 6 C. P. 40.

Where an article is sold, which turns out to be of less value than the price given for it, the extra price if there be no fraud cannot be recovered back. *Per Le Blanc, J., Cox v. Prentice*, 3 M. & S. 349. But if parties agree to abide by the weighing of any article at any particular scales, and, in the weighing, an error not perceived at the time takes place from an accidental mis-reckoning of some weight, and the thing is reported of more weight than it really is, and the price is paid thereupon, money had and received is sustainable. *Per Le Blanc, J., and Id. Ellenborough, C.J., S. C.* In that case a bar of silver, having been assayed by a third person, was bought of the defendant by the plaintiff and paid for according to the assay, but it turned out that the assay was wrong, and the bar contained less silver; it was held that the plaintiff could recover what he had over-paid.

Though this action will not lie for the purpose of determining a right to an interest in land; *Lindon v. Hooper*, Cowp. 414; yet where the title is not in issue it will often lie to recover back payments made under misapprehension of title. Thus, a tenant who paid rent to his landlord and was afterwards ejected by a third person who recovered mesne profits from him for the period during which the tenant has paid his rent, may recover the rent so paid from his landlord in an action for money had and received, the landlord not having set up any title at the trial of the ejectment. *Newsome v. Graham*, 10 B. & C. 224; see *Freem.*, 2nd ed. 479 (*d*). So where a tenant continues to pay rent to the defendant in ignorance of the failure of a life on which his lease depends, he may recover back the payments, there being no dispute about title. *Barber v. Brown*, 1 C. B., N. S. 121; 26 L. J., C. P. 41. But rent paid by the tenant F. of the equitable mortgagor, to the



equitable mortgagee T. on his claim as such, is not recoverable by F. from T. *Fuick v. Tranter*, (1905) 1 K. B. 427.

As to money had and received on rescinding a contract or on breach of warranty, see *ante*, pp. 330, 331, 488.

*Money obtained by fraud, duress, &c.*] Where money has been obtained by fraud, this action lies to recover it back; and money fraudulently obtained may be recovered, although the defendant may be entitled to it as legatee. *Crockford v. Winter*, 1 Camp. 124. After the death of a bankrupt tenant for life his assignees were allowed to recover as money had and received, the bygone rents from a person who had received them under the colour of a fraudulent assignment. *Pearce v. Duy*, cited 2 Russ. & Myl. 124. If A. by means of a false pretence or promise, or condition which he does not fulfil, induce B. to give him a cheque, and hand it over to C. in fraud of B., but C. takes it *bonâ fide* for value and obtains cash for it at B.'s bankers, B. cannot recover the money from C. *Watson v. Russell*, 3 B. & S. 34; 31 L. J., Q. B. 304; Ex. Ch., 5 B. & S. 968; 34 L. J., Q. B. 93. Where the defendant, being secretly married already, married the plaintiff and received the rents of her lands, they were held recoverable in this form of action. *Hasser v. Wallis*, 1 Salk. 28. Where A. is agent of B. to pay certain acceptances of B., and the defendant obtains payment from A. by falsely representing himself to be the holder of one of the acceptances, the action for money had and received will lie at the suit of A., or *semble* of B. also. *Holt v. Ely*, 1 E. & B. 795. In *Govett v. Hopgood*, Exeter Sp. Assizes, 1852, cor. Erle, J., the plaintiff, a lady imbecile from age and infirmity, recovered in this form of action a large sum which was alleged to have been a gift by her to the defendant's wife. The plaintiff, being herself called as a witness, showed her incapacity on her examination, and the judge left it to the jury to say whether she knew what she was about when she gave the money. Where the defendant fraudulently colluded with J. S., who was insolvent, to obtain wines from the plaintiff, the proceeds on the re-sale of which eventually came into the defendant's hands in satisfaction of a debt due to him from J. S.; the plaintiff was held entitled to recover in this action. *Abbotts v. Barry*, 2 B. & B. 369; 5 B. Moore, 98. The plaintiff can only rescind a contract on the ground of fraud when he can disaffirm the contract and remit the defendant to his former state. *Urquhart v. Macpherson*, 3 Ap. Ca. 831, J. C., and see also cases cited *infra*.

The promoters of a company advertised a large capital in 120,000 shares: the plaintiff took an allotment of 60 shares; notice was then published by the promoters that all the shares were allotted; whereupon the plaintiff paid a deposit on the shares and signed the subscription contract. He afterwards discovered that less than half the shares had been in fact allotted, and that the company had no funds. Held, that on this evidence of fraud he might recover back his deposit from one of the active promoters. *Wontner v. Shairp*, 4 C. B. 401. See also *Jarrett v. Kennedy*, 6 C. B. 319, cited *ante*, p. 608. If a fraudulent statement in a public advertisement can be traced to the secretary of a company, and purport to be by order of the directors, *semb.* an express authority to publish it may be presumed. *Wontner v. Shairp*, *supra*; and see *Watson v. Charlemont*, *El. of*, 12 Q. B. 856. But a party who seeks to repudiate shares on the ground of fraud must do so while he is in a condition to put both parties *in statu quo*. Thus he cannot do so after the company has gone into liquidation; *Stone v. City and County Bank*, 3 C. P. D. 282, C. A.; nor after he has received dividends and has permitted the company to become incorporated under 19 & 20 V. c. 47. *Clarke v. Dickson*, E. B. & E. 148; 27 L. J., Q. B. 223; *Colc v. Bishop*, E. B. & E. 150, n.; *Addie v. W. Bank of Scotland*, L. R., 1 H. L. Sc. 145,

165. But he may sue for the fraud and so get damages; S. C.; *Clarke v. Dickson*, 6 C. B., N. S. 453; 28 L. J., C. P. 225: see *Action for deceit, post*, p. 846; he has not, however, this remedy against the company, *vide post*, p. 1113. Where an allottee of shares has repudiated them on the ground of fraud by the company, and his name has been removed from the register, it seems that the sum paid on the shares is recoverable in this form of action. See *Ship v. Crosskill*, L. R., 10 Eq. 73; *Askew's case*, L. R., 9 Ch. 664, 666.

There is an important difference between cases where a contract may be rescinded on account of fraud and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained; for "it is enough to show that there was a fraudulent representation as to any part of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission, unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration." *Kennedy v. Panama, &c., R. Mail Co.*, L. R., 2 Q. B. 580, 587, *per Cur.*; *accord. Seddon v. N. E. Salt Co.*, 1905, 1 Ch. 326. See further, cases, cited *sub tit. Action for deceit, post*, pp. 843 *et seq.*

Where a man has been obliged involuntarily, and by wrongful duress, to pay money, it may be recovered in this action; as where he has paid an exorbitant sum to redeem his goods from pawn; *Astley v. Reynolds*, 2 Str. 915; or wrongful detention; *Ashmole v. Wainwright*, 2 Q. B. 837; *Green v. Duckett*, 11 Q. B. D. 275. See *Kendal v. Wood*, L. R., 6 Ex. 243, *ante*, p. 611. Plaintiff being indebted to the defendant and others, offered a composition of 5s. in the pound, which some of the creditors accepted, but the defendant refused until the plaintiff had privately given him 50l., when he executed the deed. Some of the other creditors had refused to sign unless the defendant signed, and this he knew; held, that the plaintiff could recover the 50l. *Atkinson v. Denby*, 7 H. & N. 934; 31 L. J., Ex. 362, Ex. Ch.; *In re Lenzberg's Policy*, 7 Ch. D. 650, and see *post*, p. 619. So where a party to a reference has been obliged to pay an unreasonable charge of the arbitrator in order to take up the award; *per Cur.* in *Re Coombs*, 4 Exch. 839. See *Roberts v. Eberhardt*, 3 C. B., N. S. 482; 28 L. J., C. P. 74, Ex. Ch. So the action lies where goods, not liable to seizure, are seized by a revenue officer, who extorts money to release them; *Irving v. Wilson*, 4 T. R. 485; or a public officer demands and exacts an excessive fee, as a parish clerk for a search in a register; *Steele v. Williams*, 8 Exch. 625; 22 L. J., Ex. 225; or a corporation officer extorts a fee for granting a licence; *Moryan v. Palmer*, 2 B. & C. 729; or a sheriff claims and receives a larger fee than he is entitled to; *Dew v. Parsons*, 2 B. & A. 562; or a toll-keeper exacts an illegal toll; *Parsons v. Blandy*, Wightw. 22; or a railway company, bound by their special Act to charge rates equally to all, detains or refuses to carry the parcels of a particular person until he pays an unreasonable charge. *Parker v. Gt. W. Ry. Co.*, 7 M. & Gr. 253; *Edwards v. Id.* 11 C. B. 588; 21 L. J., C. P. 72; *Baxendale v. Id.*, 16 C. B., N. S. 137; 33 L. J., C. P. 197, Ex. Ch.; *Sutton v. Id.*, 3 H. & C. 800; 35 L. J., Ex. 18; L. R., 4 H. L. 226; *Baxendale v. L. & S. W. Ry. Co.*, L. R., 1 Ex. 137; *Gidlow v. Lancashire & Yorkshire Ry. Co.*, L. R., 7 H. L. 517. And this, although part of the money was received by the defendants as agents of another company and for their use. *Parker v. Bristol & Exeter Ry. Co.*, 6 Exch. 702. See further, *post*, pp. 633, 634. So if a mortgagee with power of sale refuse to stop a sale unless the mortgagor pays expenses not duly chargeable upon him, which the mortgagor accordingly pays under protest. *Close v. Phipps*, 7 M. & Gr. 586. So where a mortgagee having agreed to assign his security on payment of

principal, interest and costs, made a claim for costs to which he was not entitled, and on his refusal to execute the assignment on any other terms, the assignee, by direction of the mortgagor, paid the sum demanded under protest; held, that the mortgagor could recover the excess, as paid not under duress in the strict legal sense, but as paid involuntarily under undue pressure. *Fraser v. Pendlebury*, 31 L. J., C. P. 1. So if a sheriff obtain payment by a wrongful seizure under a *fi. fa.* by a threat of selling the goods, though not liable to the execution; *Valpy v. Manley*, 1 C. B. 594; or a solicitor illegally detain deeds till an undue claim is satisfied; *Wakefield v. Newbon*, 6 Q. B. 276; *Turner v. Deane*, 3 Exch. 836; even though he detain them as solicitor of the third person, who had no right to payment, and though he has paid over the money to his client; *Oates v. Hudson*, 6 Exch. 346; 20 L. J., Ex. 112;—in all such cases this action is maintainable. See also *Gibbon v. Gibbon*, 13 C. B. 205; 22 L. J., C. P. 131. And in these cases it makes no difference that the defendant, who has obtained the money as an agent, has handed it over to his principal. See *Steele v. Williams*, 8 Exch. 625, and cases cited *Id.* 622; *Oates v. Hudson*, *supra*. *Aliter*, if the agent have received, without fraud, money paid under a mistake of facts, and has paid it over to his principal, or settled it in account with him. *Holland v. Russell*, 4 B. & S. 14; 32 L. J., Q. B. 297, *ante*, p. 612; *Shand v. Grant*, 15 C. B., N. S. 324.

Personal duress will, of course, avoid a payment made under its influence; and the wrongful detention of the plaintiff's goods or property for the purpose of obtaining money will, we have seen above, be ground for reclaiming the money paid under such circumstances; but this is not on the ground of *duress*, but because the payment is involuntary. Where there is a fair and *bonâ fide* agreement to pay for redelivery of the detained goods, and no undue advantage taken, the action will not lie; for generally mere duress of goods will not avoid a contract or agreement, so as to enable a party to recover back money paid under it. See *Allee v. Backhouse*, 3 M. & W. 650; *Skate v. Beale*, 11 Ad. & E. 983.

A party cannot try a title to land in an action for money paid, to release goods taken as a distress by a claimant of the land. *Lindon v. Hooper*, Cowp. 414. And see the observations of the Court in *Gingell v. Purkins*, 4 Exch. 725, and cases cited *ante*, p. 612. Nor can the owner of cattle *rightfully* distrained damage feasant, recover in this action an excessive demand for damage, though paid under protest. *Gulliver v. Coscus*, 1 C. B. 788. So it did not lie by a tenant against his landlord for the overplus after sale under a distress; for the proper remedy was an action for not leaving it in the hands of the sheriff or constable; *Yates v. Eastwood*, 6 Exch. 805; 20 L. J., Ex. 303; *Evans v. Wright*, 2 H. & N. 527; 27 L. J., Ex. 50; but it seems that the stat. 35 & 36 V. c. 92, s. 13, makes it the duty of the landlord to pay the overplus to the tenant, and this form of action is therefore now the appropriate remedy. Where an action is brought, and the defendant pays the demand "without prejudice," he nevertheless cannot afterwards recover the money so paid. *Brown v. McKinnally*, 1 Esp. 279. So money recovered by regular legal process, though in fact not due, cannot be recovered back in this action; *Marriott v. Hampton*, 7 T. R. 269; even though the process was not followed by a final order or judgment; *Handet v. Richardson*, 9 Bing. 644; *Moore v. Fulham Vestry*, (1895) 1 Q. B. 399, C. A.; or even though recovered after judgment by a writ of *fi. fa.* knowingly issued to levy a sum already paid by the judgment debtor. *De Medina v. Grove*, 10 Q. B. 152, 172, Ex. Ch., *In Ward v. Wallis*, (1900) 1 Q. B. 675, 678, it was, however, held by Kennedy, J., that the above principle did not apply unless there was *bonâ fides* on the part of the person A. who had got the benefit, under legal process, of the payment of his

opponent B. and that if A. had therein taken an unfair advantage, or acted unconscientiously, knowing he had no right to the money, that principle did not prevent B. from recovering it back. Thus where B. sued A. for work and labour done and on the writ by mistake gave credit for the payment of 75*l.* on account, and claimed the balance, A., knowing of the mistake, paid the amount claimed, and B. gave him a receipt for the whole sum due; B. was held entitled to recover the 75*l.* from A. in another action. S. C. So where a certificated bankrupt, upon being arrested upon a *ca. sa.* for a debt provable under the commission, paid the money under a protest stating his bankruptcy and certificate, and warning the sheriff that he should apply to the Court to have the money returned, it was held that this was not such a payment under legal process, with knowledge of the facts, as precluded the bankrupt from recovering back the money. *Payne v. Chapman*, 4 Ad. & E. 364. And where defendant, knowing he had no real claim, arrested the plaintiff, a foreigner, on his arrival from abroad, for 10,000*l.*, and, under the compulsion of a colourable legal process, extorted from him 500*l.*, "as a payment in part of the writ," the court held that this action was maintainable. *De Cadaval, Dk., v. Collins*, *Id.* 858, see further notes to *Marriott v. Hampton*, 2 Smith's L. C.

[*Against officer de facto.*] Though a title to land cannot, as we have seen, be tried in this form of action, a title to an office or appointment is often tried in it. Thus the person entitled may sue a usurper of an office for the fees wrongfully received, as in the case of the disputed title to a stewardship of an honour or a court baron; *Howard v. Wood*, 2 Lev. 245; Freem. 478, the cases collected *Id.* in 2nd ed.; or office of clerk of the papers in the King's Bench office; *Woodward v. Aston*, 1 Vent. 296; or office of clerk of the peace; *Wildes v. Russell*, L. R., 1 C. P. 722; or the office of registrar of an inferior court; *Osgood v. Nelson*, L. R., 5 H. L. 636; or a rightful against a tortious guardian in socage; *obiter, per Holt*, C. J., in *Lamine v. Dorrell*, 2 Ld. Raym. 1217; or the office of crier of a court; *Green v. Hewett*, 1 Peake, 182; or prothonotary; *Campbell v. Hewitt*, 16 Q. B. 258. And in such actions it will be sufficient to show the fees received *communibus annis*. *Montague v. Preston*, 2 Vent. 170, 171; B. N. P. 76 (e) *semb.* *Campbell v. Hewitt, supra.* But if there be no accustomed fees attached to the office, and the profits be only casual, as in the case of a sexton who receives only gratuities for showing a cathedral, no such action lies. *Boyer v. Dodsworth*, 6 T. R. 681. The action lies against a corporation which has taken, and wrongfully detained, fees belonging to an officer of it; *Hall v. Swansea, Mayor, &c., of*, 5, Q. B. 526; and thus the title to the office itself may be tried.

[*On waiver of tort.*] We have seen that a taking or detention of goods from the plaintiff may be sometimes treated as a sale to the wrongdoer; *ante*, p. 550. So a wrongful receipt by the defendant of the proceeds of the goods wrongfully sold may be treated as a receipt to the plaintiff's use by waiving the preceding tortious detention of them. *Lamine v. Dorrell*, 2 Ld. Raym. 1216; *Kitchen v. Campbell*, 3 Wils. 304. So where the defendant has wrongfully received payment of the plaintiff's cheque, *vide ante*, p. 406, or post office order for money. *Fine Art Society v. Union Bank of London*, 17 Q. B. D. 705, C. A. See *Bavins v. L. & S. W. Bank*, (1900) 1 Q. B. 270, C. A. So where the defendants wrongfully seized money of the plaintiff, and paid it to their joint account at the banker's, it was held that this action lay against both. *Neate v. Harding*, 6 Exch. 349; 20 L. J., Ex. 250. Where a member of the defendant's firm sold the plaintiff's government stock under a forged power of attorney, and the defendants

received the price innocently, it was held that the plaintiff could recover the price in this form of action. *Stone v. Marsh*, 6 B. & C. 551; *Marsh v. Keating*, 1 N. C. 198. See on S. C., *Reid v. Rigby*, (1894) 2 Q. B. 40; and *Jacobs v. Morris*, (1902) 1 Ch. 816, C. A. The right to maintain this action seems in such cases to be founded, not on the right to treat a mere tort as a contract, but on the right to refrain from suing for the tort, and to estop the wrongdoer from setting up his own wrong to defeat the plaintiff's remedy for the proceeds. Thus if, after a wrongful sale of goods, the owner elect to claim and to accept part of the proceeds of the sale from the wrongdoer as money paid to his use, the tort is waived, and the owner's only remedy for the residue of the proceeds is by action for money had and received. *Lythgoe v. Vernon*, 5 H. & N. 150; 29 L. J., Ex. 164. See *Smith v. Baker*, *infra*; *Roe v. Mutual Loan Fund*, 19 Q. B. D. 347, C. A. Conversely, where the plaintiff has elected to treat the conversion as a tort by recovering a judgment in trover against A., he cannot, even though the judgment be unsatisfied, sue for the proceeds of the sale by A. and the defendant, which sale was the conversion complained of, although the defendant alone received the proceeds. *Buckland v. Johnson*, 15 C. B. 145; 23 L. J., C. P. 204. Such a defence will, however, require to be specially pleaded. In some cases, however, the act relied on as an election "is of an ambiguous character and may or may not be done with the intention of adopting and affirming the wrongful act. In such cases the question whether the tort has been waived becomes rather a matter of fact than of law." *Smith v. Baker*, L. R. 8, C. P. 350, 355, 356, *per* Bovell, C. J.; *accord. Rice v. Reed*, (1900) 1 Q. B. 66, *per* A. L., Smith, L. J. See further notes to *Smith v. Hodson*, 2 Smith L. Cases.

This action lies to recover money in the hands of an overseer, levied on a conviction which has been quashed. *Feltham v. Terry*, cited 1 T. R. 387.

Money stolen by the defendant from the plaintiff constitutes a debt from the defendant to the plaintiff; but the generally received opinion has been that it could not be sued for until after the prosecution of the defendant for the felony. See *Stone v. Marsh*, *supra*; *Chowne v. Baylis*, 31 Beav. 351; 31 L. J., Ch. 757. And it has been held that the plaintiff would be nonsuit, where his case was founded on an unprosecuted felony. *Wellock v. Constantine*, 2 H. & C. 146; 32 L. J., Ex. 285. The doctrine on which these cases were grounded has, however, been said to be without legal foundation. *Wells v. Abrahams*, L. R., 7 Q. B. 554, *per* Cur. See further on this subject, *Ex pte. Ball*, 10 Ch. D. 667, C. A.; *Midland Insur. Co. v. Smith*, 6 Q. B. D. 561, and *Roope v. D'Avigdor*, 10 Q. B. D. 412.

[*In case of wagering contracts.*] By the Gaming Act, 1815 (8 & 9 V. c. 109), s. 18, all contracts by way of gaming or wagering shall be null and void; and no suit can be maintained "for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: provided always that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute for or toward any plate, prize or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise." The words "any person" include the other party to the wager. See *Strachan v. Universal Stock Exchange* (No. 2), (1895) 2 Q. B. 697, *per* C. A. As to what is a wagering contract see *Carlill v. Carbolic Smoke Ball Co.*, (1892) 2 Q. B. 490, *per* Hawkins, J.; his judgment was affirmed in C. A., (1893) 1 Q. B. 256.

The section prohibits only actions by one party to the wager against the other, or against the stake-holder to recover the stake won. Thus if the party depositing the sum staked, claimed it back from the stake-holder, even

after the event is ascertained, but before the money is paid over, he can maintain money had and received against him. *Hampden v. Walsh*, 1 Q. B. D. 189; *Diggle v. Higgs*, 2 Ex. D. 422, C. A.; see also *Hermann v. Charlesworth*, (1905) 2 K. B. 123, C. A. Money deposited as a wager upon a lawful game or race in which the depositors are engaged, does not come within the proviso in sect. 18, and can, therefore, be recovered from the stake-holder as money deposited on a void contract. S. C.; *Trimble v. Hill*, 5 Ap. Ca. 342, J. C. A deposit of money or other securities by S. with V. as "cover" or security for the payment of differences on a wagering contract for the sale and purchase of stocks is not deposited to "abide the event" within sect. 18, *ante*, p. 617, and may be recovered by S. if the contract has been determined by revocation or otherwise before the money, &c., has been applied in satisfaction of losses incurred by S.; *Ex pte. Wood*, (1898) 2 Q. B. 383, C. A.; *Universal Stock Exchange v. Strachan*, (1896) A. C. 166, D. P.; but not otherwise; *Id. v. Id.* (No. 2), *supra*. See further *In re Gieve*, (1899) 1 Q. B. 794, C. A. The recovery back of stakes deposited is not affected by the Gaming Act, 1892, s. 1, *ante*, p. 591; *Burge v. Ashley and Smith*, (1900) 1 Q. B. 744, C. A. But where C. advanced 500*l.* to P. to enable P. to deposit it with a stake-holder, to abide the event of a wager between P. and X., on the terms that P. should repay C. the amount, only if P. won, P. did win and received the stakes, it was held that C. was precluded by the section from recovering the 500*l.* from P. *Carney v. Plimmer*, (1897) 1 Q. B. 634, C. A. A principal who has employed an agent, A., to make bets for him on commission, can sue A. for bets so made, and won and received by him. *Bridger v. Savage*, 15 Q. B. D. 363, C. A.; *Beeston v. Beeston*, 1 Ex. D. 13. But he cannot sue A. for damages for not making the bets for him. *Cohen v. Kittell*, 22 Q. B. D. 680.

*In cases of illegal contracts.*] Where money has been paid in pursuance of an illegal contract, it is generally irrevocable. See cases cited 1 Smith L. C., 11th ed. 399 *et seq.*, and *Lowry v. Bourdieu*, 2 Doug. 468. And there is no distinction in this respect between *mala prohibita* and *mala in se*. *Aubert v. Maze*, 2 B. & P. 371; *Cannan v. Bryce*, 3 B. & A. 179. But in some cases it is recoverable as money had and received to the use of the party paying it, as in the following cases: see 1 H. Bl., 4th ed. 65, n.:—

1. When the contract remains *executory*, though the plaintiff and defendant be *in pari delicto*; *Tuppenen v. Randall*, 2 B. & P. 467; as a deposit upon an illegal wager; *Aubert v. Walsh*, 3 Taunt. 277; *Busk v. Walsh*, 4 Taunt. 290. Where the plaintiff authorized his money to be applied to an illegal purpose, he may recover it before it has been paid over or applied to such purpose. *Bone v. Ekless*, 5 H. & N. 925; 29 L. J., Ex. 438. See also *Taylor v. Bowers*, 1 Q. B. D. 291, C. A.

2. Money is recoverable from a stake-holder in whose hands it has been deposited upon an illegal consideration, though *executed* by the happening of the event upon which a wager is made; provided the money has not been paid over by the stake-holder to the other party, or was paid over after notice to the contrary. *Cotton v. Thurland*, 5 T. R. 405; *Bate v. Cartwright*, 7 Price, 540; *Hustelow v. Jackson*, 8 B. & C. 221; *Hodson v. Terrill*, 1 Cr. & M. 797. See *Barclay v. Pearson*, (1893) 2 Ch. 154, 165.

3. The money is recoverable, though the contract be executed, if the plaintiff be not *in pari delicto* with the defendant. *Per* Ld. Mansfield, C.J., *Lowry v. Bourdieu*, 2 Doug. 472. As where money is extorted from the plaintiff by the threat of prosecuting a penal action against him; *Unwin v. Leaper*, 1 M. & Gr. 747; *Williams v. Hedley*, 8 East, 378; or, to induce the plaintiff to accept a composition, in common with the other creditors, on the plaintiff's debt to him. *Smith v. Bromley*, 2 Doug. 696, n.; *Atkinson v.*

*Deuby*, and *In re Leuzberg's Policy*, cited *ante*, p. 614. So where the plaintiff gave the defendant a promissory note for the like purpose, and was compelled to pay it at the suit of a third person, to whom the defendant had indorsed it, he was held entitled to recover the amount from the defendant in this form of action. *Smith v. Cuff*, 6 M. & S. 160. But in a similar case, where the plaintiff had voluntarily paid the note to the defendant, it was held to be a voluntary payment, which he could not recover back. *Wilson v. Ray*, 10 Ad. & E. 82. As to the recovery of premiums paid on an illegal policy, *vide infra*.

4. Money is not recoverable where the contract is *executed* and the plaintiff is *in pari delicto* with the defendant. *Andree v. Fletcher*, 3 T. R. 266; *Thistlewood v. Cracroft*, 1 M. & S. 500; *Stokes v. Twitchen*, 8 Taunt. 492. Thus where on a criminal charge an order has been made on A. to find a surety for his good behaviour, and B. becomes such surety on the terms that 50*l.*, the amount of the recognizance, should be deposited by A. with B. as security to him, A. cannot recover the 50*l.* either before or after the expiration of the recognizance, and although he has made no default. *Herman v. Jeuchner*, 15 Q. B. D. 561, C. A. So in the case of a surety for the appearance of a prisoner in a criminal case. *Wilson v. Struquell*, 7 Q. B. D. 548, as corrected by *Herman v. Jeuchner*, *supra*. See also *Consolidated, &c., Co. v. Musgrave*, (1900) 1 Ch. 37. So where the plaintiff has paid money to compromise a prosecution for disobeying an order of sessions, which he afterwards finds to be irregular and void, he cannot recover back his money. *Goodall v. Loundes*, 6 Q. B. 464. So where the plaintiff paid money to the defendant on the terms that he should not appear at the public examination of a bankrupt or oppose his discharge. *Kearley v. Thomson*, 24 Q. B. D. 742, C. A. Partial execution of the contract is sufficient to prevent the money being recovered back. S. C. See further *Begbie v. Phosphate Sewage Co.*, *Scott v. Brown*, and *Slaughter v. Brown*, cited *post*, p. 667. So where the agent A. of an insurance company P., has *bonâ fide* induced H. to effect a policy with P. which is illegal and void for want of interest, *vide ante*, p. 422, the premiums paid are not recoverable by H. *Harse v. Pearl Life Assur. Co.*, (1904) 1 K. B. 558, C. A. *Secus* where the agent's statements were fraudulent. *Id.* 563, *per* Collins, M.R., following *British Workman's, &c., Assur. Co. v. Cunliffe*, 18 T. L. R. 502, C. A.

The agent of a party to an illegal contract, who receives money paid under it to the use of his principal, cannot set up the illegality of the transaction to an action brought against him by his principal. *Tenant v. Elliott*, 1 B. & P. 3; *Farmer v. Russell*, *Id.* 296. But it is otherwise where the receipt itself is illegal, and the agent is therefore also *particeps criminis*. *McGregor v. Lowe*, Ry. & M. 57; *per* Crompton, J., in *Nicholson v. Gooch*, 5 E. & B. 1016; 25 L. J., Q. B. 137.

The defence of illegality must be specially pleaded. See *Defence in actions on simple contracts*, *post*, p. 665.

[On transfer of debt.] Where A. was indebted to B., and B. to C., and B. gave an order to A. to pay C. the sum due from A. to B., and the order was assented to by A., on the security of which C. lent B. a further sum; it was held that, on A.'s refusal to pay, C. might maintain an action for money had and received against him. *Israel v. Douglas*, 1 H. Bl. 239; *Wilson v. Coupland*, 5 B. & A. 228; *Walker v. Rostron*, 9 M. & W. 411; *Griffin v. Weatherby*, L. R., 3 Q. B. 753. It seems, however, that the agreement must be such that the debt due from B. to C. is thereby extinguished. *Uxon v. Chadley*, 3 B. & C. 591; *Liversidge v. Broadbent*, *Wharton v. Walker*, *infra*; *Cochrane v. Green*, 9 C. B., N. S. 448; 30 L. J., C. P. 97. Where A., being indebted to B., gave him an order upon C., his (A.'s) tenant, to pay the

amount out of the next rent that would become due, and B. sent the order to C., but had not any direct communication with him upon the subject, and at the next rent-day C. produced the order to A., and promised him to pay the amount to B., and, upon receiving the difference between that and the whole rent, A. gave a receipt for the whole,—it was held that B. could not recover the amount of the order from C., either in an action for money had and received, or upon an account stated. *Wharton v. Walker*, 4 B. & C. 163; see the principle of the cases discussed in *Liversidge v. Broadbent*, 4 H. & N. 603; 28 L. J., Ex. 332. So where an overseer stopped part of a pauper's allowance, and engaged to pay it to the pauper's landlord for his rent, in pursuance of an understanding between the three, it was held that the landlord could not maintain money had and received against the overseer. *Blackledge v. Harman*, 1 M. & Rob. 344. Where, by the consent of all parties, the defendant is to pay to the plaintiff a debt due from defendant to A., who is the plaintiff's debtor, it lies on the plaintiff to show that there was, at the time of the agreement, an ascertained debt due from defendant to A. *Fairlie v. Denton*, 8 B. & C. 395. A promise by A. to B. to pay money when A. receives a debt due to him from C., does not constitute an equitable assignment, so as to charge the debt in the hands of C., or to afford a defence in an action by A. against C. for the debt due to him. *Field v. Megaw*, L. R., 4 C. P. 660. But an undertaking to pay when and as received "all dividends coming to me in respect of my proof for 800*l.*, upon the estate of J. L.," operates as an equitable assignment of such dividends. *Ex pte. Brett*, 7 Ch. D. 419. So a letter from A. and B. to their creditor, C., "we hold at your disposal the sum of about 425*l.*, due to us from D. for goods delivered by us to them," is an equitable assignment to C. of D.'s debt. *Gorringe v. Irwell India Rubber, &c., Works*, 34 Ch. D. 128, C. A. An assignment of all the grantor's future book debts is good, although it is not confined to those arising in a particular business. *Official Receiver v. Tailby*, 13 Ap. Ca. 523, D. P. The assignment is subject to any lien or set-off available against the assignor. *Roxburghe v. Cox*, 17 Ch. D. 520, C. A.; *Webb v. Smith*, 30 Ch. D. 192, C. A. See also *Young v. Kitchin*, and *Newfoundland, Government of, v. Newfoundland Ry.*, *post*, p. 708. A writing opening a credit for a particular sum does not constitute an equitable assignment thereof. *Lariviere v. Morgan*, L. R., 7 H. L. 423. If an order given by A. to B. to pay C. a debt due from B. to A. amount to a bill of exchange, as defined in the Stamp Act, 1891, s. 32 (*ante*, p. 239), it will in general be inadmissible in evidence unless stamped as such. *Pott v. Lomax*, 6 H. & N. 529; 30 L. J., Ex. 210. See *Griffin v. Weatherby*, L. R., 3 Q. B. 753, and other cases cited *ante*, pp. 241 *et seq.* It may be observed that the Bills of Exchange Act (45 & 46 V. c. 61), s. 53, provides that "a bill of itself does not operate as an assignment of funds in the hands of the drawee, available for payment thereof."

Under the J. Act, 1873, s. 25 (6), *ante*, p. 307, any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt of which notice in writing shall have been given by the debtor, is effectual to transfer the legal right (subject to equities affecting the same), to the debt and the remedies therefor from the date of the notice. Under this section the legal right to the debt itself passes to the assignee. *Read v. Brown*, 22 Q. B. D. 128, C. A. A mortgage of debts due to the mortgagor in the ordinary form, with the usual proviso for redemption, &c., is "an absolute assignment (not purporting to be by way of charge only)." *Tancred v. Delagoa Bay, &c., Ry. Co.*, 23 Q. B. D. 239, *accord*. *Durham v. Robertson*, *per* C. A., and *Bateman v. Hunt*, *post*, p. 621; *Hughes v. Pump House Hotel Co.*, (1902) 2 K. B. 190, C. A. So an assignment of debts may be absolute, although a trust is thereby created as to the proceeds of such debts in favour of the assignor. *Comfort v. Betts*, (1891) 1 Q. B. 737,



C. A.; *Fitzroy v. Cave*, (1905) 2 K. B. 364, C. A.; such an assignment is not invalid as savouring of maintenance, or because taken for a collateral purpose. S. C. Where the defendants, the trustees and executors under a will, sent G., a residuary legatee, an account showing the amount of the share due to him, and G. sent this account to H., with the direction, signed by him, "I hereby instruct the trustees in power to pay H. the balance shown in the above statement," whereof notice was given to the defendants, it was held that H. could recover under sub-sect. 6. *Harding v. Harding*, 17 Q. B. D. 442. But a memorandum, "we hereby charge the sum of 1,080*l.*, which will become due to us from J. R. on the completion of the above buildings as security for the advances, and we hereby assign our interest in the above-mentioned sum until the money with added interest shall be repaid you," is not within sub-sect. 6. *Durham v. Robertson*, (1898) 1 Q. B. 765, C. A. See also *Mercantile Bank of London v. Evans*, (1899) 2 Q. B. 613, C. A.; *Jones v. Humphreys*, (1902) 1 K. B. 10. A deed signed and sealed by one partner A. in the name of his firm, purporting to assign a partnership debt for valuable consideration, is good as an equitable assignment, although A. had no authority to execute a deed for the partnership. *Marchant v. Morton Down & Co.*, (1901) 2 K. B. 829, 832; *Ex pte. Wright*, (1906) 2 K. B. 209. Debts may be assigned under the sub-section before they become due. *Walker v. Bradford Old Bank*, 12 Q. B. D. 511. The debtor cannot object that there is no consideration for the assignment. S. C. It is sufficient to give notice of assignment after the death of the assignor; S. C.; or after that of the assignee. *Bateman v. Hunt*, (1904) 2 K. B. 530, C. A. Where there have been successive assignments to several persons of a debt, priority of notice determines the title of the assignees. *Marchant v. Morton Down & Co.*, *supra*. As to the deductions which the defendant may make in respect of claims he has against the assignor, see *Young v. Kitchin*, and *Newfoundland, Government of, v. Newfoundland Ry. Co.*, *post*, p. 708. This sub-section is retrospective. *Dibb v. Walker*, (1893) 2 Ch. 429. The notice of assignment may be disregarded where the debtor had given a negotiable security for the debt. *Bence v. Shearman*, (1898) 2 Ch. 582. Although the requirements of sub-sect. 6 have not been complied with, the assignee of a debt for valuable consideration may, after notice to the debtor of the assignment, sue him for the debt. *William Brandt & Sons v. Dunlop Rubber Co.*, (1905) A. C. 454, D. P., making the assignor a party to the action; *Id.* 462.

*In case of partnership.*] One partner cannot sue his co-partner for his share of the profits as long as the partnership is undissolved and accounts unsettled; therefore, where two persons agree to divide the profits of an agency between them, and one of them receives, on account of such agency, a certain sum of money, the other cannot maintain this action for a moiety, it being a partnership transaction, and there being no account settled. *Bovill v. Hammond*, 6 B. & C. 149. A transaction between partners may, however, by agreement or a separate security, be so separated from the partnership affairs, though arising out of them, as to form the subject of an action by one against another. Such an action involves no general account. See *Jackson v. Stopherd*, 2 Cr. & M. 361; *Coffee v. Brian*, 3 Bing. 51; *Pearson v. Skelton*, 1 M. & W. 504; also cases *ante*, p. 595, *Action for money paid*, and *post*, p. 628, *Action on an account stated*. As to what constitutes partnership of persons *inter se*, see the Partnership Act, 1890, ss. 1, 2, *ante*, pp. 555, 556, and *Walker v. Hirsch*, 27 Ch. D. 460, C. A.

## ACTION FOR INTEREST.

Where interest is recoverable by law, it is either claimed in a special claim on an agreement—or given by way of damages by the jury, though not demanded in the claim—or it is the subject of a separate claim for interest, which last form has been commonly adopted where the principal sum only is recoverable under another claim. Thus, as interest is not generally recoverable, at common law, on claims for goods sold, money lent or had and received (*vide post*, p. 623), it is usual, if interest be due at all, to demand it in a separate claim. Gibbs, C.J., in *Maberley v. Robins*, 5 Taunt. 625, thought that a separate count was not necessary to enable the jury to give interest by way of damage even on a count to recover a deposit paid on a sale, and in cases within the statute 3 & 4 W. 4, c. 42, *post*, p. 625, the claim seems to be superfluous, for the jury may give interest on any issue in such cases. See also *Edwards v. Gt. W. Ry. Co.*, 11 C. B. 588; 21 L. J., C. P. 72. A claim for interest is not supported by proof that the defendant, a widow, promised the plaintiff to pay interest on a debt of her husband, if the plaintiff forebore to “proceed against her” for payment of the debt; for the debt was not *her* debt. *Petch v. Lyon*, 9 Q. B. 147.

Under this head the subject of interest will be noticed generally, and without reference to a special claim.

Interest, when recoverable, is to be calculated down to the time of final judgment. *Robinson v. Bland*, 2 Burr. 1085—8. But if there has been a tender, it runs only to the time of such tender. *Dent v. Dunn*, 3 Camp. 296. Where a principal sum is payable with interest at a fixed rate the interest ceases to accrue on the recovery of a judgment for the principal, for the contract has then passed *in rem judicatum*; *Florence v. Jennings*, 2 C. B., N. S. 454; 26 L. J., C. P. 274; *Ex pte. Fewings*, 25 Ch. D. 338, C. A.; and the judgment debt bears interest at 4 per cent. under 1 & 2 V. c. 110, s. 17. *Ex pte. Oriental Financial Association*, 4 Ch. D. 33, C. A. If however the interest is payable at a given rate under a covenant so expressed as to avoid such merger, that rate will continue to be payable, notwithstanding the judgment. *Economic Life Assur. Soc. v. Usborne*, (1902) A. C. 147, D. P.

[*When due at common law.*] The principle upon which interest is claimed at common law is, that it is matter of contract, express or implied, between the parties. “It is now established as a general principle, that interest is allowed by law only upon mercantile securities, or in those cases where there has been an express promise to pay interest; or where such promise is to be implied from the usage of trade, or other circumstances;” *per* Abbott, C.J., *Higgins v. Sargent*, 2 B. & C. 349; *Page v. Newman*, 9 B. & C. 381; *Rhodes v. Rhodes*, Johns. 653; 29 L. J., Ch. 418; *L. Chatham & Dover Ry. Co. v. S. E. Ry. Co.*, (1893) A. C. 429, D. P.; *Johnson v. Rea*, (1904) A. C. 817; notwithstanding many older cases at variance with the rule as above stated. But “money obtained by fraud and retained by fraud can be recovered with interest.” *Id.*, p. 822, *per* J. C. See also *Borthwick v. Elderslie S.S. Co.*, (1905) 2 K. B. 516, 520, *per* Collins, M. R. There may be a usage to pay a certain interest on the settled balance of a merchant’s account; see *Orme v. Galloway*, 9 Exch. 544; 23 L. J., Ex. 118. Where title deeds have been deposited to secure a loan the loan carries interest. *In re Kerr’s Policy*, L. R., 8 Eq. 331. *Acc. In re Drax*, (1903) 1 Ch. 781, C. A. In an action on an undertaking to let judgment go by

default in a suit for a mortgage debt, and to pay principal and interest, in consideration of staying execution for a certain time, it was held that the jury might give interest by way of damages down to the date of the verdict for breach of the agreement by non-payment; and this without the aid of stat. 3 & 4 W. 4, c. 42. *Harper v. Williams*, 4 Q. B. 219. Under a warrant of attorney to pay a sum of money, with interest at a given rate, on a given day, if the sum be not paid on that day, there is no contract to continue to pay the same rate of interest after the day for payment; damages may, however, be awarded by the jury for the non-payment, and the former rate may be taken by them as a guide in assessing the damages. *Cook v. Fowler*, L. R., 7 H. L. 27. See also *In re Roberts*, 14 Ch. D. 49, C. A. In the case of a money bond, see *In re Dixon*, *post*, p. 753.

The following cases in which interest was not allowed must now be taken as subject to the statute hereafter mentioned.

It has been held that interest cannot, at common law, be recovered on money received to the use of another; *De Havilland v. Bowerbank*, 1 Camp. 50; though the money was obtained by fraud; *Crockford v. Winter*, *Id.* 129; nor, for money lent, to be repaid either upon demand or at a given time; *Calton v. Bragg*, 15 East, 223; *Higgins v. Sargent*, 2 B. & C. 351; nor, where the borrower by a written instrument promised to repay it at a certain time; *Page v. Newman*, 9 B. & C. 378; nor, on money paid; *Carr v. Edwards*, 3 Stark. 132; nor, on money due for work and labour; *Trelawney v. Thomas*, 1 H. Bl. 303; nor, on money due for goods sold and delivered to be paid for on a certain day; *Gordon v. Sean*, 12 East, 419; 2 Camp. 229, n.; nor, upon a policy of insurance; *Kingston v. McIntosh*, 1 Camp. 518; nor, upon a policy of insurance on a life, where the money was payable six months after proof of the death; *Higgins v. Sargent*, 2 B. & C. 348; nor, on a single bond; *Hogan v. Page*, 1 B. & P. 337; nor on rent; *per Tindal, C.J.*, *Foster v. Weston*, 6 Bing. 714; nor, on an instrument, "to pay 1,500*l.* to be delivered in goods by three payments of 500*l.* each, at 3, 5, and 7 months." *Foster v. Weston*, 6 Bing. 709. An auctioneer employed to sell an estate, who receives a deposit from the purchaser, is a stake-holder liable to be called upon to pay the money at any time; and therefore, although he may make interest by it, he is not liable to pay interest to the vendor on the completion of the contract. *Harrington v. Hoggart*, 1 B. & Ad. 577. So of an agent or banker who holds money payable at a moment's notice. See cases cited by Parke, J., S. C.

*Interest in the case of mercantile instruments.*] The mercantile instruments which have always been held to carry interest, whether mentioned or not, are bills of exchange and promissory notes. By the Bills of Ex. Act, 1882, s. 9 (3), *ante*, p. 352, where a bill of exchange, or promissory note (see s. 89, *ante*, p. 412), is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date thereof, and if undated from its issue; and where interest is made payable at a certain rate, the jury may give interest at the *same* rate, against the drawer, from the time of being due; *Keene v. Keene*, 3 C. B., N. S. 144; 27 L. J., C. P. 88; but the jury are not bound to give it. *Cook v. Fowler*, *supra*. If the instrument be silent about interest, it is payable only from the time when the instrument becomes due. Upon a bill or note, payable on demand generally, not specifying interest, interest is given from the time of the demand proved; *Blaney v. Hendricks*, 2 W. Bl. 761; or, dispensed with, *e.g.*, by the bank which gave the note closing its doors; *In re East of England Banking Co.*, L. R., 6 Eq. 368; L. R., 4 Ch. 14; overruling *In re Herefordshire Banking Co.*, L. R., 4 Eq. 250. And when no demand is

proved, from the issuing of the writ. *Pierce v. Fothergill*, 2 N. C. 167. Against the drawer of a bill, not mentioning interest, interest is only recoverable from the time of his receiving notice of dishonour. *Walker v. Barnes*, 5 Taunt. 240; 1 Marsh. 36. It has, however, been said that, in an action on a bill not bearing interest on its face, interest is in the nature of damages, and the jury may allow it, or may disallow it in case the delay of payment has been occasioned by the default of the holder. *Per Bayley, J., Cameron v. Smith*, 2 B. & A. 308; *Brewerton v. Parker*, 17 L. T. 325, Byles, J. But though the jury are to decide whether interest is to be allowed, and what is the interest current at any particular place, it is a question of law what rate of interest is to be allowed on such a bill; therefore where the jury gave the indorsee of a bill interest at 6 per cent., in an action against the drawer on non-acceptance, and the interest at the place where it was drawn was found to be 25 per cent., it was held that the plaintiff was entitled by law to the higher rate. *Gibbs v. Fremont*, 9 Exch. 25; 22 L. J., Ex. 302. The indorsee of a bill may sue the acceptor for interest, although he has taken another bill from the defendant for the amount of the first, which has been duly paid. *Lumley v. Musgrave*, 4 N. C. 9.

When goods are sold to be paid for by bill, interest from the time when the bill would, if given, have become due may be recovered as part of the price in an action for goods sold and delivered. *Farr v. Ward*, 3 M. & W. 25; *Davis v. Smyth*, 8 M. & W. 399.

*Interest implied.*] A promise to pay interest may be implied from the acts of the parties. Thus, where a former balance has been settled upon an allowance of interest in a banker's book, it is an admission by the party of a contract to pay interest on the sums advanced to him by the banker. *Calton v. Bragg*, 15 East, 223, 228, *per* Ld. Ellenborough, C.J. So where a tradesman S. in his yearly accounts delivered to his customer A., charged interest for 3 years and longer, and A. made no objection to the charge, and paid S. from time to time sums generally on account, it was held that an agreement to pay interest should be inferred. *In re Anglesey, Mqs. of*, (1901) 2 Ch. 548. But where the defendant undertook to transfer to plaintiff's account a sum due from defendant to A., plaintiff cannot recover interest on it merely because interest was allowed in the usual course of dealing between defendant and A. *Frühling v. Schroeder*, 2 N. C. 77.

Compound interest is not generally allowed unless the parties have expressly or impliedly contracted to pay it, or there be a custom. *Fergusson v. Pyffe*, *post*, p. 625. Even where the defendant contracted to pay money by certain instalments, and also interest on each instalment from the day appointed for payment, and to secure payment of such interest by his bond, it was held that, on default of payment, a jury was not bound, either at common law or under stat. 3 & 4 W. 4, c. 42, s. 28, to award interest upon such interest. *Attwood v. Taylor*, 1 M. & Gr. 279. Where the plaintiffs had acted as agents for the defendant, and advanced moneys, and at the close of each account (which was delivered annually) had charged interest, and at each rest had added the interest of the preceding year to the principal, Ld. Ellenborough held that the accounts, which had not been objected to for a number of years, afforded evidence of a promise to pay interest in this manner. *Bruce v. Hunter*, 3 Camp. 467. But where compound interest is so charged, it must appear that the debtor knew that the practice was to make such rests. *Moore v. Voughton*, 1 Stark. 487; and see *Dawes v. Pinner*, 2 Camp. 486, n. And even where a mortgage debtor had settled mortgage accounts on the footing of compound interest, both he and the mortgagee being under the erroneous

impression that compound interest was payable under the mortgage deed, the debtor was held entitled to have the accounts reopened. *Daniell v. Sinclair*, 6 Ap. Ca. 181, J. C.

Where, by the course of dealing between a banker and his customer, the former has charged compound interest on the amount of the customer's overdrawn account, the banker loses the right to charge compound interest when the relation of banker and customer ceases between the parties, as on the death of the customer. *Williamson v. Williamson*, L. R., 7 Eq. 542; following *Fergusson v. Fyffe*, 8 Cl. & F. 121. But it seems that the balances will carry simple interest from the customer's death. S. CC.

*Interest by statute.*] By the Civil Procedure Act, 1833, 3 & 4 W. 4, c. 42, s. 28, "upon all debts or sums certain payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law."

By sect. 29, the jury "may, if they shall think fit, give damages in the nature of interest over and above the value of the goods at the time of the conversion or seizure in all actions of *trover* or *trespass de bonis asportatis*, and over and above the money recoverable in all actions on *policies of assurance* made after the passing of this Act" (14th August, 1833).

Money claimed on a special agreement in writing, to let judgment go by default, in an action against a mortgagor for principal and interest, and to pay the amount of debt and costs on a named day, if certain securities were then ready, is not a debt certain payable at a time certain within sect. 28; *semb. Harper v. Williams*, 4 Q. B. 219. The deposit paid on a consideration that has failed may be recovered back with interest, on a previous demand of interest made under it; *Mowatt v. Londesborough*, 4 E. & B. 1; 23 L. J., Q. B. 177; claiming interest from an earlier date than the date of the demand will not vitiate it. S. C. So interest may be recovered on an over-payment made by a person to obtain his goods from a carrier, on which an illegal charge has been made, if due demand be made under the statute. *Edwards v. Gt. W. Ry. Co.*, 11 C. B. 588; 21 L. J., C. P. 72. A letter of application for a loan till a day certain, not showing on the face of it an obligation to repay, is not an instrument by virtue of which the debt is payable at a certain time. *Taylor v. Holt*, 3 H. & C. 452; 34 L. J., Ex. 1. A demand of payment of the balance of an account, stated therein inaccurately, is not within the statute. *Hill v. S. Staffordshire Ry. Co.*, L. R., 18 Eq. 154; *Ward v. Eyre*, 15 Ch. D. 130, C. A. A lump sum payable for freight, under a charter-party, on the delivery of the cargo is not within the section, because it is not payable at a time certain. *Merchant Shipping Co. v. Armistage*, L. R., 9 Q. B. 39, 114, Ex. Ch.; see also *L. Chatham & Dover Ry. Co. v. S. E. Ry. Co.*, (1893) A. C. 429. So where, under a written agreement, a provisional payment subject to adjustment was to be made. S. C. The "sum certain payable must be a certain sum which is due absolutely and in all events from the one party to the other, although it may not come strictly within the term 'debt.'" S. C.: *Id.* 436, *per* Ld. Herschell, C. A covenant by A. to pay a sum within 6 years after his death has been held to be within the section. *In re Horner*, (1896) 2 Ch. 188. See also *Duncombe v. Brighton Club, &c., Co.*, L. R., 10 Q. B. 371.

A claim indorsed on the writ for interest on the amount claimed thereby, from its date till payment or judgment, is not a sufficient demand within sect. 28. *Rhymney Ry. Co. v. Rhymney Iron Co.*, 25 Q. B. D. 147, C. A. A notice of a call made on a contributory of a company being wound up, stating that interest would be charged if payment were not made by a certain day, is within it. *Ex pte. Lintott*, L. R., 4 Eq. 184; *Barrow's case*, L. R., 3 Ch. 784; see *In re Welsh Flannel, &c., Co.*, L. R., 20 Eq. 360; as to interest on calls on forfeited shares, see *Stocken's case*, L. R., 5 Eq. 6. As to demand for interest when the amount of debt is not ascertained, *vide* (1893) A. C. 436, *per* Ld. Herschell, C.

Interest is not payable under sect. 29, under a policy of insurance, in respect of a delay in payment occasioned only by there being no person who could give a discharge for the amount thereof. *Webster v. British Empire, &c., Assur. Co.*, 15 Ch. D. 169, C. A. Nor in an action brought against an executor for the proceeds of the plaintiff's minerals, severed and converted by his testator. *Phillips v. Homfray*, (1892) 1 Ch. 465, C. A.

As to interest on a solicitor's bill, *vide ante*, p. 506.

By 17 & 18 V. c. 90, s. 1, all Acts or parts of Acts of Parliament mentioned in the schedule, and "all existing laws against usury," are repealed. By sect. 3, where interest was payable on August 10th, 1854, on any contract, express or implied, for payment of the legal or current rate of interest, or where interest was then payable by any rule of law, the same rate shall be recoverable as if the Act had not passed. By sect. 4, nothing is to affect the law relating to pawnbrokers. See *Flight v. Reed*, 1 H. & C. 703; 32 L. J., Ex. 265, and observations thereon in *Rimini v. Van Praagh*, L. R., 8 Q. B. 1. The repeal of the usury laws does not, however, deprive the Court of the power of relieving expectant heirs from unconscionable bargains. *Aylesford, El. of, v. Morris*, L. R., 8 Ch. 484. See also *Bolingbroke v. O'Rorke*, 2 Ap. Ca. 814, D. P. Now by the Money Lenders Act, 1900, 63 & 64 V. c. 51, s. 1 (1), *ante*, p. 600, in an action by a money-lender for money lent, or for enforcing a security, where the interest is excessive the Court may grant relief. See cases in which this relief is given, *ante*, p. 601.

#### ACTION ON AN ACCOUNT STATED.

By Rules, 1883, O. xx. r. 8, "in every case in which the cause of action is a stated or settled account, the same shall be alleged with particulars, but in every case in which a statement of account is relied on by way of evidence or admission of any other cause of action which is pleaded, the same shall not be alleged in the pleadings."

To recover upon a claim on an account stated the plaintiff must prove an absolute acknowledgment by the defendant of the plaintiff's claim. A qualified acknowledgment is not sufficient, as "I would have paid you if you had not done so and so." *Evans v. Verity, Ry. & M.* 239. And an offer of a sum certain, on demand of a larger, is not evidence on the account stated. *Wayman v. Hilliard*, 4 Moore & P. 729; 7 Bing. 101. An entry in a bankrupt's examination of a certain sum being due to A., is not, it seems, evidence of an account stated between them. *Pott v. Clegg*, 16 M. & W. 321; and *Ex pte. Topping*, 34 L. J., Bky. 44, cited *post*, p. 691, overruling *Eicke v. Nokes*, 1 M. & Rob. 359. An oral admission of a debt due for goods sold, is evidence of an account stated, though the agreement for the sale was in writing. *Newhall v. Holt*, 6 M. & W. 662. An agreement by a member of a company, on behalf of the company, to pay the plaintiff's bills in consideration of withdrawing an attachment against the company's funds, is evidence of an account

stated in an action against the member as one of the company, though the defendant became a member after the debt was incurred. *Barker v. Birt*, 10 M. & W. 61. The company in this case seems to have been an unincorporated company or trading partnership. Where a party, examined before commissioners of bankrupt, admitted that he had received a sum on account of the bankrupt, after an act of bankruptcy, but not that it was a subsisting debt; held that this would not support a count on an account stated with the assignees. *Tucker v. Burrow*, 7 B. & C. 623.

A promissory note given in 1844 by the defendant for a sum described as interest on a note for 117*l.* dated 1838, is evidence on an account stated of a subsisting debt of 117*l.* due in 1844. *Perry v. Stude*, 8 Q. B. 115. An I O U is evidence of an account stated with the person who produces it, though not named in it, and if another person was meant, the defendant must prove this. *Feseunmeyer v. Adcock*, 16 M. & W. 449. But it may be shown that it was given on a consideration that has failed; as for part of a deposit on a sale which has gone off for want of title. *Wilson v. Wilson*, 14 C. B. 616; 23 L. J., C. P. 137; and see *Berry v. Storey*, 2 C. L. R. 815, H. T. 1854, C. P. Where an I O U was given for a stipulated premium, extra the consideration specified in an apprentice deed, which was therefore void by 8 A. c. 9, s. 39, yet the master may recover the money under an account stated, the boy having, in fact, served out his full term. *Westlake v. Adams*, 5 C. B., N. S. 248; 27 L. J., C. P. 271. An account stated may be maintained on an oral agreement of what the balance between the parties is, though one of the items be the price of land sold under an oral agreement, whether the statement be after the land has changed hands; *Cocking v. Ward*, 1 C. B. 858; or before, if it be shown to have subsequently come into the defendant's possession. *Laycock v. Pickles*, 4 B. & S. 497; 33 L. J., Q. B. 43. See also *Wilson v. Marshall*, *infra*. But there must be an admission of a debt due, in order to support an account stated: therefore when the defendant orally agreed to purchase a lease to the plaintiff, and gave as deposit an I O U for 25*l.*, and afterwards refused to complete the purchase; it was held that the I O U, taken with the circumstances which it was given, was no evidence of an account stated. *Lemere v. Elliott*, 6 H. & N. 656; 30 L. J., Ex. 350. See *Buck v. Hurst*, L. R., 1 C. P. 227, *ante*, p. 598.

In an action by the plaintiff as executrix, where the defendant, on being applied to by her for the payment of interest, stated that she would bring her some, it was held that, though this was an admission that something was due, still, as the nature of the debt did not appear, nor whether it was due to the plaintiff as executrix, or in her own right, nor that it was one for which assumpsit would lie, the plaintiff was not entitled to recover even nominal damages. *Green v. Davies*, 4 B. & C. 235; and see *Teal v. Auty*, 2 B. & B. 101. And, generally an account is not stated unless some specific sum is agreed upon; therefore a letter asking the plaintiff "to hold the defendant's cheque till Monday, when I will send the amount," the amount of the cheque being unknown, will not support this claim. *Lane v. Hill*, 18 Q. B. 252; 21 L. J., Q. B. 318. If it appear that the account is stated of a debt due from a third person to the plaintiff, which defendant promised to pay without any consideration, this is a defence. *French v. French*, 2 M. & Gr. 644; *Wilson v. Marshall*, L. R., 2 C. L. 356, Ex. Ch. So where the defendant gave a written promise to pay a debt due from her deceased husband to the plaintiff's deceased husband with interest, this was held no evidence on a common count for interest, or on an account stated; for the debt was not due from the defendant. *Petch v. Lyon*, 2 Q. B. 147. A promissory note was found among the testator's papers, upon which the executors promised to pay it, but it afterwards appeared that it was intended as a legacy, and was not in payment of a debt; held, not evidence of an account stated with the

payee. *Gough v. Pindon*, 7 Exch. 48; 21 L. J., Ex. 58. A written guarantee by one of several partners without the authority of the others, and a letter written by their clerk explaining it, also without the authority of all, are not evidence of an account stated by the firm. *Brettel v. Williams*, 4 Exch. 623. It is sufficient to prove the account stated without giving evidence of the several items constituting the account; *Bartlett v. Emery*, 1 T. R. 42, n.; and proof of the admission of a single item is sufficient. *Highmore v. Primrose*, 5 M. & S. 65.

Where a partnership has been dissolved and a balance struck, it may be recovered under this claim even as between partners; *Foster v. Allanson*, 2 T. R. 479; *Brierly v. Cripps*, 7 C. & P. 709; *Wilson v. Cutting*, 10 Bing. 436; and the action is then maintainable without any express promise to pay. *Wray v. Milestone*, 5 M. & W. 21. But it will only lie on a final balance of the partnership accounts, and not during the continuance of the partnership. *Fromont v. Coupland*, 2 Bing. 170; *Goddard v. Hodges*, 1 Cr. & M. 37; *Carr v. Smith*, 5 Q. B. 128. If an account were stated of the balance due on a deed or bond, this action did not lie, for it continued to be a specialty debt. *Middleditch v. Ellis*, 2 Exch. 623.

The plaintiff may recover, though the account was, in fact, stated by the defendant with the plaintiff's wife; but not on an account stated by the wife of the defendant; *Styart v. Rowland*, B. N. P. 129; unless she is proved to be the defendant's agent in the transaction. An acknowledgment in a casual conversation with a stranger, not shown to be the agent of the plaintiff, is not sufficient. *Breckon v. Smith*, 1 Ad. & E. 488. Where there were accounts between A. and B., and C. became a partner with B., and dealings continued between the partners and A. who afterwards settled an account with B. and C., wherein was included the money due from A. to B. alone, *Ld. Kenyon* held that the whole might be given in evidence in an action by B. and C. as on an account stated. *Moore v. Hill*, Peake, Ev., 5th ed. 253; see *Gough v. Davies*, 4 Price, 214; *David v. Ellise*, 5 B. & C. 196. The debt on which the account is founded may be an equitable one; thus, where a trustee holds money in trust for the plaintiff, and states an account with him and acknowledges himself a debtor for the amount, he is liable on this claim. *Per Crompton, J., Howard v. Brownhill*, 23 L. J., Q. B. 23, citing *Roper v. Holland*, 3 Ad. & E. 99. An account stated was formerly considered conclusive, but errors in it may now be corrected. *Per Ld. Mansfield, C.J., Trueman v. Hurst*, 1 T. R. 42; *Dails v. Lloyd*, 12 Q. B. 531. If the defendant account with the plaintiff in a particular character, he will be taken to have admitted that character. *Peacock v. Harris*, 10 East, 104.

A promissory note, if not properly stamped, cannot be given in evidence as an admission of an account stated; *Green v. Davies*, 4 B. & C. 235; but an unstamped foreign bill of exchange drawn abroad, which has not been presented for payment, or indorsed or negotiated in the United Kingdom, can so be used. *Griffin v. Weatherby*, L. R., 3 Q. B. 753. A note, payable on a contingency, is not evidence of an account stated. *Morgan v. Jones*, 1 C. & J. 162. See further on the admissibility of bills or notes to prove an account stated, *ante*, pp. 360, 375, 393, 415.

The account must be stated before the commencement of the action; and where a defendant, after action brought, had offered a cognovit, it was held insufficient evidence to support the count. *Spencer v. Parry*, 3 Ad. & E. 331; *Allen v. Cook*, 2 Dowl. 546.

Where the plaintiff relies on an account stated on one day, the defendant cannot prove, without pleading payment or set-off, a subsequent accounting including fresh items, by which the balance was turned against the plaintiff. *Fidgett v. Penny*, 1 C. M. & R. 108. But if the second accounting were a



mere correction of the first, it would be admissible. See *Thomas v. Hawkes*, 8 M. & W. 140.

Where accounts are submitted to an arbitrator, his award cannot be given in evidence as an account stated. *Bates v. Townley*, 2 Exch. 152, overruling *Keen v. Batshore*, 1 Esp. 194. But where an incoming tenant agrees to take fixtures at a valuation to be made by brokers, and after it has been made the tenant enters, the value so ascertained may be recovered on such a claim. *Salmon v. Watson*, 4 B. Moore, 73.

An infant cannot state a valid account; *Trueman v. Hurst*, 1 T. R. 40; but formerly it was good if ratified after full age and before action. *Williams v. Moor*, 11 M. & W. 256. The Infants' Relief Act, 1874 (37 & 38 V. c. 62, *post*, p. 675), s. 1, however, makes all accounts stated with infants absolutely void, and they are therefore now incapable of ratification; see also sect. 2. No account can be stated with the agent of a lunatic, so as to bind the lunatic; nor can a lunatic state one. *Tarbut v. Bispham*, 2 M. & W. 2.

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## ACTIONS AGAINST CARRIERS.

Carriers may be of goods or of persons, or of both; and they may be carriers by land or by sea; or of dead or of live stock. The obligations are not the same in all these cases.

### COMMON CARRIERS.

The obligation or liability of owners and masters of British seagoing ships has been already noticed under a previous head, *ante*, pp. 472 *et seq.*, specially with reference to the Merchant Shipping Act, 1894.

The obligations of carriers by land are regulated in some respects by the Carriers Act (11 G. 4 & 1 W. 4, c. 68), which relates to their liability for loss of goods. Canal and railway companies are subject to the regulations of the Railway and Canal Traffic Act, 1854 (17 & 18 V. c. 31), and the Regulation of Railways Act, 1873 (36 & 37 V. c. 48), both in respect of goods and passenger traffic, as well as to the Acts relating to carriers in general, so far as they are applicable. Railway companies are further regulated by the Regulation of Railways Act, 1868 (31 & 32 V. c. 119).

The Railway and Canal Traffic Act, 1854, professes only to regulate the obligations of companies as carriers on their respective rails or canals, and does not apply to other carriers using such rails or canals. Hence the obligation of these latter carriers must depend on the general law of carriers. It is presumed that carriers by inland waters are within the Land Carriers Act, 11 G. 4 & 1 W. 4, c. 68; at least there appears to be no other statute specially applicable to inland navigation, except the several local or private Acts under which such canals, &c., are established, and except the Act 8 & 9 V. c. 42, by which canal companies (theretofore empowered only to take tolls) were allowed to become carriers of goods themselves, with power to make reasonable charges to be fixed by the several companies, and subject to the general laws of the realm as to the liability and protection of common carriers.

It may be observed that there is no analogy between the transmission of a telegram and the consignment of goods through a carrier. *Playford v.*

*United Kingdom Telegraph Co., L. R.*, 4 Q. B. 706; *Dickson v. Reuter's Telegraph Co.*, 2 C. P. D. 62; 3 C. P. D. 1, C. A. As to letter carriers, *vide post*, p. 651.

*Action for loss of, or injury to, goods.*] In an action for loss of, or injury to, goods, the plaintiff will have to prove (if denied): 1. That the defendant is a common carrier; 2. The delivery of the goods for conveyance, and the contract, if special; 3. The loss or injury; 4. The damage.

*Action for refusing to carry.*] In this action the plaintiff will have to prove, besides the defendant's character as a common carrier, the tender of the goods to the defendant for conveyance, and the refusal of the defendant to accept the goods for that purpose, although the plaintiff was then ready and willing to pay a reasonable reward in that behalf. *Vide post*, pp. 631, 636. The action is one of tort for refusal to perform a public duty, whereby the plaintiff has sustained special damage.

*Who are common carriers.*] A common carrier is a person who undertakes to transport from place to place, for hire, the goods of such persons as think fit to employ him. Coach owners are common carriers, as well as owners of carts and waggons carrying for hire. So the owners or masters of vessels, whether engaged in coasting trade or voyages beyond seas. *Morse v. Slue*, 2 Lev. 69; *Nugent v. Smith*, 1 C. P. D. 19; reversed on another ground, *Id.* 423, C. A. But this has been doubted, at any rate, unless the ship is a general ship. *Id.* 425, *per* Cockburn, C.J. See also *Benett v. Peninsular & Oriental Steamboat Co.*, 6 C. B. 775. So lightermen; *Maving v. Todd*, 1 Stark. 72; bargemen; *Rich v. Kneeland*, Cro. Jac. 330; and all persons who openly profess to carry goods between different places by road or water for hire, are common carriers. See, however, *Liver Alkali Co. v. Johnson*, Ex. Ch., *infra*. Railway companies may become common carriers (8 & 9 V. c. 20, ss. 86, 89). So canal and navigation companies (*Id.* c. 42, ss. 5, 6). And such companies generally are common carriers, but only as to such things as they publicly profess to carry, or are obliged by their several Acts to carry. *Johnson v. Midland Ry. Co.*, 4 Exch. 367. As to carriers of live stock, *vide post*, p. 631.

A carman undertaking jobs for special bargains, and not professing to carry generally is not a common carrier. *Brind v. Dale*, 2 M. & Rob. 80; *Scaife v. Farrant*, L. R., 10 Ex. 358, Ex. Ch. Nor is a wharfinger merely as such, though he has been treated as a carrier in some reported cases. See *Sideways v. Todd*, 2 Stark. 400, and cases cited 2 Kent, Comm. § 599, n. Nor is a London cab-driver or a hackney coachman, plying for passengers, a common carrier. *Ross v. Hill*, 2 C. B. 877. In cases like the last, the liability is that of an ordinary hired bailee, which falls far short of that of a common carrier. S. C.; *Coggs v. Barnard*, 2 Ld. Raym. 909. See *post*, pp. 636, 647, 648. A ferryman, though bound to carry all comers, is not, therefore, a common carrier. See *Willoughby v. Horridge*, 12 C. B. 751; 22 L. J., C. P. 90; *Walker v. Jackson*, 10 M. & W. 161; *contra*, 2 Kent, Comm. § 599. A barge owner who lets out his barges to all that come to him, and to only one person for each voyage, each being made under a separate agreement, the customer fixing the termini in each case, incurs the responsibilities of a common carrier with respect to the goods he carries. *Liver Alkali Co. v. Johnson*, L. R., 7 Ex. 267, Ex. Ch.; L. R., 9 Ex. 338. The Ex. Ch., however, declined to hold that he was a common carrier so as to be bound to carry all goods tendered him for carriage; and Brett, J., held that neither the defendant nor any other shipowner who carried goods in his ship was a common carrier. See further as to carriers by ship, *Nugent v.*

*Smith*, 1 C. P. D. 423, C. A. As to the implied warranty that the ship is seaworthy, *vide ante*, p. 475.

*The common law liability and implied contract of a common carrier.*] A common carrier is bound, at common law, to receive and carry all goods reasonably offered to him, and for which the person bringing the goods is ready and willing and offers to pay reasonable hire and reward. *Pickford v. Gt. Junction Ry. Co.*, 8 M. & W. 372; *Garton v. Bristol & Exeter Ry. Co.*, 1 B. & S. 112; 30 L. J., Q. B. 273. He is, in the absence of any special contract, bound to deliver within a time that is reasonable, having regard to all the circumstances of the case; *Taylor v. Gt. N. Ry. Co.*, L. R., 1 C. P. 385; *Donohoe v. L. & N. W. Ry. Co.*, 1 R., 1 C. L. 304, Ex.; but he is not responsible for the consequences of delay, arising from causes beyond his own control. *Taylor v. Gt. N. Ry. Co.*, *supra*; and see *Raphael v. Pickford*, 5 M. & Gr. 551. He is bound to carry by the route which he professes to be his route, and must use reasonable diligence in delivering the goods, having reference to the means at his disposal for forwarding them; and he is not justified in delaying the delivery by adopting a particular mode of forwarding the goods, merely because that is the mode usually adopted. *Hales v. L. & N. W. Ry. Co.*, 4 B. & S. 66; 32 L. J., Q. B. 292. But provided he carry by a reasonable and usual route, he is not bound to carry by the shortest route, even though empowered by statute to charge a mileage rate for carriage. *Myers v. L. & S. W. Ry. Co.*, L. R., 5 C. P. 1. If the road be obstructed by snow, he is not bound to use extraordinary means, involving additional expense for accelerating the conveyance of cattle or goods, though the delay may be prejudicial to the goods or their owner, and though, by extra exertions, the passengers have been forwarded. *Bridlon v. Gt. N. Ry. Co.*, 28 L. J., Ex. 51. He is also an insurer of the goods against all accidents, except the act of God or the king's enemies; *Forward v. Pittard*, 1 T. R. 27; and whether the loss occurs by accident, robbery, violence, or the negligence of third persons. *Trent Navigation v. Wood*, 4 Dong. 287; 3 Esp. 127. Act of God means not merely an accidental circumstance, but something overwhelming (*Oakley v. Portsmouth, &c., Steam Packet Co.*, 11 Exch. 623; 25 L. J., Ex. 101, *per* Martin, B.), which "could not happen by the intervention of man, as storms, lightning, and tempests" (*Forward v. Pittard*, 1 T. R. 33, *per Cur.*), and which "could not have been prevented by any amount of foresight and pains and care reasonably to be expected from" the carrier. *Nugent v. Smith*, 1 C. P. D. 441, 444, *per* James, L. J. See also *Nichols v. Marsland*, L. R., 10 Ex. 255; 2 Ex. D. 1, C. A.; *Nitrophosphate, &c., Manure Co. v. L. & S. Catherine's Dock Co.*, 9 Ch. D. 503.

Common carriers from a place within to a place without the realm, are subject to the same liabilities, at common law, as a common carrier who carries only within the realm. *Crouch v. L. & N. W. Ry. Co.*, 14 C. B. 255; 23 L. J., C. P. 73.

As to the effect on the carrier's liability, of fraudulent concealment on the part of the sender of the goods, see *post*, p. 651.

In the case of live stock, a carrier is not liable for an injury caused by the inherent vice of the animal; it is sufficient if he provide for its carriage a truck that is reasonably fit for the purpose. *Blower v. Gt. W. Ry. Co.*, L. R., 7 C. P. 655; explaining *Carr v. Lancashire & Yorkshire Ry. Co.*, 7 Exch. 707; 21 L. J., Ex. 263, *per* Parke, B., cited by Erle, J., in *M'Manus v. Id.*, 4 H. & N. 347; 28 L. J., Ex. 358; *Kendall v. L. & S. W. Ry. Co.*, L. R., 7 Ex., 373; see also *Richardson v. N. E. Ry. Co.*, L. R., 7 C. P. 75; *Gill v. Manchester, &c., Ry. Co.*, L. R., 8 Q. B. 186. Nor is he liable if the injury done is such that no reasonable precaution could have prevented. *Nugent v. Smith*, *supra*. So, a carrier is not liable for injury to goods

caused by their inherent unfitness for the carriage contemplated, though not known to either party. *Lister v. Lanc. & Yorkshire Ry. Co.*, (1903) 1 K. B. 878. Nor for that caused by ordinary wear and tear, or chaling during the journey, nor for the natural decay of perishable goods. Story on Bailments, § 492 *a*, cited *Blower v. Gt. W. Ry. Co.*, L. R., 7 C. P. 663, 664. See further, *post*, p. 650.

A carrier may limit, generally, his business to certain goods, and is then not obliged to carry other kinds of goods; his obligation in this respect depends upon what he publicly professes to do. *Johnson v. Midland Ry. Co.*, 4 Exch. 367; *In re Oxlade & N. E. Ry. Co.*, 1 C. B., N. S. 454; 26 L. J., C. P. 129; 15 C. B., N. S. 680.

Any statutory exemption from liability must be pleaded specially. See Rules, 1883, O. xix. r. 15, *ante*, p. 309.

*Evidence of the contract.*] The contract implied from the delivery and acceptance of the goods, to and by the defendant, in his capacity of carrier, is to charge a reasonable reward for the conveyance, and the jury are the judges of this; *semb. Ashmole v. Wainwright*, 2 Q. B. 837; *Harrison v. L. Brighton & S. C. Ry. Co.*, 2 B. & S. 122; 31 L. J., Q. B. 113; and if the carrier refuse to carry or deliver, except upon payment of an exorbitant charge, the excess, if paid, may be recovered back. S. C. See *ante*, p. 614, *Action for money had and received*. But it is competent, at common law, to make a previous special bargain in each case, for the rate of charge; and under the Carriers Act, 1830, s. 6, *post*, p. 637. *Carr v. Lancashire & Yorkshire Ry. Co.*, 7 Exch. 707; 21 L. J., Ex. 261.

Where the carrier delivers a ticket or other notice to the person from whom he receives the articles, specifying the terms on which he agrees to carry, and the customer assents (or does not dissent), the terms of the notice will establish a special agreement, and will exclude the common law contract, so far as it is varied by those terms: *Wyld v. Pickford*, 8 M. & W. 443; *Gt. N. Ry. Co. v. Morville*, 21 L. J., Q. B. 319; *Phillips v. Edwards*, 3 H. & N. 813; 28 L. J., Ex. 52; *Zunz v. S. E. Ry. Co.*, L. R., 4 Q. B. 539, 544; see also *Watkins v. Rymill*, 10 Q. B. D. 178, and cases there cited; and such a specific notice is not "a public notice or declaration" within sect. 4 of the Carriers Act, set out *post*, p. 637. *Walker v. York & N. Midland Ry. Co.*, 2 E. & B. 750; 23 L. J., Q. B. 73. If the customer in such a case decline the terms, and wish to fix the carrier with the common law liability, he must tender or offer a reasonable compensation, and sue for the refusal to receive the goods. *Per Parke, B.*, in *Carr v. Lancashire Ry. Co.*, *supra*; *Garton v. Bristol & Exeter Ry. Co.*, 1 B. & S. 112; 30 L. J., Q. B. 273. As to the effect of the delivery, to the consignor, of a ticket with conditions printed thereon, *vide post*, p. 652. Where goods are sent by the defendants, "the company accepting no liability," the stipulation does not exempt the company from liability for a loss arising wholly from their own negligence. *Martin v. Gt. Indian Peninsular Ry. Co.*, L. R., 3 Ex. 9. See further, *ante*, pp. 473, 474. But a condition to relieve the carrier "from all liability for loss or damage by delay in transit, or from whatever other cause arising," protects him against the consequences of his servant's negligence, including damage from loss of market. *Brown v. Manchester, &c., Ry. Co.*, 8 Ap. Ca. 703, D. P. And where a passenger, by steamer, takes luggage subject to the further condition, that the ship will not be accountable unless bills of lading have been signed therefor, and the luggage is lost through the negligence of the captain, the plaintiff cannot recover unless the condition has been complied with. *Wilton v. Atlantic Mail, &c., Co.*, 10 C. B., N. S. 453; 30 L. J., C. P. 369. See also *Peninsular & Oriental S. Nav. Co. v. Shand*, 3 Moo., P. C., N. S. 272.

A contract that goods should be carried "at owner's risk," was held not to exempt the carrier from liability in respect of delay. *Robinson v. Gt. W. Ry. Co.*, II. & R. 97; 35 L. J., C. P. 125; *D'Arc v. L. & N. W. Ry. Co.*, L. R., 9 C. P. 325. It seems that in these cases the purport of the condition "owner's risk" was to free the company from all liability whatever in respect of the goods. The present modified meaning of the term "owner's risk," is to free the carrying company "from all liability of loss, damage or delay except upon proof that such loss, damage or delay arose from wilful misconduct on the part of the company's servants." This condition was, however, held not to exonerate the company where goods which were to be carried by G. by a particular route, were by mistake sent by another route and in consequence delayed, because the delay did not arise in the performance of the contract; *Mallet v. Gt. E. Ry. Co.*, (1899) 1 Q. B. 309. But even if this decision be correct it is not to be extended, for where goods sent under a similar contract were in the course of their journey by mistake not transferred into the proper train, and were therefore sent by another route for expedition, and delay was occasioned, G. was held protected by the condition. *Foster v. Gt. W. Ry. Co.*, (1904) 2 K. B. 306. As to evidence of "wilful misconduct" see *Lewis v. Id.*, 3 Q. B. D. 195, C. A. and *Forder v. Id.* (1905) 2 K. B. 53, 32.

The general notice affixed in the offices of carriers, or advertised in newspapers, by which carriers were accustomed to limit, or attempt to limit, their common law liability, are deprived of that effect, so far as regards all common carriers *by land*, by the Carriers Act, s. 4, *post*, p. 637. And it would seem that even if a *knowledge* of such a public notice could be brought home to the customer, it would not now protect the carrier. There ought to be proof of a specific agreement between the carrier, or his agent, and the individual tendering the goods. The case of special contracts with railway and canal companies is now provided for by stat. 17 & 18 V. c. 31, s. 7, cited *post*, p. 641.

By the Railway Clauses Consolidation Act (8 & 9 V. c. 20), s. 90, and by clauses in most of the special acts constituting railway companies, the company is enabled to determine upon "reasonable charges" in respect of the carriage of passengers and goods; and it is generally provided, among other things, by what are known as "Lord Shaftesbury's Clauses," that these charges shall also be "equal," *i.e.*, that all persons and classes of goods shall, under like circumstances, be treated alike as to charges. See *Manchester, &c., Ry. Co. v. Denaby Colliery Co.*, 11 Ap. Ca. 97, D. P. When the question of reasonableness comes in issue at N. P., as in an action for refusing to carry, &c., it is one for the jury, and is not a question of law. And where the question of "equality" involves an inquiry into the greater or less risk incurred by the company in the conveyance of certain parcels as compared with others, it is for the jury. *Crouch v. Gt. N. Ry. Co.*, 11 Exch. 742; 25 L. J., Ex. 137. Under these acts it has been held that a railway company cannot treat other carriers on their rail on a different footing from other customers, and therefore that it cannot charge such carriers on a higher scale for "packed parcels," that is, parcels enclosing smaller parcels collected by the consigning carrier from different persons, and consigned to a single agent for distribution among other persons. *Parker v. Gt. W. Ry. Co.*, 7 M. & Gr. 253; *Crouch v. Gt. N. Ry. Co.*, 9 Exch. 556; 23 L. J., Ex. 148; *Id. v. Id.*, 11 Exch. 742; 25 L. J., Ex. 137; *Piddington v. S. E. Ry. Co.*, 5 C. B., N. S. 111; 27 L. J., C. P. 295; *Sutton v. Gt. W. Ry. Co.*, 3 H. & C. 800; 35 L. J., Ex. 18; L. R., 4 H. L. 226; *Baxendale v. L. & S. W. Ry. Co.*, L. R., 1 Ex. 139. But if the packed parcels be separately directed so as to give more trouble on delivery, a higher charge is justifiable. *Baxendale v. E. Counties Ry. Co.*, 4 C. B., N. S. 63;

27 L. J., C. P. 137. A railway company charged a through rate, including collection and delivery as well as conveyance, which rate was charged whether the goods were collected and delivered by the company or not; it charged the plaintiff who collected and delivered the goods the full amount, as if it had done so; it was held that he could recover such overcharge in an action for money had and received. *Baxendale v. Gt. W. Ry. Co.*, 14 C. B., N. S. 1; 32 L. J., C. P. 225; 16 C. B., N. S. 137; 33 L. J., C. P. 197, Ex. Ch., see *Pickford v. Gt. Junction Ry. Co.*, 10 M. & W. 399; *Baxendale v. L. & S. W. Ry. Co.*, L. R., 1 Ex. 137; and *Evershed v. L. & N. W. Ry. Co.*, 2 Q. B. D. 254; 3 Q. B. D. 134, C. A.; 3 Ap. Ca. 1029, D. P. *Secus* in cases where the company is under no statutory obligation to carry the goods. *Stone v. Midland Ry. Co.*, (1904) 1 K. B. 669, C. A. The special acts of railway companies generally authorize higher charges for small parcels sent in separate packages, and sometimes provide that large aggregate quantities of goods sent in several small parcels at the same time, shall be subject to a tonnage charge on the aggregate, and not to the higher rate, as upon small separate packages. See *Parker v. Gt. W. Ry. Co.*, 6 E. & B. 77; 26 L. J., Q. B. 209. But the decisions on all these acts would be out of place in a work of this kind, and are therefore omitted. In order to show a breach by the railway company of the equality clauses, it may be proved that it was well known in the trade and, inferentially, to the company, that mercantile houses were in the habit of despatching packed parcels by the company, and that the company charged less for these parcels than for the packed parcels of the plaintiff, a carrier. *Sutton v. Gt. W. Ry. Co.*, *ante*, p. 633. Evidence that the agent and traffic manager of the company were present at a reference between another carrier and the defendants, where facts of this sort were proved in their hearing, is also admissible to prove that the defendants knew the usage of the mercantile houses above stated, and knowingly charged the plaintiff a higher rate than others for the carriage of like packed parcels. S. C.

By the Regulation of Railways Act, 1868 (31 & 32 V. c. 119), s. 16, equality is secured to all persons using steamers worked by railway companies; and by sect. 17 railway companies are now bound on application to deliver particulars of the charge for the conveyance of goods on their railway, distinguishing how much is for conveyance and how much for loading and other expenses. *Vide post*, p. 645.

When a railway company undertakes to carry goods from a station on its railway to a place on another distinct railway with which it communicates, this is evidence of a contract with them for the *whole* distance, and the other railway company will be regarded as *its* agents, and not as contracting with their original bailor. *Muschamp v. Lancaster, &c., Ry. Co.*, 8 M. & W. 421; *Webber v. Gt. W. Ry. Co.*, 3 H. & C. 771; 34 L. J., Ex. 170; 4 H. & C. 582, Ex. Ch. And the same position obtains in the case of passengers. *Vide post*, pp. 651, 652. But the first railway company might, by a special contract evidenced by the terms of the receipt note or otherwise, restrain its own liability as carrier to the limits of its own rail where it expressly acts as *agent* for the other company; *Fowles v. Gt. W. Ry. Co.*, 7 Exch. 699; 22 L. J., Ex. 76; such a condition embodied in a notice signed by the consignor has been held just and reasonable within the meaning of the Railway and Canal Traffic Act, and, therefore, to protect the company (assuming they would be otherwise liable) beyond its own line; *Aldridge v. Gt. W. Ry. Co.*, 15 C. B., N. S. 582; 33 L. J., C. P. 161; and that Act does not apply at all to the carriage of goods over lines not worked by the company. *Zunz v. S. E. Ry. Co.*, L. R., 4 Q. B. 539. Where X. Railway Co. undertook to carry goods over X. and Y. railways, which were damaged on Y. railway, and the contract with X. excluded liability for

damage done on Y., it was held that company Y. could not be sued for it, for there was no contract with Y. *Coxon v. Gt. W. Ry. Co.*, 5 H. & N. 274; 29 L. J., Ex. 165. Plaintiff, a passenger, took a ticket from a place on railway X. to a place on railway Y.; in the Railway Act for X., the company was made not liable for ordinary passenger's luggage; on railway Y., there was no such provision; plaintiff's luggage was lost on railway Y.; it was held that the Y. company was not liable, the contract being with X.; and *semble*, X. company was not liable by reason of their statutable exemption. *Mytton v. Midland Ry. Co.*, 4 H. & N. 615; 28 L. J., Ex. 385; see *Bristol & Exeter Ry. Co. v. Collins*, 7 H. L. C. 194; 29 L. J., Ex. 41. A receipt note by railway A. for goods "to be sent" to a place on another railway and there "delivered" for one entire sum, is one entire contract with railway A. for the whole distance, and a subsequent company cannot be sued for loss on their railway. S. C. But the effect of such special acceptances, and of the conditions contained in them, when the contract involves an undertaking to cause goods to be conveyed over successive portions of distinct railways forming a continuous line, has been the subject of much difference of opinion among the judges; and it cannot be taken as yet settled how far conditions or limitations inserted in the receipt note, and therein confined to the carriage of the goods while on the railway of the first company, can be considered as accompanying the goods throughout the whole distance;—or whether the company is to be considered as carrying with the ordinary common law liability of carriers when beyond its own limits;—or on the conditions and limitations which may be legally in force on each successive railway. The principle to be adduced from the above cases is, that in respect of any cause of action arising out of the contract of carriage of goods, the contracting party can alone sue the carrier. The owner of the goods, however, although not a party to the contract, may sue for a tort, which would have been actionable, apart from the terms of the contract. *Martin v. Gt. Indian Peninsular Ry. Co.*, 3 Ex. 9, 14, *per* Bramwell and Channell, BB. As to the rules applicable to passengers and their luggage, *vide post*, pp. 652, 653. Where a railway company, A., contracts to carry over its own line and that of another company, B., and enters into such contract as agent for the company B., the company B. may be sued for an accident on its line. *Gill v. Manchester, &c., Ry. Co.*, L. R., 8 Q. B. 186. Where there has been a general acceptance by company A. to convey goods over another railway, B., to C., the bailor may countermand the bailment while in the hands of company B., and if the goods be lost in consequence of inattention to the countermand, and of delivery at C., he may sue A. for the loss. *Scothorn v. S. Staffordshire Ry. Co.*, 8 Exch. 341; 22 L. J., Ex. 121. The plaintiff sent goods to a carrier, X., to be carried from A. to D. by three independent carriers, X., Y., Z.; there being an arrangement between X., Y., Z., that X. should carry from A. to B., Y. from B. to C., and Z. from C. to D.; X. received the freight for the whole journey, and paid over to Y. and Z. their proportion, after notice that the goods were lost before arriving at B.: held, that X. was not liable, in an action for money had and received, to repay the sum he had so paid over. *Greeves v. W. India, &c., S. Ship Co.*, Ex. Ch., *ex relatione amici*, revers. S. C. in Q. B., 20 L. T. 912, T. T. 1869.

A railway company is liable on its contract, whether the transit be over other railways, or partly by sea, or partly by coach, and whether payment for the whole be before or after delivery to the consignee; and where a railway company receives a parcel directed to a place beyond its line without objection or special contract, there is an implied contract of carriage over the entire distance, although the consignor may have pointed out a route different from the one usually adopted by the company. *Wilby v. W. Cornwall Ry.*

*Co.*, 2 H. & N. 703; 27 L. J., Ex. 181. A condition that the company will not be responsible for loss or injury in receiving, &c., live stock, if occasioned by the restiveness of the animals, does not exonerate them from injury proximately caused through negligence of the company. *Gill v. Manchester, &c., Ry. Co.*, *ante*, p. 635.

When the carrier's receipt for the goods is offered in evidence in order to prove the contract, the necessity for an agreement stamp depends on the amount payable for the carriage, and not on the value of the goods; *Latham v. Rutley*, Ry. & M. 13; if the sum payable amount to 5*l.*, a stamp is now required, *vide ante*, pp. 232, 234. The receipt in the case of an inland carrier is exempt from duty as a warrant for goods, *vide ante*, p. 276, but where the goods are exported or carried coastwise, it becomes a bill of lading, and must be stamped as such, *vide ante*, p. 246. A receipt under the Carriers Act, s. 3, *post*, p. 637, is exempt from duty.

Though a cab driver is not a common carrier, yet if charged on an implied contract to carry a passenger's luggage "safely and securely," it is no variance; for this shall be taken to mean such obligation to use ordinary care as arises out of the relation between a bailee for him and his bailor, and not the mere extended liability of a common carrier. *Ross v. Hill*, 2 C. B. 877. As to the liability of the proprietor of a metropolitan cab for a loss occasioned by the driver, see *Powles v. Hider*, 6 E. & B. 207; 25 L. J., Q. B. 331; and cases cited *post*, pp. 776, 777. A carrier, even without reward, is liable for gross neglect. *Beauchamp v. Powley*, 1 M. & Rob. 38.

Where the action is for refusing to carry, the plaintiff need not aver or prove a strict tender of the fare; it is enough that he was ready to pay. *Pickford v. Gd. Junction Ry. Co.*, 8 M. & W. 372. But where the carrier has limited his liability unless a certain charge be paid, payment or tender of that charge must be proved. *Wyld v. Pickford*, *Id.* 443.

An exception of "insurance risks" in a contract with A. for carriage by water, does not relieve A. from his liability as a common carrier. *Sutton v. Ciceri*, 15 Ap. Ca. 141, D. P. Nor from that resulting from his negligence; *Price & Co. v. Union Lighterage Co.*, (1904) 1 K. B. 412, C. A.; *Nelson (James) & Sons v. Nelson Line, &c.*, No. 2, (1907) 1 K. B. 769, C. A.

A contract to undertake sea risk for additional freight or otherwise is, under 54 & 55 V. c. 39, s. 92 (2), *ante*, p. 266, a contract for sea insurance, and must comply with the stamp and other provisions of that statute, *vide ante*, pp. 266 *et seq.*

*Carriers Act, 1830, 11 G. 4 & 1 W. 4, c. 68.*] This Act and the Acts next following (*post*, pp. 640, 644, 646) govern almost all the cases which now come before the courts, so far as regards the liability of carriers, by land or by canal navigation, and it has therefore been thought superfluous to insert the numerous cases decided before the passing of them upon the efficacy of general notices issued by such carriers in order to restrain liability. For the same reason, many of the cases before the Railway and Canal Traffic Act, in which the special contract of railway companies have been held sufficient to exempt them from the consequences of their own negligence, are omitted. See *Curr v. Lancashire, &c., Ry. Co.*, 7 Exch. 707; *Austin v. Manchester, &c., Ry. Co.*, 10 C. B. 454; 21 L. J., C. P. 179; and other cases.

By stat. 11 G. 4 & 1 W. 4, c. 68, s. 1, no common carrier *by land* for hire shall be liable for the *loss of or injury to* any articles of the descriptions following; (that is to say),—gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or timepieces of any



description, trinkets, bills, notes of the governor and company of the banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silk in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace (not machine-made, 28 & 29 V. c. 94), or any of them,—contained in any parcel which shall have been delivered, either to be carried for hire, or to accompany the person of any passenger in any mail or stage coach or other public conveyance, when the value of such articles contained in such parcel or package shall exceed 10*l.*—unless at the time of the delivery thereof at the office, warehouse, or receiving-house of such common carrier, or to his book-keeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger, the value and nature of such articles shall have been declared by the person sending or delivering the same, and the increased charge hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.

Sect. 2 authorizes the demand of an increased rate of charge for such articles, notified by a notice publicly affixed in the carrier's office, which all persons sending parcels are to be bound by without further proof of the same having come to their knowledge.

Sect. 3 provides "that when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted, as hereinbefore mentioned, the person receiving such increased rate of charge, or accepting such agreement, shall, if thereto required, sign a receipt for the package or parcel acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the . . . carrier . . . shall not have or be entitled to any benefit or advantage under this Act, but shall be liable and responsible as at the common law, and be liable to refund the increased rate of charge."

By sect. 4, no public notice or declaration heretofore made, or hereafter to be made, shall be deemed or construed to limit or in anywise affect the liability at common law of any such public common carriers in respect of any articles or goods to be carried by them; but all such common carriers shall be liable, as at the common law, to answer for the loss of or injury to any articles and goods, in respect whereof they may not be entitled to the benefit of the Act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding.

By sect. 5, for the purposes of the Act, every office, warehouse, or receiving-house, used or appointed by such common carrier for receiving parcels, shall be taken to be the receiving-house or office of such carrier; and any one or more carriers may be sued without joining their co-proprietors.

By sect. 6, nothing in the Act shall be construed to annul or affect any *specul contract* between such common carrier and any other parties for the conveyance of goods and merchandise.

By sect. 7, a person who has insured, as above, may recover back the extra charge as well as the value of the goods lost or damaged.

By sect. 8, nothing in the Act shall be deemed to protect any common carrier for hire from liability to answer for loss or injury to any goods whatsoever arising from the *felonious acts* of any coachman, guard, book-keeper, porter, or other servant in his employ, nor to protect any such coachman, &c., from liability for any loss or injury occasioned by his own personal neglect or misconduct.

By sect. 9, common carriers shall be liable to pay only the actual value, as proved, not exceeding the declared value, together with the increased charges paid by the owner.

Where a carrier makes one contract to carry by land and sea, and goods are lost on the land journey, the carrier is within the protection of the Act. *Pianciani v. L. & S. W. Ry. Co.*, 18 C. B. 226; *Le Conteur v. Id.*, L. R., 1 Q. B. 54; *Baxendale v. Gt. E. Ry. Co.*, L. R., 4 Q. B. 244; Ex. Ch.

Under sect. 1, articles more for ornament than use have been considered "trinkets," as bracelets, shirt pins, rings, brooches, ornamental purses, and scent bottles; but not a plain metal fusee box. So silk made into articles, as watch-guards, is within it; silk hose, gold chains for eye-glasses, &c. *Bernstein v. Baxendale*, 6 C. B., N. S., 251; 28 L. J., C. P. 265; and cases cited, *Id.* So is a silk dress made up for wearing. *Flowers v. S. E. Ry. Co.*, 16 L. T. 329, E. T. 1867, Ex.; overruling *Davey v. Mason*, Car. & M. 45. Hand-painted designs of carpets are not within the term "paintings," which is to be used in its ordinary sense as meaning works of art. *Woodward v. L. & N. W. Ry. Co.*, 3 Ex. D. 121. Whether an article is of the description mentioned in this section is a question of fact for the jury. S. C., following *Brunt v. Midland Ry. Co.*, 2 H. & C. 889; 33 L. J., Ex. 187. A blank acceptance for 11*l.*, lost by the carrier before delivery, and before the drawer's name has been inserted, is not a bill nor a writing of the value of 10*l.* within sect. 1. *Stoessiger v. S. E. Ry. Co.*, 3 E. & B. 549; 23 L. J., Q. B. 293.

The Act extends to all the articles enumerated in sect. 1, although not (within the words of the preamble) "an article of great value in small compass." To entitle a party to recover for loss or injury to any article of such description, he must give *express* notice to the carrier of the value and nature of the article. A looking-glass exceeding the value of 10*l.* was packed up in a case and sent to the carrier's office to be conveyed from London to a house near Lymington; a notice was fixed up in the office pursuant to sect. 2: the words "looking-glass," "keep this edge upwards," were written on the case, but no declaration was made of the nature and value of the article, and no increased rate of carriage paid; the parcel was conveyed from Lymington to its destination on a brewer's truck, which was the usual way: it was held that the carrier was not liable for breakage of the glass. *Owen v. Burnett*, 2 Cr. & M. 353; 4 Tyr. 133. A packed waggon sent for carriage by the defendants, containing enumerated articles, is a parcel or package within sect. 1. *Whaite v. Lancashire & Yorkshire Ry. Co.*, L. R., 9 Ex. 67. The expressed opinion of the carrier as to its real value will not supersede the necessity of a formal declaration of it. *Boys v. Pink*, 8 C. & P. 361. The packing-case in which goods mentioned in sect. 1 are contained is usually considered as accessory to them. *Wyld v. Pickford*, 8 M. & W. 443. So the frame of a framed picture is accessory to it, and within the Act. *Henderson v. L. & S. W. Ry. Co.*, L. R., 5 Ex. 90. But where the packing-case contains articles, some within the statute and some not, the value of the case, and of the articles not within the statute, may be recovered separately. *Treadwin v. Gt. E. Ry. Co.*, L. R., 3 C. P. 308. The defendant must prove that the goods fall within sect. 1. See *Sutton v. Ciceri*, 15 Ap. Ca. 144, D. P.

The declaration required by sect. 1 must be given at the time of delivery, whether that be at the carrier's office or to a carter sent to the customer's house to collect parcels, or on the road, or elsewhere; the carrier may then demand the increased charge as publicly notified in his office under sect. 2, and on payment thereof he is to give the receipt, if required, under sect. 3. If no such declaration be made by the bailor on delivery, the carrier is protected by sect. 1 in respect of the specified articles, except in cases of

felony referred to in sect. 8. *Hart v. Baxendale*, 6 Exch. 769; 21 L. J., Ex. 123, Ex. Ch. But by sect. 3, if no notice has been affixed under sect. 2, the carrier is not protected, even though no declaration has been made. See *Baxendale v. Hart*, 6 Exch. 769, 778; 20 L. J., Ex. 338, 340, *per Cur.* In *Hart v. Baxendale*, *supra*, which is cited in many text books in support of the contrary proposition, the Court decided that there had been a sufficient notice under sect. 2, and the exception to the ruling of Pollock, C.B., at the trial being allowed on that hypothesis, the effect on the carrier's liability of the absence of a notice, did not directly arise in Exch. Cham. Where the plaintiff sent a valuable picture by a railway, and declared its nature and value at the time of its delivery to the carrier, and the carrier did not demand any increased rate to which he was entitled under sect. 2, and only the ordinary charge was paid, the carrier was held not to be protected by the statute from his common law liability for an injury which happened to the picture on its journey. *Behrens v. Gt. N. Ry. Co.*, 7 H. & N. 950, 953; 31 L. J., Ex. 299, 300, Ex. Ch. "There is nothing in the statute which protects the carrier from liability if, after the value is declared to be such as would entitle him to demand an increased rate of charge, he chooses to accept the goods to be carried without making any demand for such increased rate or requiring it to be either paid or promised"; *per Cur.*, S. C. The "loss" provided for by sect. 1 means loss by the carrier or his servant, so that the parcel cannot be delivered; it protects the carrier against liability for damage caused by delay in delivery in consequence of a temporary loss. *Millen v. Brasch*, 10 Q. B. D. 142, C. A. But in the case of a temporary loss the carrier will be liable for detention of the goods beyond a reasonable time after they have been found; *Hearn v. L. & S. W. Ry. Co.*, 10 Exch. 793; 24 L. J., Ex. 180; an injury done to goods sent beyond their destination is within the protection of sect. 1. *Morrill v. N. E. Ry. Co.*, 1 Q. B. D. 302, C. A.

Where an innkeeper had no express authority from the defendants to take in parcels, and used his discretion in sending them by the defendant's mail or any other coach; though he kept no regular booking-office, it was held that for the purpose of taking in a parcel the inn was a receiving-house of the defendants within sect. 5. *Syns v. Chaplin*, 5 Ad. & E. 634. See also *Stephens v. L. & S. W. Ry. Co.*, *infra*.

Since this Act, if articles mentioned in sect. 1 are sent without declaration of value and payment of the increased charge, carriers who have complied in the requirements of the Act are not liable though the loss be occasioned by the gross negligence of their servants. *Hinton v. Dibbin*, 2 Q. B. 646; *Morrill v. N. E. Ry. Co.*, *supra*. And it seems that there is no distinction between the negligence of themselves or their servants; but *wilful misfeasance* would come under a different consideration. See S. CC. By sect. 8, where the loss is by the felony of the carrier's servants, the Act does not protect. *Metcalf v. L. & Brighton Ry. Co.*, 4 C. B., N. S. 307; 27 L. J., C. P. 205. The servants of a common carrier or other agent employed by a railway company to forward goods to their destination are servants of the company within that section; *Machu v. L. & S. W. Ry. Co.*, 2 Exch. 415; *Stephens v. L. & S. W. Ry. Co.*, 18 Q. B. D. 121, C. A.; *accord. Doolan v. Midland Ry. Co.*, 2 Ap. Ca. 792, D. P.; but the company is not estopped from denying that the thief is its servant, and may show that though he represented himself as being one of the servants of the carrier employed by the company, he was not so in fact. *Way v. Gt. E. Ry. Co.*, 1 Q. B. D. 692. Where to a defence founded on sect. 1 that the value of the goods had not been declared, the plaintiff replies under sect. 8, alleging a felony by the defendant's servants, the plaintiff must prove facts which show not merely that *somebody* must have stolen them while they were *in transitu*, but also

that it is more likely that they were stolen by the defendant's servants than any one else. *Metcalfe v. L. & Brighton Ry. Co.*, 4 C. B., N. S. 311; 27 L. J., C. P. 333; *Gt. W. Ry. Co. v. Rimmell*, *infra*. It is not sufficient to show merely that they had greater opportunity of committing the theft; *M'Queen v. Gt. W. Ry. Co.*, L. R., 10 Q. B. 569; although it is not necessary to give evidence which would fix any one servant of the company with the felony. *Vaughton v. L. & N. W. Ry. Co.*, L. R., 9 Ex. 93. See also *Kirkstall Brewery Co. v. Furness Ry. Co.*, L. R., 9 Q. B. 468. Where the carrier carries on a special contract exempting him from liability for loss unless the goods are declared, and extra charge paid, felony by his servant will not deprive him of this protection unless there be also gross negligence; *Shaw v. Gt. W. Ry. Co.*, (1894) 1 Q. B. 373, following *Butt v. Gt. W. Ry. Co.*, 11 C. B. 140; 20 L. J., C. P. 241, which case is explained in *Gt. W. Ry. Co. v. Rimmell*, 18 C. B. 575; 27 L. J., C. P. 201; and in *Metcalfe v. L. & Brighton Ry. Co.*, 4 C. B., N. S. 307; 27 L. J., C. P. 205, as not, in fact, being a case under the Carriers Act at all; negligence is the material point when there is a special contract; felony, when the statute is set up as a defence. S. CC.

A specific notice repudiating liability in certain cases, and served on the customer, as to which see further, *ante*, p. 632, is not a public notice or declaration within sect. 4, and it may, if he assent to it, or do not dissent, amount to a special contract, or be evidence of one for the jury, within sect. 6. *Walker v. York & N. Midland Ry. Co.*, 2 E. & B. 750; 23 L. J., Q. B. 73. It has, however, been held that sect. 6 applies only to contracts, the provisions of which are inconsistent with the exemption claimed by the carriers under sect. 1. *Baxendale v. Gt. E. Ry. Co.*, L. R., 4 Q. B. 244, Ex. Ch.

*Railway and Canal Traffic Act, 1854, 17 & 18 V. c. 31.*] By this Act, very important provisions are made respecting the traffic on railways and canals. "Traffic" includes not only passengers and their luggage, and goods, animals and other things conveyed by any railway or canal company, but also carriages, waggons, trucks, boats, and vehicles of every description adapted for running or passing on the railway or canal of any such company; and "railway company" or "canal company" includes as well lessees and contractors working railways or canals as the companies or owners, and all navigations whereon tolls are levied by Act of Parliament. Sect. 1. The Act provides against neglect of any company to afford facilities for traffic, or undue preference being shown by such company in favour of certain persons or traffic; sect. 2; and gave certain special remedies by application to the Court of C. P. in case of alleged breach of the enactment. Sects. 3—5. No proceedings shall be taken for any violation of the above enactment except in the manner provided by the Act, but nothing therein is to take away any right, remedy, or privilege of any person against such company. Sect. 6. Hence it has been held that no action lies for the breach of the provisions of sect. 2: *Manchester, &c., Ry. Co. v. Denaby Main Colliery Co.*, 14 Q. B. D. 209, C. A.; *Rhynney Ry. Co. v. Rhynney Iron Co.*, 25 Q. B. D. 116, C. A.; *Lancashire, &c., Ry. Co. v. Greenwood*, 21 Q. B. D. 215; except, perhaps, after an adjudication by the commission in which this jurisdiction of the C. P. is now vested (*vide post*, p. 641), that the company has been guilty of undue preference, for money subsequently extorted by the company. See *Id.*, p. 219; *Manchester, &c., Ry. Co. v. Denaby Main Colliery Co.*, 11 Ap. Ca. 97, 112. In this case the judgment of the C. A., *ubi supra*, on this point was affirmed in D. P., on the ground that there had not, in fact, been undue preference. The section imposes an obligation on the company to provide reasonable facilities for carrying animals and other classes of goods which they are not bound to convey as common carriers. See *Dickson v. Gt. N.*

*Ry. Co.*, 18 Q. B. D. 176, C. A.; *Winsford Local Board v. Cheshire Lines Committee*, 24 Q. B. D. 456. This Act has been extended to the steam vessels of a railway company, and the traffic carried on thereby, where the railway has been constructed by a special Act, passed after July 28th, 1863, incorporating the Railway Clauses Act, 1863, 26 & 27 V. c. 91. See *Id.* 31. See further as to equality provisions the Regulation of Railways Act, 1868, s. 16, *post*, p. 645, and *Id.* 1871, s. 12, *post*, p. 646.

The Regulation of Railways Act, 1873 (36 & 37 V. c. 48), ss. 11 *et seq.*, extended the provisions of 17 & 18 V. c. 31; and sect. 6 transferred the jurisdiction of the C. P. above mentioned to the Railway Commissioners appointed under sect. 4. By the Railway and Canal Traffic Act, 1888 (51 & 52 V. c. 25), the jurisdiction of these Commissioners has been, by sect. 8, transferred to the Railway and Canal Commission, established under sect. 3; and the jurisdiction is extended by sects. 9—16.

By 17 & 18 V. c. 31, s. 7, every company, &c., shall be liable for loss of or injury to any horses, cattle or other animals, or to any articles, goods, or things, in receiving, forwarding, or delivering thereof, occasioned by the neglect or default of the company or its servants, notwithstanding any *notice, condition, or declaration* made and given by such company contrary thereto, or in anywise limiting such liability; and every such notice, condition, or declaration is declared to be null and void. Provided that nothing therein shall be construed to prevent such companies from making *such conditions* with respect to receiving, forwarding, and delivering such animals, articles, &c., as shall be adjudged by the court or judge before whom any question relating thereto shall be tried, to be just and reasonable. The section further provides certain limits to damages recoverable for loss or injury to any such animals (namely, a horse, 50*l.*; neat cattle, 15*l.* each; sheep and pigs, 2*l.* each), unless the person sending or delivering the same to the company shall, at the time of delivering, have declared them to be of higher value, in which case the company may charge a reasonable percentage on the excess of value above the limited sum, to be paid in addition to the ordinary charge, such percentage to be notified in the manner prescribed by the Carriers Act, s. 2 (*ante*, p. 637), and to be binding on the company as therein mentioned. Proof of the value and amount of injury is to lie on the claimant. No *special contract* between the company and the other parties respecting the receiving, forwarding, or delivering of any goods, &c., shall be binding on or affect such party, unless it be signed by him or the person delivering the goods for carriage. Nothing in the Act is to alter or affect the rights or liabilities of the company under the Carriers Act, with respect to the articles mentioned in that Act (*ante*, pp. 636, 637).

Sect. 7 applies only to loss occasioned by the negligence of the company or default in the nature of negligence, or within the scope of the servant's employment. Theft by the company's servants, without negligence on the part of the company, is not within it. *Shaw v. Gt. W. Ry. Co.*, (1894) 1 Q. B. 373.

The language of sect. 7 differs much from that of the Carriers Act. The word "public" is not inserted before the word "notice," but it is now settled that "general notices to limit the liability shall be null and void; but the parties may make special contracts with the companies, provided those contracts are adjudged by the court to be just and reasonable, and provided they be signed by the parties." *Simons v. Gt. W. Ry. Co.*, 18 C. B. 805, 829; 26 L. J., C. P. 25, 32, *per* Jervis, C.J. *Accord. M<sup>r</sup>Manus v. Lancashire & Yorkshire Ry. Co.*, Ex. Ch. *post*, p. 631, and *Peck v. N. Staffordshire Ry. Co.*, D. P., *post*, p. 642. The section only applies to carriage of goods over lines which the company are working themselves, and not to contracts by the company to carry over other lines. *Zunz v. S. E. Ry. Co.*, L. R., 4 Q. B.

539. But where the company contract to carry over their own as well as other lines, they must prove that the loss did not occur on their line, in order to avail themselves of a condition of non-liability. *Kent v. Midland Ry. Co.*, L. R., 10 Q. B. 1. See also *Flowers v. S. E. Ry. Co.*, 16 L. T. 329, E. T. 1867, Ex.

In *Simons v. Gt. W. Ry. Co.*, *ante*, p. 641, the Court held that a condition exempting a company from liability for loss, detention, or damage, if goods were improperly packed, was unreasonable. *Accord. Garton v. Bristol & Exeter Ry. Co.*, 1 B. & S. 112; 30 L. J., Q. B. 273, where an action was held to lie for refusing to carry unless the plaintiff signed that condition. But a company may stipulate not to be liable for loss or damage, "however caused," in a contract to carry at a special or mileage rate. *Simons v. Gt. W. Ry. Co.*, *ante*, p. 641. If the particular condition relied on by the company to protect them in the particular case be a reasonable one, the unreasonableness of other conditions in the contract, not relied on, is not material. *Per Cur.*, S. C. The Act makes the question of reasonableness one of law, and not of fact. *Per Cur.*, S. C.; *Gt. W. Ry. Co. v. McCarthy*, 12 Ap. Ca. 218, D. P.

A special contract professing to protect a company from damage to horses, "however occasioned," is not reasonable; *M'Manus v. Lancashire & Yorkshire Ry. Co.*, 4 H. & N. 327; 28 L. J., Ex. 353, Ex. Ch.; *M'Cance v. L. & N. W. Ry. Co.*, 7 H. & N. 477; 31 L. J., Ex. 65; 3 H. & C. 343; 34 L. J., Ex. 39; *Doolan v. Midland Ry. Co.*, 2 Ap. Ca. 792, D. P.; *Ashendon v. L. Brighton & S. Coast Ry. Co.*, 5 Ex. D. 190. Conditions annexed by a railway company to its "cattle tickets," that the company should not be liable for damage to cattle from any cause whatever, "it being agreed that the animals are to be carried at the owner's risk, and that the owner of the cattle is to see to the efficiency of the waggon before his stock is placed therein; complaint to be made in writing to the company's officer before the waggon leaves the station," are not reasonable; *Gregory v. W. Midland Ry. Co.*, 2 H. & C. 944; 33 L. J., Ex. 155; even though the owner is allowed a free pass for a man to take care of the cattle. *Rooth v. N. E. Ry. Co.*, L. R., 2 Ex. 173. But a declaration in such a contract that the horses sent thereunder did not exceed 10*l.* in value, binds the sender. *M'Cance v. L. & N. W. Ry. Co.*, *supra*. A railway company gave the plaintiff a printed notice, that it would only carry marbles, subject to the conditions therein stated, one of which was that it would not be responsible for any loss or injury unless the marbles were declared and insured according to their value. With knowledge of these conditions the plaintiff instructed the company by letter, to forward them "not insured," which it did, and the marbles were injured,—it was held, though there was no wilful default or neglect found, that the company were liable, and that the condition was neither just nor reasonable, for the effect of such a condition would be to exempt the company from responsibility for injury, however caused, whether by its own negligence, or even by fraud or dishonesty on the part of its servants. *Peck v. N. Staffordshire Ry. Co.*, 10 H. L. C. 473; 32 L. J., Q. B. 241. The conditions must be embodied in a special contract signed by the party, otherwise they will not bind him. Thus the above letter was held not to constitute a special contract in writing, the words "not insured" being insufficient, either expressly or by reference, to embody the above condition. S. C. Where, however, the defendant has been in the habit of conveying the plaintiff's goods on certain printed conditions exempting the defendant from liability, and known as "owner's risk," *vide ante*, p. 633, a memorandum signed by the plaintiff, "Please receive and forward," &c.; "owner's risk," is a sufficient contract, and evidence of the terms is admissible. *Lewis v. Gt. W. Ry. Co.*, 3 Q. B. D. 195, C. A. Where an agent who is employed to deliver cattle to be sent by a railway company signs the consignment note, he must be taken

to have known the contents and thereby binds his principal. *Kirby v. Gt. W. Ry. Co.*, 18 L. T. 658, Martin, B.; *Gt. W. Ry. Co. v. McCarthy*, 12 Ap. Ca. 218, D. P.

Where a special contract provided that the company should not be liable for damage to horses conveyed, and a horse was injured in consequence of its being left without food all night in a box at the station, there being no one to receive it on its arrival; held, that the company was not liable; and *semble*, the damage being the fault of the sender or the consignee, in not providing for the reception of the horse, the defendants would not be responsible, independently of the special contract. *Wise v. Gt. W. Ry. Co.*, 1 H. & N. 63; 25 L. J., Ex. 258. A condition exempting the company from liability "in respect of any loss or detention of or injury to cattle" in the receiving, forwarding, or delivery thereof, except on proof that it arose from the wilful misconduct of the company's servants, does not protect the company from liability for a wrongful detention at the end of the transit under a mistaken claim for unpaid freight. *Gordon v. Gt. W. Ry. Co.*, 8 Q. B. D. 44. Where cattle were accidentally smothered by the fall of the lid of a van in which they were carried on a railway, and the van was not objected to by the drover, who was allowed a free pass to accompany the cattle, it was held, that a special contract exempting the company from liability for loss or damage from suffocation, or any other cause, was reasonable, and would protect them; and *semble*, even without such contract, the company would not be liable under the above circumstances. *Pardington v. S. Wales Ry. Co.*, 1 H. & N. 392; 26 L. J., Ex. 105. On sending fish the plaintiff signed a condition, that, as to fish, the company should not be responsible under any circumstances for loss of market, or other loss or injury arising from delay or detention of trains, or from any other cause whatever, other than *gross neglect* or fraud; the fish arrived too late for the market they were intended for, but the cause of the delay was not shown; it was held that the condition was reasonable, and protected the defendants. *Beal v. S. Devon Ry. Co.*, 5 H. & N. 875; 29 L. J., Ex. 441. The decision was affirmed in Ex. Ch., 3 H. & C. 337; the court holding the condition reasonable, as it left the company liable in all cases where carriers are liable for gross negligence, that is, for want of reasonable care, skill, and expedition. So a condition that the company should not as to meat, &c., be liable for loss of market, provided they were delivered within a reasonable time, was held reasonable. *Lord v. Midland Ry. Co.*, L. R., 2 C. P. 339; see also *White v. Gt. W. Ry. Co.*, 2 C. B., N. S. 7; 26 L. J., C. P. 158. But a condition that the company should not be answerable for any consequences arising from over-carriage, detention, or delay in the conveying or delivering of cattle, *however caused*, was held unreasonable. *Allday v. Gt. W. Ry. Co.*, 5 B. & S. 903; 34 L. J., Q. B. 5.

In determining whether a condition is reasonable, the courts consider whether any reasonable alternative is offered to the customer, as of sending at a legal higher rate, not subject to the condition. In such case, even although the condition relieve the company from all liability, there is strong *primâ facie* ground for holding it to be reasonable. *Brown v. Manchester, &c., Ry. Co.*, 8 Ap. Ca. 703, D. P.; cited *ante*, p. 632. See further *Lewis v. Gt. W. Ry. Co.*, 3 Q. B. D. 195, C. A.; and *Gt. W. Ry. Co., v. McCarthy*, 12 Ap. Ca. 218, D. P. An alternative offer to carry at the company's risk at a rate not exceeding the rate authorized by the company's Act, is reasonable. S. C. A condition that the company would not be liable for loss or injury to dogs carried beyond 2*l.*, unless 5 per cent. on the declared value beyond 2*l.* were paid, is not a reasonable alternative. *Dickson v. Gt. N. Ry. Co.*, 18 Q. B. D. 176, C. A.

A condition as to risk of luggage on a passenger's ticket is within sect. 7.

*Cohen v. S. E. Ry. Co.*, 2 Ex. D. 253, C. A. (overruling *Stewart v. L. & N. W. Ry. Co.*, 3 H. & C. 135; 33 L. J., Ex. 199); *Wilkinson v. Lancashire, &c., Ry. Co.*, (1906) 2 K. B. 619; (1907) W. N. 117, C. A. Sect. 7 does not apply if the railway company does not receive the goods in the capacity of carriers, as where luggage was left at the defendants' cloak-room by a person who had been a passenger by the railway. *Van Toll v. S. E. Ry. Co.*, 12 C. B., N. S. 75; 31 L. J., C. P. 241; and other cases cited *post*, pp. 648, 655.

Most of the above cases are cases relating to injury, which have happened after the contract for the carriage has been completely made; but the statute goes further. Sect. 7, *ante*, p. 641, in terms, applies to injuries in the receiving, forwarding, or delivering, and protects railway companies, beyond a certain amount, unless the value of the animal is declared. Where injury was done to a horse at a railway station by the negligence of the company, before the declaration of value had been made, or ticket taken, or fare demanded, it was held that this was an injury in the *receiving*, and the owner could not recover more than 50*l.*, even though it was the usual practice to put horses in their boxes before declaring their value or paying the fare. *Hodgman v. W. Midland Ry. Co.*, 5 B. & S. 173; 33 L. J., Q. B. 233; Ex. Ch. 6 B. & S. 560; 35 L. J., Q. B. 85.

A railway company cannot repudiate a special contract on the ground that it has not been signed by the consignor: the proviso in sect. 7 only applies to cases where the company seek to relieve themselves from liability, by reason of there being a special contract. *Basendale v. Gt. E. Ry. Co.*, L. R., 4 Q. B. 244.

To entitle the company to demand the percentage under sect. 7, the sender must make a declaration of the value with the intention of paying the percentage; but the company is bound to carry at the ordinary rate without increased risk if the sender require it, even though the company have notice of the higher value of the animals. *Robinson v. L. & S. W. Ry. Co.*, 19 C. B., N. S. 51; 34 L. J., C. P. 234. The reasonableness of the percentage is a question for the jury. *Harrison v. L. Brighton & S. C. Ry. Co.*, 2 B. & S. 152, 167; 31 L. J., Q. B. 113, 119, *per Erle, C. J.*, in Ex. Ch. The principle is not what profit it may be reasonable for the company to make, but what is reasonable to charge the party charged. See *Canada Southern Ry. Co. v. International Bridge Co.*, 8 Ap. Ca. 723, J. C. See further as to percentage for risk, *Dickson v. Gt. N. Ry. Co.*, *ante*, p. 643.

*The Regulation of Railways Act, 1868*, 31 & 32 V. c. 119, Part II.] The interpretation clause, sect. 2, is as follows:—

“The term ‘railway’ means the whole or any portion of a railway or tramway, whether worked by steam or otherwise.

“The term ‘company’ means a company incorporated either before or after the passing of this Act for the purpose of constructing, maintaining, or working a railway in the United Kingdom (either alone or in conjunction with any other purpose); and includes, except when otherwise expressed, any individual or individuals not incorporated, who are owners or lessees of a railway in the United Kingdom, or parties to an agreement for working a railway in the United Kingdom.

“The term ‘person’ includes a body corporate.”

By sect. 14, where a company, by through booking, contracts to carry any animals, luggage or goods, from place to place, partly by railway and partly by sea, or partly by canal and partly by sea, a condition exempting the company from liability for any loss or damage which may arise during the carriage of such animals, &c., by sea, from the act of God, the king's enemies, fire, accidents from machinery, boilers and steam, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature



and kind soever, shall, if published in a conspicuous manner in the office where such through booking is effected, and if printed in a legible manner on the receipt or freight note which the company gives for such animals, &c., be valid as part of the contract between the consignor of such animals, &c., and the company, in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such condition. For the purposes of this section the word "company" includes the owner, lessees or managers of any canal or other inland navigation. See *The Stella*, (1900) P. 161.

By sect. 15, railway companies are to exhibit in their booking offices a table of the fares of passengers by the trains included in the time tables of the company, from that station to every place for which passenger tickets are there issued.

By sect. 16, "where a company is authorized to build, or buy, or hire, and to use, maintain, and work, or to enter into arrangements for using, maintaining, or working steam vessels for the purpose of carrying on a communication between any towns or ports, and to take tolls in respect of such steam vessels, then and in every such case, tolls shall be at all times charged to all persons equally, and after the same rate, in respect of passengers conveyed in a like vessel, passing between the same places under like circumstances, and no reduction or advance in the tolls shall be made in favour of or against any person using the steam vessels, in consequence of his having travelled, or being about to travel, on the whole or any part of the company's railway, or not having travelled or not being about to travel, on any part thereof, or in favour of or against any person using the railway, in consequence of his having used or being about to use, or his not having used or not being about to use, the steam vessels; and where an aggregate sum is charged by the company for conveyance of a passenger by a steam vessel and on the railway, the ticket shall have the amount of toll charged for conveyance by the steam vessel distinguished from the amount charged for conveyance on the railway."

"*The provisions of the Railway and Canal Traffic Act, 1854, so far as the same are applicable, shall extend to the steam vessels and to the traffic carried on thereby.*" This paragraph was repealed by 51 & 52 V. c. 25, s. 59.

By sect. 17, "where any charge shall have been made by a company in respect of the conveyance of goods over their railway, on application in writing within one week after payment of the said charge, made to the secretary of the company, by the person by whom or on whose account the same has been paid, the company shall within fourteen days render an account to the person so applying for the same, distinguishing how much of the said charge is for the conveyance of the said goods on the railway, including therein tolls for the use of the railway, for the use of carriages and for locomotive power, and how much of such charge is for loading and unloading, covering, collection, delivery, and for other expenses, but without particularizing the several items of which the last-mentioned portion of the charge may consist."

By sect. 18, "where two railways are worked by one company, then in the calculation of tolls and charges, for any distances in respect of traffic (whether passengers, animals, goods, carriages, or vehicles), conveyed on both railways, the distances traversed shall be reckoned continuously on such railways, as if they were one railway."

This Act is extended by 34 & 35 V. c. 78, *post*, p. 646.

The equality clauses did not, under 17 & 18 V. c. 31, *ante*, p. 640, originally apply to steamers worked by railway companies. *Branley v. S. E. Ry. Co.*, 12 C. B., N. S. 63; 31 L. J., C. P. 286. The Act was,

however, extended to them in certain cases by 26 & 27 V. c. 91, s. 31, *ante*, p. 641.

*The Regulation of Railways Act, 1871, 34 & 35 V. c. 78.*] By sect. 12, where railway companies under contract to carry passengers or goods by sea, procure the same to be carried in a vessel not belonging to them, they are liable for loss or damage to the same extent as though the vessel had belonged to them.

This section extends the provisions of 31 & 32 V. c. 119, s. 16, *ante*, p. 645, to the carriage of goods which the company contract to carry, but procure to be carried in ships not belonging to them.

*Who should be plaintiff.*] The proper person to sue, as plaintiff, is the person in whom the property was vested, when lost or damaged. Hence, the consignee is usually the proper plaintiff, because delivering of goods to the carrier commonly vests the property in the consignee. *Dunlop v. Lambert*, 6 Cl. & F. 600; *Fragano v. Long*, 4 B. & C. 219; *Dawes v. Peck*, 8 T. R. 330. But where there is a special contract between the consignor and carrier, the consignor may be plaintiff, and the ownership is immaterial. *Dunlop v. Lambert, supra*. See also *Gl. W. Ry. Co. v. Bagge*, 15 Q. B. D. 625. If the consignment do not change the property, as where goods are sent on approval, the consignor should sue; *Swain v. Shepherd*, 1 M. & Rob. 223; or where the sale is insufficient to bind the vendee under the Sale of Goods Act, 1893. *Coats v. Chaplin*, 3 Q. B. 483; *Coombs v. Bristol & Exeter Ry. Co.*, 3 H. & N. 510; 27 L. J., Ex. 401. See cases cited *ante*, pp. 526 *et seq.* On the other hand, where there is a contract between the consignee and the carrier, so that the former is liable to the latter for the freight, the consignee may sue. *Mead v. S. E. Ry. Co.*, 18 W. R. 735, E. T. 1870, C. P.

Where a single box containing the separate property of A. and B. is delivered to the carrier by a joint agent, A. and B. may join in the action. *Metcalfe v. L. & Brighton Ry. Co.*, 4 C. B., N. S. 317; 27 L. J., C. P. 333. A special property is sufficient to support the action. Thus, a laundress may sue a carrier employed by her, who loses the linen returned by her through him. *Freeman v. Birch*, 3 Q. B. 492, n.

Where the contract is made with one railway company for carriage of goods over the lines of several other companies, *vide ante*, pp. 634, 635.

*Proof of delivery to defendant.*] In an action against the proprietor of a stage coach for the loss of a parcel, it is sufficient to prove the delivery of the parcel to the driver. *Williams v. Crauston*, 2 Stark. 82. A delivery of goods on the wharf, to some officer accredited for that purpose, as to the mate, binds the shipowner; *Cobban v. Downe*, 5 Esp. 41; *British Columbia, &c., Co. v. Nettleship*, L. R., 3 C. P. 499; or if the master receive goods at the quay or beach, or send his boat for them, the shipowner's responsibility commences with the receipt; *Abbott on Shipping*, 14th ed. 503, citing *Molloy*, b. 2, c. 2, s. 2; unless it appears that the consignee does not intend to trust the shipowner with the custody, as where he sends his own servant in charge of the goods, who has the exclusive management of them. *E. India Co. v. Pullen*, Str. 690. Where the only proof of delivery was, that the goods were left at an inn-yard where defendant and other carriers put up, it was held to be insufficient. *Selway v. Holloway*, 1 Ld. Raym. 46. So, leaving goods at a wharf piled up among other goods, without communication with any one there, is not a delivery to the wharfinger. *Buckman v. Levi*, 3 Camp. 414. Where the ordinary course of business, at a railway office, was to accept goods, with a special limitation of liability, in writing, and this

was known to the plaintiff, who nevertheless caused his goods to be left with a railway porter at the station, without complying with the regular course, and the porter received them, and they were lost: held, that the company was not liable as on contract, the delivery not being in due course, and the porter not being shown to have, or to have professed to have, power to contract with the plaintiff otherwise than in the ordinary course. *Slim v. Gt. N. Ry. Co.*, 14 C. B. 647; 23 L. J., C. P. 166.

[*Proof of non-delivery by defendant.*] Very slight evidence of non-delivery is sufficient to call upon the defendant to prove delivery. *Griffiths v. Lee*, 1 C. & P. 110; *Hawkes v. Smith*, Car. & M. 72. Whether the carrier is bound to deliver at the residence of the consignee, seems to depend on the circumstances of each particular case. In the absence of any express contract or usage, carriers by land are bound to deliver the goods to, or at the house of, the consignee. See *Hyde v. Trent and Mersey Navigation Co.*, 5 T. R. 389; *Storr v. Crowley*, M'Cl. & Y. 129; *Duff v. Budd*, 3 B. & B. 182, citing *Bodenham v. Bennett*, 4 Price, 31. And if it be the carrier's course of trade to deliver goods at the consignee's residence, he is clearly bound to do so. *Golden v. Manning*, 2 W. Bl. 916. Where goods are conveyed by sea, it seems to be sufficient for the captain to deposit them in some place of safety, and give notice to the consignee. See *Hyde v. Trent and Mersey Navigation Co.*, 5 T. R. 397. And he is bound to keep them a reasonable time until fetched, and is liable during that time. *Bourne v. Gatliffe*, 3 M. & Gr. 643; 7 M. & Gr. 850, D. P. Although the consignor of goods directs the carrier to deliver them at a certain place, the carrier may deliver them wherever he and the consignee agree; *L. & N. W. Ry. Co. v. Bartlett*, 7 H. & N. 400; 31 L. J., Ex. 92; and in such a case the carrier is not liable to an action by the consignor for not delivering at such place, as the non-delivery was pursuant to the orders of the consignee. S. C.; *Cork Distilleries Co. v. Gt. S. & W. Ry. Co.*, L. R., 7 H. L. 269. But *semble*, where there is a special contract between the carrier and the consignor, he may sue the carrier for breach thereof. S. C. If the carrier deliver the goods at the place directed, in accordance with the ordinary usage, he has fulfilled his obligation, although he has delivered them to a person the sender did not intend. *M'Kean v. M'Ivor*, L. R., 6 Ex. 36. If the consignee refuse to receive the goods, and the carrier put them into his warehouse, he is not bound as a carrier to give notice to the consignor of the refusal; it is a question for the jury "whether the carrier has done what is reasonable under the circumstances." *Hudson v. Buxendale*, 2 H. & N. 575; 27 L. J., Ex. 93. *Quære*, if the carrier be bound to keep possession of them after refusal. S. C. In an action for non-delivery of a parcel, it appeared that, on refusal of the plaintiff, the consignee, to pay the carriage, the company had sent it back forthwith to a distant terminus where it had been first delivered to them, and took no further step; held, that they ought to have kept it for the consignee a reasonable time, and that, on tender of the charges the next day, plaintiffs might sue defendants. *Crouch v. Gt. W. Ry. Co.*, 2 H. & N. 491; 26 L. J., Ex. 418; Ex. Ch., 3 H. & N. 183; 27 L. J., Ex. 345. Where the consignee makes default in receiving the goods, the carrier is entitled to recover from him the expenses reasonably incurred in taking care of the goods. *Gt. N. Ry. Co. v. Swaffield*, L. R., 9 Ex. 132.

The liability of a carrier continues till he delivers the goods or ceases to hold them, *quà* carrier. Therefore, where goods are destroyed by fire after they are deposited in the defendant's wharf, and before a reasonable time has elapsed for the plaintiff to fetch them, the defendant is liable. *Bourne v. Gatliffe*, see above. And where the question is whether the goods have been delivered by the defendant at London, evidence is admissible to show

what constitutes a delivery in London, according to the usage of that port; and former dealings between the plaintiff and defendant are evidence of such usage. S. C.; and see *ante*, pp. 478, 649.

Where there has been a delivery by the carrier, actual or constructive, though the goods remain on his premises, he is no longer liable as carrier, but only as warehouseman, or on any special terms of bailment which he may choose to impose on the customer. See *Mitchell v. Lancashire & Yorkshire Ry. Co.*, L. R., 10 Q. B. 256. Thus where cattle sent by railway were kept at the arrival station, by the direction of the owner's servant, until they could be removed according to the police regulations, the company were held not liable as carriers. *Shepherd v. Bristol & Exeter Ry. Co.*, L. R. 3 Ex. 189. So where goods are carried, "to be left till called for," and the carrier does not know the consignee's address, and the consignee does not call for the goods within a reasonable time, the carrier becomes an involuntary bailee, and is liable only for negligence. *Chapman v. Gt. W. Ry. Co.*, 5 Q. B. D. 278. So, after refusal of the goods at the consignee's address. *Heugh v. L. & N. W. Ry. Co.*, L. R., 5 Ex. 51. As to the liability of a railway company in respect of goods deposited at a cloak-room at its station, *vide post*, p. 655.

The declarations of the coachman respecting the loss of a parcel are evidence against the coach proprietor. *Mayhew v. Nelson*, 6 C. & P. 58. So where in an action for not delivering a parcel sent by rail to V., the plaintiff, to a plea of the Carriers Act, replied felony of the company's servants, the statements of the station-master at V. to the superintendent of police, with reference to the loss, and to the absconding of the parcel porter at V., are admissible in evidence. *Kirkstall Brewery Co. v. Furness Ry. Co.*, L. R., 9 Q. B. 468. But the statements of a night inspector at a railway station as to the detention of goods, which would pass through the station, and there be under the inspector's charge, were held to be inadmissible against the company. *Gt. W. Ry. Co. v. Willis*, 18 C. B., N. S. 748; 34 L. J., C. P. 195.

If the carrier deliver the goods to a wrong person, he is liable in trover; *Stephenson v. Hart*, 4 Bing. 476; *aliter*, if only lost; *Ross v. Johnson*, 5 Burr. 2825.

*Damages.*] Where goods are sent from A. to B. and are lost, the consignee is entitled to their value at B., as distinguished from the place where they were delivered to the carrier. *Rice v. Baxendale*, 7 H. & N. 96; 30 L. J., Ex. 371. And in such case the measure of damages is, in general, the market value of the goods, at the place and time at which they ought to have been delivered; and if there be no market for the sale of such goods at the place, the jury must ascertain their value, by taking their price at the place of manufacture, together with the cost of carriage, and a reasonable sum for importer's profits. *O'Hanlan v. Gt. W. Ry. Co.*, 6 B. & S. 484; 34 L. J., Q. B. 154; *Ströms Bruks Aktie Bolag v. Hutchison*, (1905) A. C. 515, D. P. The market value is to be estimated "independently of any circumstances peculiar to the plaintiff, and so independently of any contract made by him for the sale of the goods." *Rodocanachi v. Milburn*, 18 Q. B. D. 67, 77, C. A. Unpaid freight, for which the shipowner has a lien, is to be deducted from the market value, but not advanced freight. S. C.; *Dufourcet v. Bishop*, 18 Q. B. D. 373.

The damages recoverable are either "such as may fairly and reasonably be considered arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." *Hudley v. Baxendale*, 9 Exch. 341; 23 L. J., Ex. 179; see also *Cory v. Thames Iron Works Co.*,

L. R., 3 Q. B. 181, and *Elbinger Actien-Gesellschaft v. Armstrong*, L. R., 9 Q. B. 473. Plaintiff being under contract to deliver coals at a certain time in a distant colony, engaged defendant to convey them, defendant being aware of the contract: held that, on failure of the defendant, he was liable to the extra expense of conveyance by other means, incurred by plaintiff, as special damage. *Prior v. Wilson*, 8 W. R. 260, H. T. 1860, C. B. And even where plaintiff was under no contract to deliver, a rise in price of coal at the pit's mouth, between the times when the defendant's ship should have been ready to take the coals on board, and when the plaintiff could obtain another ship to carry them, was held to be *prima facie* recoverable in addition to extra freight; as by the custom of the colliery trade, the plaintiff was not able to secure a cargo, till he had vessels to carry it. *Featherston v. Wilkinson*, L. R., 8 Ex. 122. Where, owing to the delay of a month in the delivery of cloth by the defendants, which the plaintiff wanted immediately to make up into caps, the plaintiff lost the season, it was held that he could not recover, as damages, the loss of the profit he would have made by the sale of the caps, but that he could recover the amount of depreciation in the market value of the cloth owing to the lapse of the season. *Wilson v. Lancashire, &c., Ry. Co.*, 9 C. B., N. S. 632; 30 L. J., C. P. 232; see also *Gt. W. Ry. Co. v. Redmayne*, L. R., 1 C. P. 329. So the plaintiff may recover the difference between the market price of hops, on the day when they ought to have been delivered, and the price when they were available for sale, owing to delay and damage caused by the defendants. *Collard v. S. E. Ry. Co.*, 7 H. & N. 79; 30 L. J., Ex. 393; see also *Gee v. Lancashire, &c., Ry. Co.*, 6 H. & N. 211; 30 L. J., Ex. 11. In an action for not delivering samples, which the carrier knew to be such, until the season had elapsed, by reason of which they had become valueless, it was held that their value to the plaintiffs, as samples, at the time they should have been delivered was recoverable. *Schulze v. Gt. E. Ry. Co.*, 19 Q. B. D. 30, C. A. So in an action for not delivering samples in time for exhibition at a show, it was held that damages were recoverable for loss of estimated profits by reason of their not being exhibited, without evidence of the prospect of profits at the particular show. *Simpson v. L. & N. W. Ry. Co.*, 1 Q. B. D. 274.

In order to recover damages for non-sale, owing to delay in carrying, there must have been an actual contract to buy for a price. *Hart v. Baxendale*, 16 L. T. 390, Martin, B. Loss of a beneficial sub-contract cannot be recovered without notice to the carrier of the special terms thereof; *Horne v. Midland Ry. Co.*, L. R., 7 C. P. 583; Ex. Ch., L. R., 8 C. P. 131; and it seems that a mere notice of such sub-contract will not be sufficient, unless it be given under such circumstances as to make it a term of the contract that the carrier will, on breach thereof, be liable for such loss. S. C., L. R., 8 C. P. 139, 141, 145; *British Columbia, &c., Sawmill Co. v. Nettleship*, L. R., 3 C. B. 499, 509, *per* Willes, J. So loss of hire of goods, sent for hire, cannot be recovered unless the carrier had notice that they were sent for that purpose. *Hales v. L. & N. W. Ry. Co.*, 4 B. & S. 66; 32 L. J., C. P. 292. Conversely a contract for sale at less than the market value, of goods, "to arrive," is not to be considered. *Rodocanachi v. Milburn*, 18 Q. B. D. 67, C. A. The plaintiffs delivered to the defendants machinery intended for the erection of a saw-mill at Vancouver's Island; the defendants knew generally of what the shipment consisted; part was lost, so that the mill could not be erected, and the plaintiffs had to send to England to replace the loss: held, that the measure of damages was the cost of replacement in Vancouver's Island, with interest at 5 per cent. upon the amount until judgment. *British Columbia, &c., Sawmill Co. v. Nettleship*, *supra*. And even in the case of the carriage of goods by ship, damages for loss of market are recoverable where the state of the market at the time of arrival was a factor in the

contract between the parties. *Dunn v. Bucknall Bros.*, (1902) 2 K. B. 614, C. A., explaining *The Parana*, 2 P. D. 118, C. A. See further, *sub tit. Actions for not delivering Goods—Damages, ante*, pp. 516 *et seq.*

Where, by reason of a refusal to carry, or of non-delivery or delay by a railway company, a carrier, who uses the railway for his parcels, is injured in his own business as a carrier, such injury is too remote to be considered in damages. *Semb. Crouch v. Gt. N. Ry. Co.*, 11 Exch. 743; 25 L. J., Ex. 137. So the hotel expenses of the plaintiff, a commercial traveller, while he was waiting for the goods, which the defendants ought to have delivered, were held to be too remote to be recovered. *Woodger v. Gt. W. Ry. Co.*, L. R., 2 C. P. 318. See further, *post*, p. 654. A carrier, B., contracted with A. to carry A.'s goods, and B. sent them by an independent carrier, C., who injured them in transit whereby B. was compelled to pay damages in an action brought against him by A. B. gave notice to C. of the claim and action, but C. declined to interfere. It was held that B. could not recover from C. the costs of that action. *Bawendale v. L., Chatham & Dover Ry. Co.*, L. R., 10 Ex. 35, Ex. Ch. This decision has been explained on the ground that B.'s defence to the action against him was unreasonable. See *Hammond v. Bussey*, and *The Millwall, ante*, p. 492, and *Agius v. Gt. W. Colliery Co.*, *ante*, p. 548. Where bales of rags were sent for carriage without notice to the carrier that they were damp, and, in consequence only of their being damp, delay in carriage caused them to heat, and become worthless, the carrier was held liable to nominal damages only. *Baldwin v. L., Chatham & Dover Ry. Co.*, 9 Q. B. D. 582.

The cases on the measure of damages are collected and discussed in the notes to *Vicars v. Wilcocks*, 2 Smith's L. C., 11th ed. 538.

When the plaintiff has made a false declaration of the value of horses, in order to induce a railway company to carry them on lower terms, and they are injured by the company's negligence, he cannot recover more than the declared value. *McCance v. L. & N. W. Ry. Co.*, 7 H. & N. 477; 31 L. J., Ex. 65; 3 H. & C. 343; 34 L. J., Ex. 39, Ex. Ch. The defendants had in this case admitted liability by payment into court; but *quære* if they were liable at all? See cases collected, *post*, pp. 650, 651.

*Costs.*] As to the effect of the County Courts Act, 1888, s. 116, with reference to costs in actions against carriers, *vide ante*, p. 303.

### Defence.

By Rules, 1883, O. xix. r. 15, the defendant must plead specially all facts not previously stated, on which he relies, and must raise all such grounds of defence as, if not pleaded, would be likely to take the plaintiff by surprise; and r. 17 provides that the defendant shall not deny generally the allegations in the statement of claim. By r. 20, a bare denial denies the making of the contract in point of fact only, and not its sufficiency in point of law. See the rules cited *ante*, pp. 309, 310. A defence arising under the Carriers Act, s. 1, *ante*, pp. 636, 637, must therefore be specially pleaded. *Syms v. Chaplin*, 5 Ad. & E. 634. A carrier may, by his defence, set up the title of a third person, who has claimed and retaken the goods. *Sheridan v. New Quay Co.*, 4 C. B., N. S. 649, 650; 28 L. J., C. P. 58. See *Clough v. L. & N. W. Ry. Co.*, L. R., Ex. 726, Ex. Ch. As to right of master of ship to sell cargo in case of necessity, *vide ante*, p. 478.

*Loss by plaintiff's own default.*] It is questionable how far, and under what circumstances, it is a defence that a parcel was lost by the default of the plaintiff himself. It has been considered that where the gist of the

action is negligence and non-performance of duty, so as to be founded on tort rather than contract, this may be a defence. See *Webb v. Page*, 6 M. & Gr. 196; *Martin v. Gt. N. Ry. Co.*, 16 C. B. 179; 24 L. J., C. P. 209; and *Burrows v. March Gas Co.*, L. R., 5 Ex. 67; Ex. Ch., L. R., 7 Ex. 96. Goods that are brittle, or liable to injury, must be safely packed by the consignor, or the carrier will not be liable for injury done to them in carriage, if he have used due care. *Hart v. Bowendale*, 16 L. T. 390, *cor. Martin*, B. See also *Baldwin v. L., Chatham & Dover Ry. Co.*, *ante*, p. 650, and cases cited *ante*, pp. 631, 632. If the consignor have fraudulently concealed the value and risk from the carrier, in order to pay a lower rate of freight, he can maintain no action for a loss thus occasioned by his own fault. *Gibbon v. Paynton*, 4 Burr. 2298; *Bradley v. Waterhouse*, 3 C. & P. 318; M. & M. 154; *Bulson v. Donovan*, 4 B. & A. 21; see *Sleat v. Fagg*, 5 B. & A. 347, *per Abbott*, C. J.; and *McCance v. L. & N. W. Ry. Co.*, cited *ante*, p. 650. So, although the consignor is not in general bound to volunteer information as to the nature of the goods, yet, if he intentionally make false answers to the carrier's inquiries, there is fraud which avoids the contract. *Walker v. Jackson*, 10 M. & W. 168, 169, *per Parke*, B. In cases where this is a defence, the fact should be specially pleaded, unless the particular issue taken be such as to make the evidence relevant to it.

## LETTER CARRIERS.

The postmaster-general is not a common carrier, and he is not liable for the neglect or default of his subordinate officers. *Lane v. Cotton*, 1 Ld. Raym. 646; 1 Salk. 17; *Whitfield v. Le Despencer, Ltd.*, Cowp. 754. But the postmaster and his servants are each of them liable for their own *personal* negligence. S. CC. His liability has not been extended by the Telegraph Act, 1868, 31 & 32 V. c. 110, and *Id.* 1878, 41 & 42 V. c. 76, under which the undertakings of the telegraph companies have been transferred to him. *Bainbridge v. Postmaster-Gen.*, (1906) 1 K. B. 178, C. A.

When a postmaster detains letters until the payment to him of more than the legal postage, an action for money had and received, for the money so illegally extorted, may be maintained against him; *Smith v. Dennis*, Lofft, 753; *Barnes v. Foley*, 4 Burr. 2149; 5 *Id.* 2711; *Smith v. Powlitch*, Cowp. 182; or an action on the case for such detention. *Rovning v. Goodchild*, 3 Wils. 443; 2 W. Bl. 906; *Stock v. Harris*, 5 Burr. 2709.

## PASSENGER CARRIERS.

Carriers of passengers stand on a different footing from carriers of goods. They are not insurers of the person, and are responsible only for want of due care. *Christie v. Griggs*, 2 Camp. 81; 2 Kent, Com. 600; *E. Indian Ry. Co. v. Mukerjee*, (1901) A. C. 396, J. C., cited *post*, p. 798. *Readhead v. Midland Ry. Co.*, L. R., 4 Q. B. 379, Ex. Ch. Hence they do not warrant that their carriages are roadworthy, and they are not liable to a passenger for an accident caused by hidden defect in the carriage, which could not be guarded against, in the process of construction, or by subsequent observation. S. C. They are, however, liable for defects in the carriage caused by the negligence of their sub-contractors. See *Francis v. Cockrell*, L. R., 5 Q. B. 884; *Id.* 501, Ex. Ch. As to their liability for an accident, caused by the defects in a carriage of another company, sent for transit over their line, see *Richardson v. Gt. E. Ry. Co.*, 1 C. P. D. 312, C. A. If a railway company choose to contract to carry passengers, not only over their own line, but also over the

line of another company, either in whole or in part, the company so contracting incurs all the liability which would attach to them, if they had contracted solely to carry over their own line. *Per* Cockburn, C.J., in *Gt. W. Ry. Co. v. Blake*, 7 H. & N. 991; 31 L. J., Ex. 346; *Buxton v. N. E. Ry. Co.*, L. R., 3 Q. B. 549; *Thomas v. Rhymney Ry. Co.*, L. R., 5 Q. B. 226; Ex. Ch., L. R., 6 Q. B. 266. See also *John v. Bacon*, L. R., 5 C. P. 437; and cases cited *ante*, pp. 634, 635. The issuing by a railway company of a through ticket is evidence of such contract with the first company. S. C. C. But they are not liable for the negligence, or wrongful act of third persons, over whom they have no control. *Wright v. Midland Ry. Co.*, L. R., 8 Ex. 137. An adult passenger may contract to be carried at his own risk, and the carrier will not then be liable for injury even though caused by negligence: *McCawley v. Furness Ry. Co.*, L. R., 8 Q. B. 57; *Gallin v. L. & N. W. Ry. Co.*, L. R., 10 Q. B. 212; and the condition will exonerate from liability any company on whose line the passenger is carried in the course of the journey. *Hall v. N. E. Ry. Co.*, L. R., 10 Q. B. 437. But a contract by an infant to be carried without right of claim for damage caused by negligence is so much to his detriment as to be void. *Flower v. L. & N. W. Ry. Co.*, (1894) 2 Q. B. 65, C. A., *vide post*, p. 674. A passenger who has no notice of a condition, printed on the back of a ticket, taken by him in the usual way, and which has no reference thereto on the face of it, is not bound thereby. *Henderson v. Stevenson*, L. R., 2 H. L. Sc. 470. Where the passenger knows generally that there are conditions on the back of the ticket, but does not know what they are, he is bound by the conditions. See *Parker v. S. E. Ry. Co.*, 2 C. P. D. 416, C. A. If he knew that there was writing on the ticket, but did not know or believe it contained conditions, the question for the jury is whether the defendants have done what was reasonably sufficient to give him notice of the conditions. S. C. *Accord. Richardson v. Rowntree*, (1894) A. C. 217, D. P. In this case the ticket was handed to the passenger folded up, and her attention was not called to the printed conditions. Where, however, the ticket consisted of a book of paper coupons, with conditions inside, which would have been seen on opening the book, it was held that the whole book was the contract, and the plaintiff could not reject the conditions, although he did not know them. *Burke v. S. E. Ry. Co.*, 5 C. P. D. 1. See also *Watkins v. Rymill*, 10 Q. B. D. 178. See further as to conditions on ticket, cases cited *post*, p. 653.

Where a master takes a ticket for his servant the contract is with the master: and he can sue the carrier for not carrying the servant within a reasonable time. *Jennings v. Gt. N. Ry. Co.*, L. R., 1 Q. B. 7. Where, however, the servant takes the ticket for a journey by himself, although on his master's service, the contract is with the servant and the master cannot sue thereon. *Alton v. Midland Ry. Co.*, 19 C. B. N. S. 213; 34 L. J., C. P. 292; *Becher v. Gt. E. Ry. Co.*, L. R., 5 Q. B. 241. He can, however, use the carrier for a tort independent of the contract. *Berringer v. Gt. E. Ry. Co.*, 4 C. P. D. 163, *post*, p. 775. See also *Meux v. Gt. E. Ry. Co.*, *infra*.

In the case of passengers a duty arises on the part of the carrier to convey them with due care, even although the contract of carriage was made with another person. *Austin v. Gt. W. Ry. Co.*, L. R., 2 Q. B. 442; *post*, p. 775. So with respect to the luggage of the passenger. *Marshall v. York & Newcastle Ry. Co.*, 11 C. B. 655; 21 L. J., C. P. 34; *Martin v. Gt. Indian Peninsular Ry. Co.*, L. R., 3 Ex. 9; see also *Meux v. Gt. E. Ry. Co.*, (1895) 2 Q. B. 387, C. A.

The reason of the difference between the above rules and those relating to the carriage of goods (*vide ante*, p. 646) may be that the bailor of the goods, if they be injured, may sue for their value, as trustee for the owner,



whereas unless the passenger could sue, nothing could be recovered for his loss by injury: and passengers' luggage, as an accessory to the passenger, follows the rule which applies to him. The cases relating to personal injury to passengers are collected under *Action for negligence, post*, pp. 774, and 796 *et seq.*

The mere taking of a passenger's ticket from A. to B. is evidence of a contract to convey the passenger within a reasonable time from A. to B., but not that the train shall arrive at the time it is expected; *Hurst v. Gt. W. Ry. Co.*, 19 C. B., N. S. 310; 34 L. J., C. P. 264; but the publication of the time bills of the company will amount to a promise that a train will leave A. for B. as advertised, for the conveyance of any person who regularly applies for a ticket and tenders the proper fare, although part of the line of railway belongs to a different company; such publication will also render the company liable for damages occasioned to the plaintiff by the representation, if such train do not in fact run; *Denton v. Gt. N. Ry. Co.*, 5 E. & B. 800; 25 L. J., Q. B. 129; or if there be not room in the train for the plaintiff to whom the company have issued a ticket. *Gt. N. Ry. Co., v. Hawcroft*, 21 L. J., Q. B. 178. Where the time tables state that "every attention will be paid to insure punctuality so far as it is practicable; but the departure or arrival of the trains will not be guaranteed, nor will the company hold themselves responsible for delay or any consequences arising therefrom," there is a contract to use due attention to keep the times specified as far as reasonably possible, having regard to all the circumstances. *Le Blanche v. L. & N. W. Ry. Co.*, 1 C. P. D. 286, C. A.

A passenger who has taken a ticket for a journey on the defendant's railway, under a condition to show and deliver it up when required, and on failure to do so to pay the fare from the station whence the train originally started, could not on failure to produce the ticket to the company's servants lawfully be removed by them from the carriage in which he is travelling. *Butler v. Manchester, &c., Ry. Co.*, 21 Q. B. D. 207, C. A. And now see Regulation of Railways Act, 1889, 52 & 53 V. c. 57, s. 5. If the company justify their breach of a contract to carry on the ground that the passenger has not complied with the conditions of a bye-law, they must show that they have strictly observed the bye-law on their part. *Jennings v. Gt. N. Ry. Co.*, *ante*, p. 652.

An allegation that an omnibus plies between D. and C. is not supported by evidence which shows that the omnibus, though running from D. to C., yet starts from a point beyond D. and runs to a point beyond C. *Marshall v. Matson*, 15 L. T. 514, Bramwell, B.

There does not appear to be any obligation, apart from contract, on a passenger carrier to receive passengers, even though there is adequate accommodation. But see 2 Kent, Com. 601, *contra*. The point was not decided in *Benett v. Peninsular, &c., Steamboat Co.*, 6 C. B. 775. Even if there be such obligation, special circumstances might warrant the rejection of a passenger; as misconduct, refusal to comply with reasonable regulations, over-loading, &c. Kent, *supra*.

Passenger steamers and emigrant ships are regulated by the Merchant Shipping Act, 1894, 57 & 58 V. c. 60, Part III., ss. 267 *et seq.* Sect. 320 provides that passengers shall in certain cases have contract tickets.

*Damages.*] If in consequence of the wrongful delay or erroneous information of the carrier, a passenger is reasonably obliged to hire another conveyance, or stop a night on the road, the expenses may be recovered; but the jury cannot give *general damages* for consequent derangement or loss of business, trouble, or inconvenience. *Gt. N. Ry. Co. v. Hawcroft*; *Denton v. Gt. N. Ry. Co.*, cited *supra*; *Hamlin v. Gt. N. Ry. Co.*,

1 H. & N. 408; 26 L. J., Ex. 20. See *Woodger v. Gt. W. Ry. Co.*, L. R., 2 C. P. 318, *ante*, p. 650. To determine whether the expenditure so incurred by the plaintiff is reasonable, one test is to consider whether a person in the position of the plaintiff would have been likely to incur it if the delay had been occasioned by his own fault and not by that of the company. *Le Blanche v. L. & N. W. Ry. Co.*, 1 C. P. D. 286, 313, C. A., *per* Mellish, L.J. In this case the cost of a special train hired by the plaintiff was held not recoverable. Where a railway company instead of conveying the plaintiff to the station to which she had booked, turned her out on a wet night, where she could get no accommodation or conveyance, and in consequence she had to walk four miles home, whereby she was made ill and was hindered in her business, it was held that she was entitled to recover damages for the inconvenience she suffered; but not for the illness or its consequences, as these were too remote. *Hobbs v. L. & S. W. Ry. Co.*, L. R., 10 Q. B. 111. See, however, as to these damages being too remote, the observations in *McMahon v. Field*, 7 Q. B. D. 591, C. A.

*Passengers' luggage.*] As respects a passenger's personal luggage given into the care of the company for carriage, under their control, it seems that a carrier of passengers is liable to the ordinary obligations of common carriers, though there may be no distinct contract for it. 2 Kent, Com. 601; *Richards v. L., Brighton & S. C. Ry. Co.*, *infra*; *Marcow v. Gt. W. Ry. Co.*, L. R., 6 Q. B. 612, 618, *per Cur.*; *Cohen v. S. E. Ry. Co.*, 2 Ex. D. 253, 259, *per* Mellish, L.J.; *Bunch v. Gt. W. Ry. Co.*, 13 Ap. Ca. 31, D. P. In respect, however, of luggage which a railway passenger by his request takes in the carriage with him, the company are not liable as insurers for loss occasioned by the passenger's own default. *Tulley v. Gt. W. Ry. Co.*, L. R., 6 C. P. 44; *Bunch v. Gt. W. Ry. Co.*, *supra*, disapproving of *Bergheim v. Gt. E. Ry. Co.*, 3 C. P. D. 221, C. A. But the company are bound, at the request of the passenger, to take charge of his personal luggage, and to convey it at their own risk. *Munster v. S. E. Ry. Co.*, 4 C. B., N. S. 676; 27 L. J., C. P. 308. Where the company provides servants, to assist passengers to discharge their luggage on arrival, the liability of the company continues until the servants have done their duty; therefore, where a passenger took articles with him into a railway carriage, and on getting out put them in charge of a railway porter to carry to a cab for him, it was held that the company's duty as carriers continued until they were placed in a cab. *Richards v. L., Brighton & S. C. Ry. Co.*, 7 C. B. 839; *Williams, J., dubitante*. So, where the plaintiff held his bag in his hand and delivered it to a porter on the platform to take to a cab. *Butcher v. L. & S. W. Ry. Co.*, 16 C. B. 13; 24 L. J., C. P. 137. So where, on departure, luggage is given to a porter to be placed in the carriage with the passenger, the liability of the company as carriers continues until it is placed there; *Bunch v. Gt. W. Ry. Co.*, 17 Q. B. D. 215, C. A.; 13 Ap. Ca. 31, D. P.; *secus*, where it has been given to a porter to take care of while the passenger's journey is suspended at his request. S. C. The company's duty is to have luggage given into their care, for carriage under their control, ready at the usual place of delivery till the passenger can, in the exercise of due diligence, call and receive it; the passenger's duty is to do so in a reasonable time. *Putscheidner v. Gt. W. Ry. Co.*, 3 Ex. D. 153. But when the luggage has once been delivered to the passenger, the liability of the company ceases, although he afterwards left it in the care of the company's porter and it was lost. *Hodkinson v. L. & N. W. Ry. Co.*, 14 Q. B. D. 228.

As to the right to sue for loss of luggage of a passenger when his ticket has been taken by another person, see *Marshall v. York and Newcastle Ry.*

Co.; *Martin v. Gt. Indian Peninsular Ry. Co.*, ante, p. 652; where see also the principle to be deduced from these cases.

A carrier of passengers is liable only for the personal luggage of the passenger, and not for merchandise; and where a passenger by a railway carries merchandise as personal luggage, the company is not liable for the loss unless it be carried openly, so that its nature is obvious and no objection has been made by the company's servants. *Gt. N. Ry. Co. v. Shepherd*, 8 Exch. 30; 21 L. J., Ex. 114, 286. In this last case there was no special contract, nor any limit imposed by the company's regulations except as to weight. If a passenger who knows that by the regulations of the company he is only entitled to take personal luggage, take merchandise without notice to the company, he cannot afterwards claim to be compensated in respect of its loss; but if the company choose to take merchandise as luggage it does not lie in their mouth, if an article be lost, to say it is exempt from liability on the ground of the article being merchandise and not luggage. S. C.; *Cahill v. L. & N. W. Ry. Co.*, 13 C. B., N. S. 818; 31 L. J., C. P. 271, Ex. Ch.; *Belfast & Ballymena Ry. Co. v. Keys*, 9 H. L. C. 556. The mere fact that a packet looks like merchandise and is marked glass, is not enough to fix the company with knowledge that it is in fact merchandise, and so to make them responsible. S. CC. "Personal or ordinary luggage" means that class of articles which are ordinarily or usually carried by passengers as their luggage. *Hudston v. Midland Ry. Co.*, L. R., 4 Q. B. 336; *Macrow v. Gt. W. Ry. Co.*, L. R., 6 Q. B. 612. Sketches and drawings carried by an artist among his personal luggage are not within the term "ordinary luggage" of a certain weight, usually carried free of charge on railways; *Mytton v. Midland Ry. Co.*, 4 H. & N. 615; 28 L. J., Ex. 385; nor are title deeds and money for use in certain causes in which the plaintiff was engaged as a solicitor; *Phelps v. L. & N. W. Ry. Co.*, 19 C. B., N. S. 321; 34 L. J., C. P. 259; nor bedding for the use of the plaintiff's household when he shall have provided himself with a home; *Macrow v. Gt. W. Ry. Co.*, supra; nor a loose bicycle. *Britten v. Gt. N. Ry. Co.*, (1899) 1 Q. B. 243. Where a servant takes as his ordinary luggage that of his master, the latter cannot sue for loss of it. *Becher v. Gt. E. Ry. Co.*, L. R., 5 Q. B. 241.

The Railway and Canal Traffic Act, 1854, s. 7, applies to passengers' luggage. *Cohen v. S. E. Ry. Co.* and *Wilkinson v. Lancashire, &c., Ry. Co.*, ante, p. 644. If a passenger takes a ticket for carriage at a fare below the ordinary rate on condition that he take no luggage, he must pay for any luggage he takes, although the private Act of the company allows passengers to take a fixed amount. *Rumsey v. N. E. Ry. Co.*, 14 C. B., N. S. 641; 32 L. J., C. P. 244.

The plaintiff, on arriving by a railway at the terminus, deposited her bag, value 20*l.*, in the cloak-room, and paid 2*d.*, and received a ticket for it, on the back of which was printed, "The company will not be responsible for any package exceeding the value of 10*l.*"; it was held that the company were not liable for its loss, though caused by their negligence, as the plaintiff was bound by the condition. *Van Toll v. S. E. Ry. Co.*, 12 C. B., N. S. 75; 31 L. J., C. P. 241; *Harris v. Gt. W. Ry. Co.*, 1 Q. B. D. 515. The condition protects the company from liability for delay in re-delivering the package; *Pepper v. S. E. Ry. Co.*, 17 L. T. 469, H. T. 1868, Q. B.; and also for damage, although occasioned by negligence of the company's servants. *Pratt v. S. E. Ry. Co.*, (1897) 1 Q. B. 718. See further as to the effect of conditions printed in or on tickets, ante, p. 652.

## ACTIONS AGAINST COMMON INNKEEPERS.

This, like the action against carriers, may be treated as founded on tort or on contract. It is generally an action *ex contractu* for some breach of the contract, express or implied, which the innkeeper has entered into, or professes to be ready to enter into, with his guest, in relation to his personal entertainment. The action for refusing to receive a guest is founded on tort.

An inn is "a house where the traveller is furnished with everything which he has occasion for whilst upon his way." *Thompson v. Lacy*, 3 B. & A. 286, *per* Bayley, J. "A person who uses the inn either for a temporary or more permanent way is a guest." *Orchard v. Bush*, (1898) 2 Q. B. 284. An innkeeper at common law is answerable for the safe keeping of the goods of a guest; *Calye's case*, 8 Rep. 32; 1 Smith's Lead. Ca.; but it is only in respect of the goods of a *guest* that he is so liable. *Strauss v. County Hotel, &c., Co.*, 12 Q. B. D. 27. Loss of a guest's goods is *prima facie* evidence of liability on the part of the innkeeper. *Dawson v. Chamney*, 5 Q. B. 154; 2 Kent, Com. 592; Story on Bailment, ss. 470—1; *Morgan v. Ravey, infra*; *Medawar v. Grand Hotel Co.*, (1891) 2 Q. B. 11, C. A. He may be exonerated by the negligence of the guest. S. C. Thus, where money is lost, the ostentatious display of it in a public room at an inn, and leaving it there in an insecure box, is evidence of negligence conducing to the loss. *Armistead v. Wilde*, 17 Q. B. 261; 20 L. J., Q. B. 524. So where the guest has taken the goods into his own custody, and leaves the door of the room unlocked. *Burgess v. Clements*, 4 M. & S. 306. The omission by the guest to leave valuable articles with the innkeeper, or to fasten his bedroom door at night, is not necessarily such negligence. *Morgan v. Ravey*, 6 H. & N. 265; 30 L. J., Ex. 131. The question for a jury will be whether the loss would or would not have happened if the guest had used the ordinary care that may reasonably be expected from a prudent man. *Oppenheim v. White Lion Hotel Co.*, L. R., 6 C. P. 515; *Cashill v. Wright*, 6 E. & B. 891. It is not enough to ask if the guest had been "grossly negligent." S. C. The obligation of the innkeeper extends to the horses and carriages of the guest. *Calye's case, supra*; *Jones v. Tyler*, 1 Ad. & E. 522; *Bather v. Day*, 2 H. & C. 14; 32 L. J., Ex. 171. Where the guest, intending to return, had gone, leaving his horse, and, after the day of his intended return, his horse was injured by being driven in a carriage by the innkeeper's servant, it was held that the innkeeper was liable as such for the injury. S. C. But he is not liable for the injury to a horse by a kick from another horse if negligence in him and his servants is disproved. *Dawson v. Chamney, supra*. As to the care he is bound to exercise towards the goods of his guest of which he retains possession by virtue of his lien, see *Angus v. McLachlan*, 23 Ch. D. 330. The real innkeeper is the person liable, and not a manager in whose name the licences have been taken out. *Dixon v. Birch*, L. R., 8 Ex. 135.

By 26 & 27 V. c. 41, s. 1, no innkeeper shall be liable to make good to any guest any loss or injury to property brought to the inn (not being a horse or other live animal, or any gear appertaining thereto, or any carriage), to a greater amount than 30*l.*, except in the following cases: (1) Where the property shall have been stolen, lost, or injured, through the wilful act, default, or neglect of the innkeeper, or any servant in his employ; (2) Where the property shall have been deposited expressly for safe custody with the innkeeper. Provided that, in case of such deposit, the innkeeper may require as a condition to his liability that the property be deposited in

a box or other receptacle, fastened and sealed by the person depositing the same. By sect. 2, if an innkeeper shall refuse to receive for safe custody any property of his guest, or if the guest shall, through any default of the innkeeper, be unable to deposit his property, the innkeeper shall not be entitled to the benefit of the Act in respect of such property. By sect. 3, every innkeeper is to cause at least one copy of sect. 1 of the Act, printed in plain type, to be exhibited in a conspicuous part of the hall or entrance of his inn, and is to be entitled to the benefit of the Act in respect of such property only as shall be brought to his inn while such copy is so exhibited. By sect. 4, "inn" means any hotel, inn, tavern, public-house, or other place of refreshment, the keeper of which is by law responsible for the property of his guest; "innkeeper" means the keeper of any such place.

It has been held that "wilful" in sect. 1, must be read with "act" only, and not also with "fault or neglect." *Squire v. Wheeler*, 16 L. T. 93, Byles, J. The guest must prove that the loss was occasioned by the wilful act, &c., of the innkeeper, to make him liable under sect. 1 (1). *Medawar v. Grand Hotel Co.*, (1891) 2 Q. B. 11, C. A. Contributory negligence of the guest, *vide ante*, p. 656, is still a defence. S. C. A material error in the copy exhibited under sect. 3 will exclude the innkeeper from the protection of the statute, *e.g.*, where the copy omits the word "act" in sect. 1 (1). *Spice v. Bacon*, 2 Ex. D. 463, C. A.

An innkeeper by the common law is bound to receive travellers who present themselves as guests, if he have accommodation. *R. v. Iveys*, 7 C. & P. 213; *Lane v. Cotton*, 12 Mod. 484, *per* Holt, C.J.; *White's case*, 2 Dyer, 158. See *Fell v. Knight*, 8 M. & W. 276. He is, however, at liberty to set up an inn for the reception of particular classes of people, and is then only bound to do what he publicly professes to do in this respect. See *per* Parke, B., in *Johnson v. Midland Ry. Co.*, 4 Exch. 371, 373. An innkeeper is not bound to provide a traveller B. with shelter and accommodation for the night if all the bedrooms be full; although B. demands to pass the night in the unoccupied coffee-room. *Browne v. Brandt*, (1902) 1 K. B. 696. Nor to receive persons who are not travellers. *R. v. Luellin*, 12 Mod. 445; *R. v. Rymer*, 2 Q. B. D. 136. Nor to retain them after they have ceased to be such. *Lamond v. Richard*, (1897) 1 Q. B. 541, C. A. Keepers of coffee-houses and taverns (not professing to lodge their guests) are not common innkeepers; *R. v. Rymer*, *supra*; *Scaley v. Tandy*, (1902) 1 K. B. 296; nor are the keepers of lodging or boarding houses, for these do not profess to entertain and lodge all travellers; *Holder v. Soulby*, 8 C. B., N. S. 254; 29 L. J., C. P. 246; see also cases cited 2 Kent, Com. 595-6. If, however, they did so profess, they would be in the same position as a common innkeeper; *Thompson v. Lacy*, 3 B. & A. 283; and there is a duty upon keepers of lodgings or boarding houses to take reasonable care for the safety of property brought by guests in the house. *Scarborough v. Cosgrove*, (1905) 2 K. B. 805, C. A.; following *Dunsey v. Richardson*, 3 E. & B. 141; 23 L. J., Q. B. 217. So a restaurant keeper, N., is liable for the loss, through his negligence, of the coat of his guest who entrusted it to N.'s care. *Ultzen v. Nichols*, (1894) 1 Q. B. 92. As to the right of an innkeeper to refuse a guest because he is accompanied by dogs, see *R. v. Rymer*, *supra*.

The lien of innkeepers is treated of hereafter under *Action for conversion of goods*, *post*, pp. 983, 984.

## DEFENCES IN ACTIONS ON SIMPLE CONTRACTS.

In no part of the system of pleading have the J. Acts, and the Rules promulgated under them, produced a greater revolution than with reference to the manner in which defences are to be raised.

All pleas and defences in abatement are abolished; Rules, 1883, O. xxi. r. 20; and all such defences as could formerly have been set up, in actions of contract, by reason of the non-joinder or misjoinder of parties have also been swept away by Rules, 1883, O. xvi. rr. 1, 4, 11, *ante*, pp. 90 *et seq.*, and any objection arising from any misjoinder or non-joinder will be remedied by the extensive powers of amendment given for this purpose by r. 11, *vide ante*, p. 90. The principal rules which govern the present system of pleading are contained in O. xix., and will be found *ante*, pp. 309 *et seq.*

The following rules also relate specially to defences:—

Order xxi. r. 1. "In actions for a debt or liquidated demand in money comprised in O. iii. r. 6, a mere denial of the debt shall be inadmissible."

These liquidated demands (see O. iii. r. 6) arise, "(A.) upon a contract, express or implied (as, for instance, on a bill of exchange, promissory note, or cheque, or other simple contract debt); or (B.), on a bond or contract under seal for payment of a liquidated amount of money; or (C.), on a statute, where the sum sought to be recovered is a fixed sum of money, or, in the nature of a debt, other than a penalty; or (D.), on a guaranty, whether under seal or not, where the claim against the principal is in respect of a debt or liquidated demand only; or (E.), on a trust."

R. 2. "In actions upon bills of exchange, promissory notes, or cheques, a defence in denial must deny some matter of fact; *e.g.*, the drawing, making, endorsing, accepting, presenting, or notice of dishonour of the bill or note."

R. 3. "In actions comprised in O. iii. r. 6, classes (A.) and (B.)" (*vide supra*), "a defence in denial must deny such matters of fact, from which the liability of the defendant is alleged to arise, as are disputed; *e.g.*, in actions for goods bargained and sold, or sold and delivered, the defence must deny the order or contract, the delivery or the amount claimed; in an action for money had and received, it must deny the receipt of the money, or the existence of those facts, which are alleged to make such receipts by the defendant a receipt to the use of the plaintiff."

R. 4. "No denial or defence shall be necessary as to damages claimed or their amount; but they shall be deemed to be put in issue in all cases, unless expressly admitted." See *Wood v. Durham, Earl of*, *ante*, p. 310.

R. 5. "If either party wishes to deny the right of any other party to claim as executor, or as trustee, whether in bankruptcy or otherwise, or in any representative or other alleged capacity, or the alleged constitution of any partnership firm, he shall deny the same specifically."

The rules relating to Set-off and Counterclaim will be found *post*, p. 704.

The Rules, 1883, require a defence, that the contract contained a material provision or condition, not mentioned in the statement of claim, or was in the nature of an escrow, *e.g.*, dependent on the approval of a third person before it operated, should be specially pleaded.

A defence denying the contract raises any objection that can be taken under the Stamp Acts. *Vide ante*, p. 222. But O. xix. rr. 15, 20 (*ante*, pp. 309, 310), require the defence of the Stat. of Frauds to be pleaded specially. *Clarke v. Cullow*, 46 L. J., Q. B. 53, C. A.

Where allegations in the statement of claim have been traversed in the statement of defence in a more general manner than is allowed by O. xix. rr. 17, 19, *ante*, p. 310, the judges in the Chancery Division in many instances

treated the case as though there were no defence pleaded, and refused the defendants leave to amend. *Thorp v. Holdsworth*, 3 Ch. D. 637; *Byrd v. Nunn*, 5 Ch. D. 781; 7 Ch. D. 284, C. A.; *Tildesley v. Harper*, *Id.* 403; *Harris v. Gamble*, *Id.* 877. See also *Crove v. Barnicot*, 6 Ch. D. 753. The practice which the above cases threatened to introduce would, in fact, have been a return to the worst abuses of the system of special pleading, which was abolished by the C. L. P. Act, 1852. The refusal of Fry, J., in *Tildesley v. Harper*, *supra*, to allow an amendment, was, however, reversed with costs by the C. A., 10 Ch. D. 393, *vide ante*, p. 292.

By R. S. C. (Nov. 1893), O. xviii A, "a plaintiff may without pleadings proceed to trial subject to the following rules:—(1). The indorsement of the writ of summons shall contain a statement sufficient to give notice of the nature of his claim or of the relief or remedy required in the action, and shall state that if the defendant appears the plaintiff intends to proceed to trial without pleadings."

(3). "The defendant may within 10 days after appearance apply by summons for the delivery of a statement of claim, and on such summons the judge may order (1) that a statement of claim shall be delivered, in which case the action shall proceed in the usual manner; or (2) that the action shall proceed to trial without pleadings, in which case it may be further ordered, if the judge shall think fit, that either party shall deliver particulars of his claim or defence." (4). "When the judge orders that the action shall proceed to trial without pleadings, and makes no order as to particulars, all defences shall be open at the trial to the defendant. Where particulars are ordered to be delivered the parties shall be bound by such particulars, so far as regards the matters, in respect of which the order for particulars was made." (5). "Where a defendant has not taken out a summons under Rule 3 of this Order, he shall not be allowed to rely on a set-off or counter-claim, or on the defence of infancy, coverture, fraud, Statute of Limitations, or discharge under the Bankruptcy Acts, unless he shall have given (within 10 days after appearance) notice to the plaintiff, stating the grounds and particulars upon which he relies." (6). "When a plaintiff endorses the writ of summons with a statement that, if the defendant appears, he intends to proceed to trial without pleadings, no pleadings shall be required or delivered, except by order of the judge made under Rule 3 of this Order."

If the defence be that the contract was with A., and not with the plaintiff, the fact of payment by the defendant to A. is not impertinent, as evidence, to the issue; for it shows that the defence is a *bonâ fide* one, and not a pretext to avoid payment of the debt. *Gerish v. Chartier*, 1 C. B. 13.

If the defendant be entitled to a verdict on the ground that no contract exists, he must have a verdict against him on inconsistent defences, which assume the existence of one; as payment, accord and satisfaction, &c. *Gregson v. Ruck*, 4 Q. B. 737.

The following defences to actions on simple contract are arrauged in alphabetical order.

### Accord and Satisfaction.

Accord and satisfaction after breach must be specially pleaded, and the evidence required in support of it depends on the allegations in the defence, and the reply to it.

In order to be a good discharge of the cause of action, an accord must be executed, that is, performed by the defendant and accepted by the plaintiff, before it can be pleaded; but the plaintiff *may* accept a valid executory agreement in satisfaction: *Evans v. Powis*, 1 Exch. 601; *Hall v. Flockton*, 14 Q. B. 380; 16 Q. B. 1039; 20 L. J., Q. B. 208, Ex. Ch.; and it will be a

question for the jury whether the *agreement*, and not the *performance* of it, was accepted in lieu and satisfaction. S. C. The defendant pleaded the pendency of certain disputes, and an agreement respecting them between the plaintiff and defendant, entered into in satisfaction, &c.; the plaintiff denied the agreement: held, that the pendency of the disputes was admitted on the record. *Hey v. Moorhouse*, 6 N. C. 52. Where a cheque sent in full satisfaction of a claim is retained on account only, this is not conclusive evidence of accord and satisfaction, it is a question of fact on what terms the cheque was kept. *Day v. McLea*, 22 Q. B. D. 610, C. A. Acceptance of a negotiable instrument by A. before he knew that it was offered to him, may be presumed, when it is for his benefit. *London and County Banking Co. v. London and River Plate Bank*, 21 Q. B. D. 535, C. A. Accord and satisfaction made by a stranger on behalf of the defendant, and adopted by the plaintiff, will be a defence. *Jones v. Broadhurst*, 9 C. B. 193; *Randall v. Moon*, 12 C. B. 261; 21 L. J., C. P. 226.

If one of several joint creditors accept a satisfaction from the debtor, this is a good defence to the action, without proof of any authority from the co-creditors to accept the satisfaction. *Wallace v. Kelsall*, 7 M. & W. 264; *Smith v. Lovell*, 10 C. B. 6; 20 L. J., C. P. 37. So, if satisfaction be accepted after breach, it is a good defence. *Blake's case*, 6 Rep. 43 b; Bullen & Leake on Pleading, 3rd. ed. p. 479; 6th ed. p. 568. The acceptance *in satisfaction*, as well as the agreement to accept or the *accord*, must be shown. *Bayley v. Homan*, 3 N. C. 920; *Hardman v. Bellhouse*, 9 M. & W. 596. It is not sufficient that the defendant was always ready and willing to carry out his part of the agreement. *Collingbourne v. Mantell*, 5 M. & W. 289; *Wray v. Milestone*, 5 M. & W. 21; *Allies v. Probyn*, 2 C. M. & R. 408. The acceptance by the creditor of satisfaction from one of several joint debtors operates as a release to all, unless the right against the co-debtors is reserved, *vide post*, p. 702.

Where a sum of money has been paid to the plaintiff in satisfaction of unliquidated damages, and a discharge, not under seal, in full signed, the question for the jury is whether the plaintiff's mind went with the terms of the paper he signed, and was he aware of its effect? If not, the discharge would not bind him. *Rideal v. Gt. W. Ry. Co.*, 1 F. & F. 706; *cor. Erle, C.J.*, cited by Mellish, L.J., in *Lee v. Lancashire & Yorkshire Ry. Co.*, L. R., 6 Ch. 527, 537, where the cases are collected. See further *N. British Ry. Co. v. Wood*, July 2nd, 1891, D. P.; Times, July 3rd, reversing Ct. of Sess., 28 Scot. L. R. 130.

An acceptance of a less sum in satisfaction of a debt of a larger liquidated amount is, by itself, no good accord; *Cunber v. Wane*, 1 Str. 426; *Foakes v. Beer*, 9 Ap. Ca. 605, D. P.; *Underwood v. Underwood*, (1894) P. 204, C. A.; but if there be some additional benefit or legal possibility of benefit to the creditor thrown in, it may be a discharge. See notes to *Cunber v. Wane*, in 1 Smith's L. C. Thus, the acceptance of a negotiable security for a less amount, e.g., a cheque payable on demand, will be a good accord and satisfaction. *Goddard v. O'Brien*, 9 Q. B. D. 37; *Bidder v. Bridges*, 37 Ch. D. 406, C. A. And on this ground, compositions with creditors, accepted by them or by several of them under an agreement, are pleadable by way of accord; for in cases of doubtful solvency, the agreement of a creditor to give up a part in consideration that others will do so, is valid as against him, and will bind, although all the creditors have not consented. *Norman v. Thompson*, 4 Exch. 755. But if the agreement is signed only as an escrow, and on the understanding that certain others are to sign it, it is no accord unless the others also agree. *Boyd v. Hind*, 1 H. & N. 938; 26 L. J., Ex. 164, Ex. Ch., where *Norman v. Thompson, supra*, is corrected and explained. Where the demand is not liquidated, as where it is claimed on a *quantum*



*meruit*, acceptance of a less sum in satisfaction is an answer. *Cooper v. Parker*, 15 C. B. 822; 24 L. J., C. P. 68.

An oral agreement to accept something as a satisfaction, followed by performance and acceptance, is a good defence by way of accord and satisfaction, notwithstanding that the substituted agreement is not in writing, and could not, therefore, have been enforced by reason of the Stat. of Frauds, s. 4. *Lavery v. Turley*, 6 H. & N. 239; 30 L. J., Ex. 49. But the mere acceptance of an invalid agreement in satisfaction would not be a defence. *Case v. Barber*, T. Raym. 450; *Noble v. Ward*, L. R., 2 Ex. 135, Ex. Ch., *ante*, p. 28.

An agreement to refer to arbitration is not an accord and satisfaction, nor will it oust the jurisdiction of the court, except where the reference is made by the contract itself a condition precedent to the right of action. *Scott v. Avery*, 5 H. L. C. 811; 6 H. & N. 239; 25 L. J., Ex. 308; *Elliott v. R. Exch. Assur. Co.*, L. R., 2 Ex. 237; *Edwards v. Aberayron, &c.*, *Insur. Soc.*, 1 Q. B. D. 563, Ex. Ch.; *Collins v. Locke*, 4 Ap. Ca. 674, J. C.; and *Dawson v. Fitzgerald*, and *Babbage v. Coulburn*, cited *ante*, p. 347.

#### Alteration.

This defence was formerly raised under a denial of the contract, where the instrument was declared on in its altered form; *Waugh v. Bassett*, 5 Taunt. 707; *Hirschman v. Budd*, L. R., 8 Ex. 171; but where it was declared on in its unaltered form, or the altered part did not appear in the declaration, it was necessary specially to plead the alteration. *Hemming v. Trenery*, 9 Ad. & E. 926. In either case, the defence must now be specially pleaded. Rules, 1883, O. xix. r. 15, *ante*, p. 309.

The leading case, *Pigot's case*, *infra*, on this defence, was decided on a deed, and so also were some other of the cases cited below, for the law is the same in the case of a deed and of a simple contract; *Davidson v. Cooper*, *infra*; and both kinds of contracts are therefore here considered together.

In *Pigot's case*, 11 Rep. 26 b, it was held (1) that an immaterial alteration by a stranger does not avoid a deed; but (2) if made by a party interested, the alteration will avoid it as against him, whether material or not; and (3) a material alteration by a stranger avoids it. Thus, a guarantee was held to be avoided by alteration while in the hands of the plaintiff by attaching seals, so as apparently to make it a deed, without the defendant's knowledge or assent, although the plaintiff sued on it as a simple contract only; *Davidson v. Cooper*, 13 M. & W. 343, Ex. Ch.; and it will make no difference that the rights of the parties actually in dispute are not thereby affected. *Mollett v. Wackerbarth*, 5 C. B. 181. But an alteration, even though made by the plaintiff, which has no effect on the liability of either party, as stated in the contract, will not vitiate the instrument; *Aldous v. Cornwell*, L. R., 3 Q. B. 573, dissenting from the second resolution in *Pigot's case*, *supra*; unless it be proved that the part altered is material for the purposes for which the instrument was created, in which case the instrument will be avoided. *Suffell v. Bank of England*, 9 Q. B. D. 555, C. A., cited *ante*, p. 396. Obligee sued obligor on a bond conditioned for performance of covenants in a deed of sale to the defendant, of certain trees which defendant was to cut down before August, 1684. Plaintiff afterwards altered the deed in his possession by erasing 1684, and writing 1685: held no answer, for the erasure was in a place not material, and to the advantage of the defendant. *Darcy v. Sharpe*, 1 Leon. 282. In *Adsetts v. Hives*, 33 Beav. 52, it was held that a

mortgage deed was not made void by the fact that the date of the day of payment in the proviso for redemption, and the names of the tenants in the parcels, had been filled in by the mortgagee after the execution of the deed. See also *Andrews v. Lawrence*, 19 C. B., N. S. 768, Ex. Ch.; and *Crediton, Bp. of, v. Exeter, Bp. of*, (1905) 2 Ch. 455. It has also been denied that a material alteration by a stranger will avoid an instrument. See 2 Sugd. Powers, 193, citing *Heufree v. Bromley*, 6 East, 310; Alderson, B., in *Hutchins v. Scott*, 2 M. & W. 814; and *Ld. Herschell in Lowe v. Fox*, 12 Ap. Ca. 217, D. P. This would probably depend on whether or no the plaintiff was the person responsible for the safe custody of the instrument. If he were so, then the alteration by a stranger would vitiate the instrument, though it was made without the knowledge of the plaintiff. *Croockewit v. Fletcher*, 1 H. & N. 893; 26 L. J., Ex. 153. See also *Bank of Hindostan v. Smith*, 36 L. J., C. P. 241. If, however, the alteration were made by a stranger at a time when the plaintiff was not responsible for its safe custody, it has never been held that it could be relied on as a defence.

As to the degree of diligence to be exercised by the person having the instrument in his custody there may be some doubt. It would seem from *Shep. Touch. 69, Argoll v. Cheney*, Palm. 402, and *Bolton v. Carlisle, Bp. of*, 2 H. Bl. 259, that he is not absolutely in the position of an insurer, and may show that the alterations arose from accident; but in *Croockewit v. Fletcher, supra*, Martin, B., makes use of language almost strong enough to make him so. The cancellation of the acceptance on a bill of exchange can be shown to have been done by mistake. *Raper v. Birkbeck*, 15 East, 17; *Wilkinson v. Johnson*, 3 B. & C. 428; *Novelli v. Rossi*, 2 B. & Ad. 757. See further as to the effect of alteration, notes to *Master v. Miller*, 1 Smith's L. Cases. The alleged alterations cannot be proved by the declarations of a deceased attesting witness. *Stobart v. Dryden*, 1 M. & W. 615. Where a deed appears to have erasures and interlineations, the presumption is that they were made before execution. *Doe d. Tatum v. Catomore*, 16 Q. B. 745; 20 L. J., Q. B. 364. The rule is different in wills, *vide ante*, p. 145. In a joint and several bond, an alteration made *bonâ fide* by one obligor, N. discharged his co-sureties, *Ellesmere Brewery Co. v. Cooper*, (1896) 1 Q. B. 75; and N. was not bound, as he only executed it as a joint and several bond. S. C.

If both parties agree to an alteration, then, unless it be made simply for the purpose of correcting an error, the old contract is rescinded, and a new one substituted. The new agreement will in general require a fresh stamp, and if it is one that cannot be stamped after its execution, it cannot be used in evidence. *Vide Stamps, ante*, pp. 244, 268.

See cases on the effect of alteration as to bills and notes, *ante*, pp. 395, 396; as to bought and sold notes, *ante*, p. 536. A material alteration does not avoid the instrument altogether, and where the plaintiff's claim arises on an instrument which the defendant has altered, the plaintiff must nevertheless sue on the instrument. *Pattinson v. Luekley*, L. R., 10 Ex. 330.

#### Counterclaim.

See *Set-off and Counterclaim, post*, pp. 704 *et seq.*

#### Coverture.

See *sub tit. Actions by and against married women, post*, p. 1171.

## Fraud.

The proof of fraud in the party seeking to enforce a contract is a good defence; but it must be specially pleaded. Rules, 1883, O. xix. rr. 6, 15; *ante*, p. 309. And the allegation of fraud must be specific. *Wallingford v. Mutual Society*, 5 Ap. Ca. 685, 697, *per* Ld. Selborne, C. As the law is the same whether the contract is under seal or not, the cases in reference to these two kinds of contract are for convenience here collected together. The fraud must be some concealment or deception, practised by the plaintiff with respect to the very transaction in question; the illegality of the transaction, by reason of usury or other causes, is not sufficient. *Green v. Gosden*, 3 M. & Gr. 446. Where a fraudulent representation constitutes the alleged fraud, it must be on a matter which, in a case of simple contract, was substantially the consideration for the agreement. *Per* Erle, J., in *Mallalieu v. Hodgson*, 16 Q. B. 712; 20 L. J., Q. B. 339; *Panama, &c., Mail Co. v. Kennedy*, L. R., 2 Q. B. 580. *Vide ante*, p. 614. But a false statement to the defendant of the state of accounts between the plaintiff and his debtor, will prove the allegation of fraud, in an action against the defendant as surety for the debtor. *Stone v. Compton*, 5 N. C. 142; but see *Mason v. Ditchbourne*, 1 M. & Rob. 460; 2 C. M. & R. 720, n.; *D'Aranda v. Houston*, 6 C. & P. 511; and *Way v. Hearn*, 13 C. B., N. S. 292; 32 L. J., C. P. 34; see further, *ante*, pp. 483, 484. Where a surety, being sued on his bond, pleads that it was procured by the fraud and collusion of the plaintiff and the principal debtor, C., it is not enough to show fraud by C., unless the plaintiff was a party to it. *Spencer v. Handley*, 4 M. & Gr. 414. Where the owner of a house sued the defendant for not taking the house according to agreement, it was held (Ld. Abinger, C.B., *dissentiente*), that the plea of fraud was not supported by proof that the plaintiff's agent had denied the existence of a nuisance, of which he, the agent, was ignorant, but which the plaintiff himself knew of; for though this was a misstatement, it was no fraud. *Cornfoot v. Fowke*, 6 M. & W. 358. But, generally, the fraud of the agent, in the course of his principal's business, is the fraud of the principal. *Per* Parke, B., *Murray v. Mann*, 2 Exch. 538; *Swire v. Francis*, 3 Ap. Ca. 106, J. C.; even although the principal is a joint stock company; *Barwick v. English Joint Stock Bank*, L. R., 2 Ex. 259, Ex. Ch.; *Mackay v. Commercial Bank of New Brunswick*, L. R., 5 P. C. 394. See also *W. Bank of Scotland v. Addie*, L. R., 1 H. L. Sc. 145, and *Central Ry. Co. of Venezuela v. Kisch*, L. R., 2 H. L. 99. Any surreptitious dealing between one principal to a contract and the agent of the other principal is a fraud. *Panama, &c., Telegraph Co. v. India Rubber, &c., Co.*, L. R., 10 Ch. 515. It seems that a fraudulent misrepresentation as to the effect of a deed may be relied on as a defence to an action on the deed. *Hirschfeld v. L. Brighton & S. C. Ry. Co.*, 2 Q. B. D. 1. See *National Provincial Bank of England v. Jackson*, 33 Ch. D. 1, C. A.

Fraud in this defence means moral fraud, and not merely an innocent misrepresentation. *Moens v. Heyworth*, 10 M. & W. 147 (*dissentiente*, Ld. Abinger); *Kennedy v. Panama, &c., Mail Co.*, *ante*, p. 614. But it should be observed that where a contract is based on a statement made by the plaintiff innocently, but which is in fact untrue, specific performance will not be ordered; *New Brunswick & Canada Ry. Co. v. Muggidge*, 4 Drew. 686; 30 L. J., Ch. 242; and the defendant is entitled to have the contract set aside. *Redgrave v. Hurd*, 20 Ch. D. 1, C. A. See further cases cited *ante*, pp. 326 *et seq.* This remedy can, however, only be obtained where the contract has not been executed and there can be *restitutio in integrum*, *vide*

*post*, p. 844. If the plaintiff had fraudulently represented a fact to be true of which he knows nothing, and which is untrue, it will be a defence. *Evans v. Edmunds*, 13 C. B. 777; 22 L. J., C. P. 211; S. C. *per* Maule, J.; *Behn v. Burness*, 3 B. & S. 751; 32 L. J., Q. B. 204, Ex. Ch. See also *Mostyn v. W. Mostyn Coal & Iron Co.*, 1 C. P. D. 145. See further generally, *Action for Deceit and Misrepresentation*, *post*, pp. 843 *et seq.* In an action by a vendee of a term against vendor for not assigning, it is a defence that the defendant's term was not assignable except by consent of the lessor, who was willing to accept a respectable assignee, and that defendant was induced to make the agreement by the false and fraudulent representation of the plaintiff that one J. M., for whose benefit the purchase was made was a respectable person, whereas he was not respectable. *Canham v. Barry*, 15 C. B. 597; 24 L. J., C. P. 100.

The fraud may consist in permitting a party to labour under error. Thus, where the defendant erroneously supposed that a picture had been in the possession of an eminent collector, and purchased it from the agent of the plaintiff, who was aware of the defendant's error, but did not undeceive him, *Ld. Ellenborough* held that the sale was void, the price being probably enhanced by the error. *Hill v. Gray*, 1 Stark. 434. So where a vendor knowingly permits the vendee to buy under a false representation by a stranger. *Pilmore v. Hood*, 5 N. C. 97. But mere concealment by the plaintiff of a defect in a chattel will not avoid the contract, where he is under no obligation to divulge it. *Smith v. Hughes*, L. R., 6 Q. B. 597. See *Turner v. Green*, *ante*, p. 283, and *Saddon v. N. E. Salt Co.*, (1905) 1 Ch. 326. Where the defendant S. was induced to contract with the plaintiff G. by G.'s fraudulent concealment of his identity, S. may repudiate the contract, within a reasonable time of his finding it out. *Gordon v. Street*, (1899) 2 Q. B. 641, C. A.

Where goods are falsely described as "the property of a gentleman deceased," or "to be sold by executors," it is fraud, for such property is likely to be sold without reserve. *Per* *Ld. Mansfield*; *Berwell v. Christie*, *Cowp.* 395. So where, at a sale by auction, the owner of the goods employs puffers to bid for him, and the buyer has no notice of such employment, it is a fraud, and the seller cannot recover the price. *Crowder v. Austin*, 3 Bing. 368; *Wheeler v. Collier*, M. & M. 126. The employment of a single puffer when the sale is to be to the highest bidder, is evidence of fraud. *Green v. Baverstock*, 14 C. B., N. S. 204; 32 L. J., C. P. 181. Now see 30 & 31 V. c. 48, ss. 4, 5, 6, *ante*, p. 328, and the S. of G. Act, 1893, s. 58 (3, 4), *ante*, p. 542.

If the maker of a chattel make it with such a defect as to render it worthless, but the defect is patent, and the person for whom it is made have an opportunity of inspecting it before it is delivered, the maker is not guilty of a fraud if he do not point out the defect. *Horsfall v. Thomas*, 1 H. & C. 90; 31 L. J., Ex. 322. See, however, observations on this case in *Smith v. Hughes*, L. R., 6 Q. B. 605, *per* Cockburn, C.J. Fraud will not avoid a contract whereby an estate in land has passed to the defendant, for the defendant must have disaffirmed the contract, in order to avail himself of the defence (see *Daves v. Harness*, L. R., 10 C. P. 166), and he cannot by such disaffirmance revert the estate in the plaintiff. See *Feret v. Hill*, 15 C. B. 207; 23 L. J., C. P. 185.

A bribe given to an agent to induce him to enter into a contract on behalf of his principal, will render the contract so entered into voidable at the option of the principal. *Smith v. Sorby*, 3 Q. B. D. 552, n. See also *Harrington v. Victoria Graving Dock Co., Id.*, 549, cited *ante*, p. 590, and *Shipway v. Broadwood*, (1899) 1 Q. B. 369, C. A.

See as to concealment in the case of insurance, *ante*, pp. 449 *et seq.*, 452,

456; in the case of a guarantee, *ante*, p. 483. And see as to frauds by vendors, *ante*, pp. 326 *et seq.*

As to frauds by companies or their directors, whereby persons have been induced to take shares, being a defence to an action for calls, see Part III., *Actions by and against Companies*, *post*, p. 1107.

#### *Frauds, Statute of, and Sale of Goods Act, 1893.*

The Rules, 1883, O. xix., r. 20, *ante*, p. 310, now require that the insufficiency of any contract by reason of the Stat. of Frauds, should be pleaded specially. *Clarke v. Callow*, 46 L. J., Q. B. 53, C. A. The same principle applies to a contract within the Sale of Goods Act, 1893, s. 4, *ante*, pp. 526 *et seq.* As to when such defence is admissible, *vide ante*, pp. 312 *et seq.*, and pp. 526 *et seq.*

#### *Illegality.*

Where a contract is illegal or immoral, it cannot be enforced; but such defence must in general be specially pleaded. *Potts v. Sparrow*, 1 N. C. 594. So a defence that the contract was a wagering one, and void by 8 & 9 V. c. 109, s. 18, *ante*, p. 617, must be pleaded specially. *Varney v. Hickman*, 5 C. B. 271. And see Rules, 1883, O. xix. 15, *ante*, p. 309. Where, however, it appears at the trial that the contract on which the plaintiff is suing is in fact a conspiracy to defraud the public, the Court will not enforce it, even although the defence of illegality is neither pleaded nor insisted on by the defendant. *Scott v. Brown*, and *Slaughter v. Brown*, cited *post*, p. 667. So in the case of a wagering policy, with the "P. P. I. clause," made illegal by 6 E. 7. c. 41, s. 4 (2 *b*). See *Gedge v. R. Exch. Assur. Co.*, *ante*, p. 422. A contract cannot be enforced where the consideration is, even in part only, illegal. *Featherston v. Hutchinson*, Cro. Eliz. 199; *Loud v. Grimrade*, 39 Ch. D. 605. Where, however, the consideration is a legal one, and the promises are some legal and some illegal, the former may be enforced, though not the latter. *Kearney v. Whitehaven Colliery Co.*, (1893) 1 Q. B. 700, C. A.

The maxim, "*In pari delicto potior est conditio defendentis*," is important to be observed when the defence or reply raises a question of illegality. The true test for determining whether or not the plaintiff and the defendant were *in pari delicto*, is by considering whether the plaintiff could make out his case, otherwise than through the medium and by the aid of the illegal transaction, to which he was himself a party. *Taylor v. Chester*, L. R. 4 Q. B. 309, 314; *Herman v. Jeuchner*, 15 Q. B. D. 561, 564, C. A.

Some cases of illegality have been already noticed under the head of *Action for money had and received*, *ante*, pp. 618 *et seq.* The facts must be stated specially on the record, and the issues joined sufficiently point out the required evidence. Rules, 1883, O. xix. r. 15, *ante*, p. 309.

In an action for work and labour, the illegality of the transaction will be a defence. Thus, where a surveyor of highways employs his own horses for a team work on the highways, for which he was liable to a penalty under 5 & 6 W. 4, c. 50, s. 46, it was held he could not recover for the value of the work. *Barton v. Piggott*, L. R., 10 Q. B. 86. So officers and servants of local boards of health are prohibited from contracting with the board by the Public Health Act, 1875, s. 193, and if they so contract they cannot recover on the contract. *Melliss v. Shirley, &c., Board of Health*, 16 Q. B. D. 446, C. A. A party will not be permitted to recover either for work and labour done, or material provided, where the whole combined forms one entire subject-matter made in violation of the provisions of an Act of

Parliament. *Bensley v. Bigwood*, 5 B. & A. 335. Thus the proprietor of a newspaper could not, before the filing of the affidavit directed by stat. 38 G. 3, c. 78, s. 1, recover upon a contract for the printing of the paper. *Houston v. Mills*, 1 M. & Rob. 325. And a printer, who had made a false affidavit under that statute that he was sole proprietor of a paper, could not sue the real proprietors for the printing, or for any matter connected with its circulation. *Stephens v. Robinson*, 2 C. & J. 209. So the printer of an immoral and libellous book cannot maintain an action for his bill against the publisher who employed him. *Poplett v. Stockdale*, Ry. & M. 337; and see *Coutes v. Hatton*, 3 Stark. 61, and *Clay v. Yates*, 1 H. & N. 73; 25 L. J., Ex. 237, *ante*, p. 581. A builder cannot sue for the contract price of a house built in contravention of the Building Acts. *Stevens v. Gourley*, 7 C. B., N. S. 99; 29 L. J., C. P. 1.

A promise to indemnify the plaintiff, in consideration of the plaintiff having published a libel, and defended an action brought against him for that libel at the defendant's request, is void. *Shackell v. Rosier*, 2 N. C. 634. A contract which amounts to maintenance is illegal, and cannot be enforced. S. C. "Maintenance is the officious assistance by money or otherwise, proffered by a third person to either party to a suit, in which he himself has no legal interest, to enable them to prosecute or defend it." See *Bradlaugh v. Newdegate*, 11 Q. B. D. 1, 6; *Alabaster v. Harness*, (1895) 1 Q. B. 339, C. A.; *Greig v. National, &c., Union of Shop Assistants*, 22 T. L. R. 274, H. S. 1906, *cor. L. C. J.*, unless the assistance be given from charitable motives; *Harris v. Brisco*, 17 Q. B. D. 504. A contract in the nature of champerty is illegal. See *Rees v. De Bernardy*, (1896) 2 Ch. 437. As to marriage brokerage contracts, see *Hermann v. Charlesworth*, (1905) 2 K. B. 123, C. A.

A promise by a director of a railway company, A., that the company would indemnify the promoters of another railway company if they failed in obtaining a bill in parliament is illegal, the company A. having no power by its act so to apply their funds, and no action lies on such promise. *Macgregor v. Deal & Dover Ry. Co.*, 18 Q. B. 618; 22 L. J., Q. B. 69, Ex. Ch. But an agreement by a railway company with a landowner to pay him a sum of money on the passing of a bill for extending the powers of the company, if he withdrew his opposition to it, is legal. *Taylor v. Chichester & Midhurst Ry. Co.*, L. R., 4 H. L. 628. A person who has expended money for the purposes of an unlicensed theatre cannot recover against another at whose request he expended the money, and who participated in the profits. *De Begnis v. Armistead*, 10 Bing. 107. Where a contract with a company is *ultra vires*, it is absolutely void, whether the company be formed under the Companies Act, 1862; *Riche v. Ashbury Ry. Carriage, &c., Co.*, L. R., 7 H. L. 653; or by statute. *Wenlock, Ly. v. River Dee Co.*, 10 Ap. C. 354, D. P.; *Mann v. Edinburgh N. Tramways Co.*, (1893) A. C. 69, D. P.

A company of more than 20 members, formed after Nov. 1st, 1862, having for its object the acquisition of gain by the company or its members, is illegal, unless registered under the Companies Act, 1862, or unless formed under some other statute or letters patent, or it be a mining company under the jurisdiction of the Stannaries; see sect. 4; and no action will lie in respect of services rendered in forming or carrying out the objects of such company if unregistered. *In re S. Wales Atlantic Steamship Co.*, 2 Ch. D. 763, C. B. And a promissory note given to such a company as security for a loan made by it in the course of carrying on its business, is given for illegal consideration. *Shaw v. Benson*, 11 Q. B. D. 563, C. A. A mutual marine insurance company, of which persons become members by effecting a mutual policy of insurance is within this section. *In re Padstow, &c., Assur. Assoc.*, 20 Ch. D. 137, C. A. So a mutual loan society. *Shaw v. Benson*,

*supra*. See further hereon *Smith v. Anderson*, 15 Ch. D. 247, C. A.; *In re Siddall*, 29 Ch. D. 1, C. A. A money club formed with less than 20 members becomes illegal when the number exceeds 20. *Ex pte. Poppleton*, 14 Q. B. D. 379. As to the effect of registration on prior transactions, *vide* S. C. Such an association may, however, be the beneficial owner of property. *R. v. Tankard*, (1894) 1 Q. B. 548. An unregistered association constituted before Nov. 1st, 1862, in which there was a continuous change of members, was held not to be formed on each such change, within sect. 4. *Shaw v. Simmons*, 12 Q. B. D. 117. As to the illegality of a contract by a company in liquidation by reason of sect. 131, see *Hire Purchase Furnishing Co. v. Richens*, 20 Q. B. D. 387, C. A. cited *ante*, p. 94.

Money paid by the plaintiff as the price of a patent right, which he knew did not exist, but bought for the fraudulent purpose of reselling to a company to be formed by him, cannot be recovered. *Begbie v. Phosphate Sewage Co.*, L. R., 10 Q. B. 491; 1 Q. B. D. 679, C. A. So money paid to a broker on an agreement with him to purchase shares, for the fraudulent purpose of deceiving the public into the belief that there is a market for the shares and that they are at a premium. *Scott v. Brown, Slaughter v. Brown*, (1892) 2 Q. B. 724, C. A. So money deposited with an agent, and expended by him in illegal disbursements, cannot be recovered from him by his principal, if the principal was at the time aware of the illegal disbursements, or assented to them. *Baynton v. Cattle*, 1 M. & Rob. 265. Payments made by an election agent or sub-agent, other than the expense agent of a parliamentary candidate, A., cannot be recovered from A., such payments being illegal under stat. 26 & 27 V. c. 29, s. 2. *In re Parker*, 21 Ch. D. 408, C. A. A London broker could not maintain an action for commission for buying and selling stock, &c., unless duly licensed by the mayor, &c., of the city of London, pursuant to 6 A. c. 68 (c. 16, Ruff.), until the repeal of sect. 4 by 50 & 51 V. c. 59; *Cope v. Rowlands*, 2 M. & W. 149; nor for sale of shares in a company, British or foreign. *Smith v. Lindo*, 4 C. B., N. S. 395; 5 C. B., N. S. 587; 27 L. J., C. P. 335, Ex. Ch. But he might recover money paid by him to the seller on account of his principal, for which the broker is, by usage, liable as a principal. S. C. Money won at a lottery is not recoverable. *Barclay v. Pearson*, (1893) 2 Ch. 154. A prize competition is a lottery where the result depends on chance alone, but not where it depends also on skill. S. C.; *Hull v. Cox*, (1899) 1 Q. B. 198. Money lent for the express purpose of playing at an illegal game, such as hazard; *M'Kinnell v. Robinson*, 3 M. & W. 434; or for illegally settling stock-jobbing transactions; *Cunnam v. Bryce*, 3 B. & A. 179; cannot be recovered back. See, however, *Pearce v. Brooks*, L. R., 1 Ex. 213, 219, *per* Martin, B.; and *Bagot v. Arnott*, 1 R., 1 C. L. 1, C. P. But money lent to enable the borrower to pay a bet already lost, is not lent on an illegal consideration within the stat. 5 & 6 W. 4, c. 41. *Ex pte. Pyke*, 8 Ch. D. 754, C. A. Money paid at the request of the defendant in fulfilment of a void contract may in general be recovered, in the case, however, of wagers this has now been altered by the Gaming Act, 1892, 55 & 56 V. c. 9, *vide ante*, p. 591. With reference to sales of stock, *vide ante*, pp. 577, 578. As to the validity of a bond given for racing debts, see *Bubb v. Yelverton*, L. R., 9 Eq. 471. A broker cannot sue for commission in respect of the sale of stock, &c., of the value of 5*l.* and upwards, unless he has sent his principal a contract note duly stamped, 54 & 55 V. c. 39, s. 53 (3); 61 & 62 V. c. 46, s. 7 (1), *vide ante*, p. 248; nor can an insurance broker recover brokerage or premiums in respect of an unstamped policy, *ante*, p. 267. By the stat. 54 & 55 V. c. 39, s. 117, *ante*, p. 221, conditions of sale avoiding stamp objections, and contracts for assuring or indemnifying against liability on the ground of absence of stamp on any instrument executed after May 16th, 1888, are void.

It is an answer to an action for refusing to allow the plaintiff to use rooms pursuant to agreement that he intended to use them for the delivery of blasphemous lectures. *Cowan v. Milbourn*, L. R., 2 Ex. 230. The defendant is entitled to justify his refusal on this ground, although at the time of the breach, he assigned a different reason to the plaintiff. S. C.

No action lies for the value of goods knowingly sold for illegal purposes—as brewers' drugs; *Langton v. Hughes*, 1 M. & S. 593; or, formerly, for bricks under statutable size; *Law v. Hodson*, 11 East, 300. See also *Gaslight & Coke Co. v. Turner*, 5 N. C. 666; 6 N. C. 324, Ex. Ch. A collateral security given for payment of the purchase-money of land, knowingly sold for the purpose of resale by lottery, is illegal; *Fisher v. Bridges*, 3 E. & B. 642; 22 L. J., Q. B. 270; and this though the security be by deed. S. C.

Where the party seeking to enforce the contract has been guilty of contravening a law made for the purposes of the revenue only, it has been held that this is not such an illegality as will prevent him from recovering at law on the contract; as where several partners sued the defendant for the price of spirituous liquors sold, it was held that the omission of the name of one of them in the license to carry on the business of distillers was no answer. *Brown v. Duncan*, 10 B. & C. 93, and cases there cited. The question is, whether the legislature has either expressly or by implication prohibited the contract? If not, a breach of the law regulating the vendor's trade may expose the firm to penalties, but does not necessarily avoid a contract of sale by him. *Smith v. Mawhood*, 14 M. & W. 452; *Bailey v. Harris*, 12 Q. B. 905. Non-delivery of a ticket to the purchaser of coals in London, as required by 1 & 2 V. c. 101, s. 3, disables the vendor from recovering the price. *Cundell v. Dawson*, 4 C. B. 376. The Weights and Measures Act, 1889 (52 & 53 V. c. 21, s. 21), contains a similar provision which is general in its operation.

"Any contract or engagement having a tendency, however slight, to affect the administration of justice is illegal and void." *Egerton v. Earl Brownlow*, 4 H. L. C. 1, 161; 23 L. J., Ch. 348, 386, per Ld. Lyndhurst; *Lound v. Grimwade*, 39 Ch. D. 605. Thus an agreement not to prosecute for a criminal offence is illegal. S. C.; *Keir v. Leeman*, 9 Q. B. 371, Ex. Ch.; *Williams v. Bailey*, L. R., 1 H. L. 200. The rule extends even to a nuisance occasioned by the obstruction of a highway; *Windhill Local Board of Health v. Vint*, 45 Ch. D. 351, C. A.; and the consent of the judge, who tried the case, to a compromise of the prosecution is immaterial. S. C.; *Keir v. Leeman*, *supra*. But securities given to a creditor, by a debtor whose debt has been contracted under circumstances that might have rendered him liable to a prosecution, may be enforced, unless they were given in pursuance of an agreement to stifle it. *Flower v. Sadler*, 10 Q. B. D. 572, C. A., following *Ward v. Lloyd*, 7 Scott, N. R. 449; 6 M. & Gr. 785. But such an agreement may be inferred from the circumstances. *Jones v. Merionethshire, &c., Building Soc.*, (1892) 1 Ch. 173, C. A. A contract to indemnify bail given on a criminal charge is illegal, *vide ante*, p. 619. An agreement between the parties to an action before trial as to how the costs shall be borne is not illegal. *Prince v. Haworth*, (1905) 2 K. B. 768.

Where a contract is made for the performance of an illegal act, knowledge that the act is illegal is not material, and the contract is void; but where the contract is capable of being legally performed, it can only be avoided by showing a wicked intention to break the law; and for this purpose knowledge of what the law is becomes material. *Waugh v. Morris*, L. R., 8 Q. B. 202.

A foreigner selling and delivering goods abroad to a British subject may recover the price, although he knows at the time of the sale and delivery that the buyer intends to smuggle them into this country, provided he takes no



actual part in the illegal adventure, as by packing, &c. *Pellecat v. Augell*, 2 C. M. & R. 311. A brewer delivering beer to an unlicensed keeper of the public-house, may maintain an action against him for the price. *Brooker v. Wood*, 5 B. & Ad. 1052. A municipal corporation may be sued for money lent, though for purposes which were *ultra vires*, and though secured by a covenant in a mortgage, which they had made without the consent of the Treasury, as required by stat. 5 & 6 W. 4, c. 76. *Payne v. Brecon, Mayor of*, 3 H. & N. 572; 27 L. J., Ex. 495. So if trustees lend their trust money to A. they may recover it from him, although such loan be *ultra vires*. *In re Collman*, 19 Ch. D. 64, C. A.

No action will lie here on a contract made abroad to do an act legal there, but illegal in England. *Santos v. Illidge*, 6 C. B., N. S. 841; 28 L. J., C. P. 317 (reversed 8 C. B., N. S. 861; 29 L. J., C. P. 348, Ex. Ch., on the ground that the contract was *not* illegal here); *Rousillon v. Rousillon*, 14 Ch. D. 351, 369. Nor where it violates some moral principle which ought to be universally recognised. *Kaufman v. Gerson*, (1904) 1 K. B. 591, C. A., as where it has been obtained by strong moral coercion. S. C.

*Illegality—Money Lenders Act, 1900.*] By stat. 63 & 64 V. c. 51, s. 2 (1) a moneylender as defined by the Act (see sect. 6, *ante*, p. 600) shall (a) register himself at an office provided by the Commissioners of Inland Revenue “under his own or usual trade name, and in no other name, and with the address or all the addresses if more than one at which he carries on his business of moneylender” and (b) carry on the business in that name and at those places of business only, and (c) “shall not enter into any agreement in the course of his business as a moneylender with respect to the advance and repayment of money or take any security” therefor except “in his registered name.” By sect. 3 (2) the registration lasts for 3 years only, but may be renewed for 3 years and so on. Any agreement made or security taken by an unregistered moneylender D. in contravention of sect. 2 (1c) is void. *Victorian, &c., Syndicate v. Doll*, (1905) 2 Ch. 624; (1906) 1 Ch. 717, n., C. A. *Accord. Bonnard v. Doll, Id.* 740, C. A. D. cannot compel the borrower B. to return the money lent, while B. can compel D. to return the securities for the loan on the terms of repaying the amount lent. *Id.* 745; but only on those terms, except perhaps in an action of trover or detinue; *Lodge v. National Union Investment Co.*, (1907) 1 Ch. 300.

*Illegality—Weights and Measures Acts, 1878, 1889.*] Under 41 & 42 V. c. 49, s. 19, “every contract, bargain, sale or dealing, made or had in the United Kingdom for any work, goods, wares, or merchandise, or other thing which has been or is to be done, sold, delivered, carried, or agreed for by weight or measure, shall be deemed to be made and had according to one of the imperial weights or measures ascertained by this Act, or to some multiple or part thereof, and if not so made or had shall be void,” and by sect. 25, any contract, bargain, sale, or dealing, made by any false weight, measures, scale, &c., shall be void. See 52 & 53 V. c. 21, s. 6, which confers on the Board of Trade power to make new denominations of standards, for the measurement of electricity, temperature, pressure, or gravities. The 60 & 61 V. c. 46, s. 1, now allows sale, &c., by metric standards.

*Illegality—Sale of spirituous liquors.*] By the Tippling Act (24 G. 2, c. 40), s. 12, no person shall maintain any action for any sum, debt or demand whatsoever, for or on account of any spirituous liquors, unless such debt shall have been really and *bonâ fide* contracted at one time to the amount of 20s. or upwards; nor shall any item in any account or demand for such liquors be allowed where the liquors delivered at one time, and mentioned in such item, shall not amount to the full value of 20s. at the

least, and that without fraud or covin, and where no part of the liquor so sold shall have been returned, or agreed to be returned, directly or indirectly. This statute is repealed, by the 25 & 26 V. c. 38, as to "liquors to be consumed elsewhere than on the premises where sold, and delivered at the residence of the purchaser thereof, in quantities not less at any one time than a reputed quart." The Act extends to the case of a person who purchases liquors in small quantities to retail them again; as the keeper of an eating-house. *Hughes v. Done*, 1 Q. B. 294. And also to the case of a tavern-keeper's bill in which there are items for spirits supplied to the defendant's guests. *Burnyeat v. Hutchinson*, 5 B. & A. 241. And a bill of exchange, part of the consideration for which is spirituous liquor sold in less quantities than of 20s. value, was held to be wholly void. *Scott v. Gillmore*, 3 Taunt. 226; *Gaitskill v. Greathead*, 1 D. & Ry. 359. But where a bill for 6*l.* had been accepted by an officer in payment of small quantities of spirits, under 20s., supplied for recruits under the defendant's command, the bill was held valid. *Spencer v. Smith*, 3 Camp. 9. Drunkenness being a punishable offence, a publican cannot recover for beer furnished to the defendant after he has become intoxicated by drinking in his public-house. *Brandon v. Old*, 3 C. & P. 440.

The County Courts Act, 1888 (51 & 52 V. c. 43), s. 182, provides that no action shall "be brought or be maintainable in any county or other court to recover any debt or sum of money alleged to be due in respect of the sale of any ale, porter, beer, cider, or perry, which was consumed on the premises where sold or supplied, or in respect of any money or goods lent or supplied, or of any security given, for, in, or towards the obtaining of any such ale," &c.

*Illegality—Sale on Sunday.*] By the Sunday Observance Act, 1677, usually known as the Lord's Day Act (29 C. 2, c. 7), s. 1, "no tradesman, artificer, workman, labourer, or other person whatsoever shall do or exercise any worldly labour, business, or work of *their ordinary callings*, upon the Lord's day, or any part thereof, works of necessity and charity only excepted." Upon this statute it has been held that a horse-dealer cannot maintain an action upon a contract for the sale and warranty of a horse made by him upon a Sunday. *Fennell v. Ridler*, 5 B. & C. 408. But where A., not knowing that B. was a horse-dealer, made an oral bargain with him on a Sunday for the purchase of a horse, and the price, which was above 10*l.*, was then specified, and the horse warranted, but it was not delivered till the following Tuesday, when the money was paid, it was held that there was no complete contract till the delivery of the horse, and consequently that the contract was not void under the statute. *Bloxsome v. Williams*, 3 B. & C. 232; see *Norton v. Powell*, 4 M. & Gr. 42, and *Beaumont v. Brengeri*, 5 C. B. 301. Though the contract was made by an agent, and the objection is taken by the party at whose request it was entered into on the Sunday, it cannot be enforced. *Smith v. Sparrow*, 4 Bing. 84. But, where goods were bought on a Sunday, and the purchaser afterwards, while the goods were in his possession, made a promise to pay for them, it was held that the seller was entitled to recover on a *quantum meruit*. *Williams v. Paul*, 6 Bing. 653. The statute does not make every work or business done on a Sunday illegal; but only carrying on trade and ordinary callings on that day. Therefore the hiring of a servant by a farmer on Sunday is good. *R. v. Whitnash*, 7 B. & C. 596; see also *Scarfe v. Morgan*, 4 M. & W. 270, and *Begbie v. Levi*, 1 C. & J. 180. So is a guarantee, given for the faithful services of a tradesman's traveller; *Norton v. Powell*, *supra*; and a contract for enlisting a soldier. *Wolton v. Gavin*, 16 Q. B. 48; 20 L. J., Q. B. 73. A farmer does not come within the provisions of this statute. *R. v. Silvester*, 33 L. J., M. C. 79, Q. B. Nor does a barber. *Palmer v. Snow*, (1900) 1 Q. B. 725.

*Illegality—Contract by or concerning bankrupt.]* The Bankruptcy Act, 1883, contains no provisions avoiding contracts made for the payment of debts barred by bankruptcy, or securities given to induce the forbearance of creditors pending proceedings in bankruptcy; but any agreement whereby proceedings in bankruptcy, or the distribution of the assets is affected, is void as against the policy of the law. Thus a promissory note given by a third person to a creditor in order to induce him to forbear from opposing an insolvent's petition, was void. *Hills v. Mitson*, 8 Exch. 751; 22 L. J., Ex. 273; *Hall v. Dyson*, 17 Q. B. 785; 21 L. J., Q. B. 224. So a guarantee given to a creditor to induce him to accept a composition; *McKewan v. Sanderson*, L. R., 20 Eq. 65; or to secure the payment of notes given for the like purpose, is void. *Clay v. Ray*, 17 C. B., N. S. 188; *Geere v. Mare*, 2 H. & C. 339; 33 L. J., Ex. 50. See also *Kearley v. Thomson*, *ante*, p. 619. An agreement of this kind, otherwise illegal, was not the less void because it had been made with the knowledge of the other creditors, and sanctioned by the Commissioners in Bankruptcy. *Humphreys v. Willing*, 1 H. & C. 7; 32 L. J., Ex. 33. See also *Blucklock v. Dobie*, 1 C. P. D. 265; *Rimini v. Van Praagh*, L. R., 8 Q. B. 1. A promise to pay a debt released by bankruptcy is *nudum pactum*, *Heather v. Webb*, 2 C. P. D. 1; but may be enforced if founded on good consideration. *Jakeman v. Cook*, 4 Ex. D. 26.

An agreement contrary to the policy of the Winding-up Acts is void. *Elliott v. Richardson*, L. R., 5 C. P. 744.

*Illegality—Contract in restraint of trade.]* All restraints upon trade are bad as being in violation of public policy, unless they are natural and not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract. The principle is that, though every man is to remain at liberty to work for himself, yet when he has obtained something he wants to sell, he should be at liberty to sell it to the best advantage, and for this purpose, must be able to preclude himself entering into competition with the purchaser. In such case a stipulation, however restrictive, will be good if the restriction is not, in the judgment of the court, unreasonable, having regard to the subject-matter of the contract. *Leather Cloth Co. v. Lorscheid*, L. R., 9 Eq. 345, 353, 354, *per James, V.-C.*; *Nordenfelt v. Maxim Nordenfelt, &c., Co.*, (1894) A. C. 535, D. P. The old hard and fast rule that a contract to restrain a man from trading at all, was necessarily illegal and void, as against public policy (see *Mitchell v. Reynolds*, 1 P. Wms. 181; 1 Smith's L. C.), is now exploded. S. C. But any contract in restraint of trade must be founded on good consideration; S. C., though the court will not inquire into the adequacy of the consideration. *Pilkington v. Scott*, 15 M. & W. 657, 660, *per Alderson, B.*; *Collins v. Locke*, 4 Ap. Ca. 674, 686, *per J. C.* Where the restriction is greater than the protection of the covenant can possibly require the covenant is bad. *Ward v. Byrne*, 5 M. & W. 548, 561. If the restriction be divisible and be good as to part, and bad as to the rest, the court will give effect to the former part. *Price v. Green*, 6 M. & W. 346, Ex. Ch.; *Robinson (William) & Co. v. Hewer*, (1898) 2 Ch. 451, C. A. Numerous cases are reported as to what contracts have been adjudged to be reasonable; an enumeration of them would be beyond the scope of the present work: they will be found collected in the notes to *Mitchell v. Reynolds*, 1 Smith's L. C., 11th ed., 417 *et seq.*; see further *Dowden & Pook v. Pook*, (1904) 1 K. B. 15, C. A., and *Henry Latham & Sons v. Johnstone-White*, (1907) 1 Ch. 322, C. A. Evidence of persons in the same trade as to their views as to the reasonableness of the restrictions in the contract is not admissible. S. C. The question is to be decided by the judge alone. *Dowden & Pook v. Pook*, *supra*. A term in a contract of sale of goods by the manufacturer E. to C., a trade purchaser, that C. should

not sell them below a fixed price, and that if C. sold them he should obtain a similar agreement from his sub-purchaser, is good. *Elliman v. Carrington*, (1901) 2 Ch. 275.

A contract not to carry on a trade within 10 miles from a town L., means within 10 miles from the borough boundary of L., *Cattle v. Thorpe*, (1900) W. N. 83, Ch.; and the distance is to be measured "as the crow flies," *i.e.*, by a straight line on a map, and not by the nearest mode of practicable access. *Moufflet v. Cole*, L. R., 8 Ex. 32, Ex. Ch.

As to trade unions, see stat. 34 & 35 V. c. 31, ss. 3, 4, 23, amended by 39 & 40 V. c. 22, s. 16, and *Rigby v. Connol*, 14 Ch. D. 482; *Wolfe v. Matthews*, 21 Ch. D. 194; *Swaine v. Wilson*, 24 Q. B. D. 252, C. A.; *Chamberlain's Wharf v. Smith*, (1900) 2 Ch. 605, and *Yorkshire Miners Assoc. v. Howden*, (1905) A. C. 256, D. P., decided thereon. See also the Trade Disputes Act, 1906, 6 E. 7. c. 47, *post*, pp. 761, 892, 910.

*Illegality—Immorality.*] One who is a party to an immoral contract cannot enforce it. Thus the price of obscene and libellous prints cannot be recovered. *Fores v. Holmes*, 4 Esp. 97. And where an action was brought against the defendant for board and lodging, and it appeared that she was a prostitute, and had boarded and lodged with the plaintiff, who kept a house of ill-fame, and partook of the profits of her prostitution, it was held that such a demand could not be supported. *Howard v. Hodges*, 1 Selw. N. P. 13th ed., 80. But a person may recover for goods sold to a prostitute, not being evidently sold to enable her to carry on prostitution. *Bowry v. Bennet*, 1 Camp. 318. So where the plaintiff was employed to wash clothes for a prostitute, knowing her to be such, and the clothes consisting principally of expensive dresses and men's nightcaps, it was held that she was entitled to recover. *Lloyd v. Johnson*, 1 B. & P. 340. So for the rent of lodgings let to one, if not knowingly let for the purpose of prostitution. *Crisp v. Churchill*, cited 1 B. & P. 340; *Jennings v. Thrognorton*, Ry. & M. 251. But if after plaintiff has become aware of the purpose for which they were let, he allow her to remain a lodger, he cannot recover. S. C. See also *Smith v. White*, L. R., 1 Eq. 626. So the hire for a brougham cannot be recovered from a prostitute where the coachmaker knew her to be such, and supplied the brougham knowing it was to be used by her as part of her display to attract men. *Pearce v. Brooks*, L. R., 1 Ex. 213. It is unnecessary that the plaintiff should have looked expressly to the proceeds of the defendant's prostitution for payment. S. C.; overruling, on this point, *Bowry v. Bennet*, *supra*. See *Taylor v. Chester*, L. R., 4 Q. B. 309.

Where a bond has been given by a man to his concubine, it is not to be presumed from the subsequent continuance of the cohabitation, that it was given to secure such cohabitation, and therefore for an immoral consideration. *In re Vallance*, 26 Ch. D. 353.

### *Infancy.*

An infant is a person under the age of 21 years, and in calculating age fractions of days are disregarded; thus if born on Sept. 3rd, he becomes of age on Sept. 2nd, 21 years afterwards. *Anon.*, cited *per Holt*, C. J., Ld. Raym. 480; 1096; S. CC., Salk. 695, 44. See also 1 Bl. Com. 463.

That the defendant was an infant at the time of the contract made, is a good defence, unless the action be for necessaries; the defence must be specially pleaded. Rules, 1883, O. xix. r. 15, *ante*, p. 309. By the Sale of Goods Act, 1893, s. 2, "Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property. Provided that where necessaries are sold and delivered to an infant, or minor,

or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor. Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery." See *In re Clabbon*, cited *post*, p. 681.

Even though given for the price of necessaries, an infant is not bound by his penal bond. *Ayliff v. Archdale*, Cro. Eliz. 920; nor by his acceptance of a bill of exchange. *Ex pte. Margrett*, (1891) 1 Q. B. 413, C. A. An infant apprentice, A., cannot be sued by his master for not serving him; *Gylbert v. Fletcher*, Cro. Car. 179; nor be restrained from serving another person, B., contrary to the apprenticeship agreement; nor can B. be restrained from employing A. *De Francesco v. Burnum*, 43 Ch. D. 165. See S. C. 45 Ch. D. 430.

Where the action, though in form *ex contractu*, is, in fact, founded upon *tort*, infancy will be no defence. *Barnard v. Haggis*, 14 C. B., N. S. 45; 32 L. J., C. P. 189. Thus an action for money had and received lies against an infant for money which he has appropriated by fraud or embezzlement. *Bristow v. Eastman*, 1 Esp. 172. But if the action be founded on mere fraudulent representation, infancy is a defence. *Johnson v. Pye*, 1 Sid. 258; see also *Liverpool Adelpi v. Fairhurst*, 9 Exch. 422, the case of a feme covert. It seems, since the J. Act, 1873, to be an answer to the defence of infancy that the infant fraudulently represented himself to be of full age. *Ex pte. Unity Joint Stock Mutual Banking Association*, 3 D. G. & J. 63; 27 L. J., Bky. 33; see cases cited in *Lempricre v. Lange*, 12 Ch. D. 675.

Where an infant has entered into a contract which is for his benefit, it is voidable only and not void, and he must repudiate it within a reasonable time after he comes of age, or he will be bound thereby. *Edwards v. Carter*, (1893) A. C. 360, D. P.

[*What are necessaries.*] An infant may bind himself for necessaries, that is, for meat, drink, apparel, lodging, medicines, &c., and also for his good teaching or instruction. Co. Litt. 172 a; Com. Dig. *Enfant* (B. 5). The question of what are necessaries is to be governed by the fortune and circumstances of the infant; and the proof of those circumstances lies on the plaintiff. *Per* Ld. Kenyon, C.J.; *Ford v. Fothergill*, 1 Esp. 211; *Ryder v. Wombwell*, L. R. 4 Ex. 32, Ex. Ch., reversing S. C., L. R., 3 Ex. 90. They may be necessaries without being absolutely requisite for bare subsistence. *Peters v. Fleming*, 6 M. & W. 42. It is a mixed question of law and fact to be left to the jury, subject to the opinion of the court as to the manner in which the jury have exercised their judgment. *Harrison v. Fane*, 1 M. & Gr. 550, 553; *Wharton v. Mackenzie*, 5 Q. B. 606. The judge must decide whether the case is such as to cast on the plaintiff the onus of proving that the articles are necessaries, and then whether there is any evidence to satisfy that onus; if the judge require such evidence, and the plaintiff do not produce any, the judge is bound to nonsuit, and ought not to leave the case to the jury. *Ryder v. Wombwell*, L. R., 4 Ex. 40, *per* Ex. Ch. An infant, a captain in the army, has been held liable for a livery ordered by him for his servant; but not for cockades for the soldiers of his company. *Hands v. Slaney*, 8 T. R. 578; and see *Coates v. Wilson*, 5 Esp. 152. So an infant may contract to pay a fine due upon his admission to a copyhold estate; *Evelyn v. Chichester*, 3 Burr. 1717; or for necessaries supplied to his wife. *Turner v. Trisby*, 1 Str. 168; B. N. P. 155. So education for the purpose of learning a business suitable for the infant may be a necessary, and if so he may bind himself, even under seal, to pay a reasonable premium therefor. *Walter v. Everard*, (1891) 2 Q. B. 369, C. A. But the plaintiff must prove his case in the same way as if there had been no deed. S. C.

A fair contract for work and labour to be done by him is binding. *Wood v. Fenwick*, 10 M. & W. 195; *Cooper v. Simmons*, 7 H. & N. 707; 31 L. J., M. C. 138; *Leslie v. Fitzpatrick*, 3 Q. B. D. 229. But not if such contract be inequitable; S. C.; *R. v. Lord*, 12 Q. B. 757; as if his master reserve a right to stop wages at will; S. C.; or during a lock-out; *Corn v. Matthews*, (1893) 1 Q. B. 310, C. A.; or if the master be not bound to supply work although the infant is restrained from working for any one else; *De Francesco v. Barnum*, 45 Ch. D. 430. *Secus*, where the master was not bound to teach or pay the apprentice while his business was at a standstill through an accident beyond his control. *Green v. Thompson*, (1899) 1 Q. B. 1. In these cases the contracts must be considered as a whole, whether they are for the benefit of the infant or not. S. C.; *Corn v. Matthews*, *supra*. See also *Evans v. Ware*, (1892) 3 Ch. 502; *Flower v. L. & N. W. Ry. Co.*, (1894) 2 Q. B. 65, C. A.; *Clements v. Id., Id.* 482, C. A.

In an action for a trousseau supplied to a female infant before her marriage, it was held that the true test of whether the goods supplied were necessaries, was the real position of the future husband in society, and not the apparent or assumed condition he might take upon himself. *Stacy v. Fifth*, 16 L. T. 498, Lush, J. A female infant who has no property of her own to settle may contract with a solicitor for the expenses of a marriage settlement. *Helps v. Clayton*, 17 C. B., N. S. 553; 34 L. J., C. P. 1. So she may bind herself for the expenses of her husband's funeral though he left no assets. *Chapple v. Cooper*, 13 M. & W. 252. Where groceries were supplied to an infant trader, it was held that he was liable for the price of so much as had been consumed, as necessaries, by him and his family. *Turberville v. Whitehouse*, 1 C. & P. 94.

It is not material to the defence whether the infant was in fact supplied by his friends with an allowance sufficient to buy all necessaries with ready money. *Burghart v. Hall*, 4 M. & W. 727. Nor is it a condition precedent to recovery that the plaintiff should have made inquiry as to the necessity of the articles sold before he supplied them. *Brayshaw v. Eaton*, 5 N. C. 231; S. C., 7 Scott, 183; *Dalton v. Gib*, 5 N. C. 198. In order to rebut the evidence that the goods supplied to him were necessaries, the defendant may show that he was already supplied with a sufficiency of similar goods, although this was not known to the plaintiff. *Bainbridge v. Pickering*, 2 W. Bl. 1325; *Brayshaw v. Eaton*, 7 Scott, 183; *Foster v. Redgrave*, L. R., 4 Ex. 35, n., Q. B.; *Burnes v. Toye*, 13 Q. B. D., 410; *Johnstone v. Marks*, 19 Q. B. D. 509, *cor. M.R. & L.J.J.*, dissenting on this point from *Ryder v. Wombwell*, L. R., 3 Ex. 90. In *Bainbridge v. Pickering*, *supra*, it was held that a female infant residing with her mother and supplied by her with necessaries could not be liable at all, as it was for the mother to decide what articles were necessaries for her daughter.

Payment for necessaries for an infant is a good payment to him. *Hedgley v. Holt*, 4 C. & P. 104. So money laid out in the purchase of necessaries for him is recoverable. *Ellis v. Ellis*, 5 Mod. 368. Money lent to an infant to be laid out in necessaries was, *if so laid out*, held to be recoverable from the infant. S. C. 12 Mod. 197; 3 Salk. 197; *Secus Darby v. Boucher*, 1 Salk. 279, and *Probart v. Knouth*, 2 Esp. 472 n. This divergence of authority is not, however, now material, for, in equity, which now prevails (see J. Act, 1873, s. 25 (11), *ante*, p. 308), money lent to an infant to pay a debt for necessaries, and so applied, was recoverable, the lender of the money standing in the place of the person paid. *Marlow v. Pitfield*, 1 P. Wms. 558, cited *Ex pte. Williamson*, L. R. 5 Ch. 313. See further 1 Salk. 279 n. (b) and *ante*, p. 599.

[*What are not necessaries.*] Although an infant may enter into a partnership

he will not be liable for the contracts of the partnership made during his infancy; but he will be liable upon such contracts made after his full age unless he notifies his disaffirmance of the partnership. *Goode v. Harrison*, 5 B. & A. 147, Ex. Ch. An infant is not liable upon an account stated, even though it appears to be for necessaries; nor can the account stated be used as evidence by way of admission on the part of the defendant to show that necessaries have been supplied to that amount. *Ingledeu v. Douglas*, 2 Stark. 36; *Hedgley v. Holt*, *supra*. Nor is the advance of wages for the purchase of things not necessaries a good payment. S. C. Nor is he liable for money lent, unless it has been laid out in necessaries; *Ellis v. Ellis*, 12 Mod. 197; 3 Salk. 197; for the equitable principle stated *ante*, p. 674, does not apply in this case. And now see Infants' Relief Act, 1874, s. 1, *infra*. He is not liable on a bill of exchange though given for necessaries. *Williamson v. Watts*, 1 Camp. 552. But he is liable on a bill accepted by him after 21, though drawn before. *Stevens v. Jackson*, 4 Camp. 164. Unless it be for a debt contracted while under age, 55 & 56 V. c. 4, s. 5, *post*, p. 676. Where goods, not being necessaries, are delivered to a carrier for an infant, the infant cannot be charged though the goods do not reach him till after he is of age. *Griffin v. Langfield*, 3 Camp. 254. An infant cannot be sued on a warranty of a horse. *Howlett v. Haswell*, 4 Camp. 118. An infant lieutenant in the navy is not liable for the price of a chronometer, he being out of employment at the time of its being furnished. *Berolles v. Ramsay*, Holt. N. P. 77. Dinners, confectionery, and fruit, supplied to an undergraduate out of college, are not, *primâ facie*, necessaries. *Brooker v. Scott*, 11 M. & W. 67; *Wharton v. Mackenzie*, and *Cripps v. Hills*, 5 Q. B. 606. And articles supplied cannot be considered as suitable necessaries if they are merely of an ornamental character, as gold rings, &c.; see *Peters v. Fleming*, 6 M. & W. 42, *per Cur.*; or betting books. *Jenner v. Walker*, 19 L. T. 398, *cor.* Cockburn, C.J. Cigars and tobacco cannot be necessaries in the absence of special circumstances rendering them necessary, medicinally or otherwise, for the infant. *Bryant v. Richardson*, L. R., 3 Ex. 98, n., and see *Ryder v. Wombwell*, *ante*, p. 674.

If the issue be joined on the goods being necessaries, the plaintiff need not prove that *all* are necessaries, but may recover *pro tanto*. *Per Cur.* in *Tapley v. Wainwright*, 5 B. & Ad. 399.

[*Ratification of promise after full age.*] A contract by an infant, other than for necessaries, was formerly voidable only, not void, and was therefore capable of being ratified by him after he had attained his majority; but now by the Infants' Relief Act, 1874 (37 & 38 V. c. 62), s. 1, "all contracts, whether by speciality or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants shall be absolutely void, provided always that this enactment shall not invalidate any contract into which an infant may by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable." Such contracts are therefore no longer capable of ratification. This section applies only to the three classes of contracts specified therein. *Duncan v. Dixon*, 44 Ch. D. 211, dissenting from the *dictum* of Jessel, M.R., in *Ex pte. Jones*, 18 Ch. D. 109, 122. Thus, it does not apply to a contract in a marriage settlement. *Duncan v. Dixon*, *supra*. Where an infant had agreed to become tenant of a house and to pay 10*l.* for the furniture therein, 6*8l.* of which sum he paid, and had occupied the house and used the furniture for some months, it was held he could not recover back the 6*8l.* under this section; *Valentini v. Canali*, 24 Q. B. D. 166; though *semble*, having elected to avoid the contract, he was entitled to have

the contract declared void, and a promissory note he had given for the balance of purchase money, delivered up. *S. C.* A mortgage given by an infant member of a building society to the society is void, although stat. 37 & 38 V. c. 42, s. 38, allows of such members and of their giving "all necessary acquittances." *Nottingham, &c., Bldg. Soc. v. Thurstan*, (1903) A. C. 6, D. P.

By 37 & 38 V. c. 62, sect. 2, "no action shall be brought whereby to charge any person upon any promise made after full age, to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age." This applies to a ratification after the passing of the Act, although the promise was made before its passing. *Ex pte. Kibble*, L. R. 10 Ch. 373. It applies to an infant's promise to marry. *Cothead v. Mullis*, 3 C. P. D. 439. See also *Ditcham v. Worrall*, 5 C. P. D. 410. *Vide ante*, p. 497. The defendant K., after he had attained 21, in settlement of a debt contracted to G. during infancy, and after action brought therefor, gave G. his acceptance, which G. indorsed to his solicitor, S., in the action, who had notice of all the circumstances; it was held that sect. 2 avoided the acceptance in the hands of S. *Smith v. King*, (1892) 2 Q. B. 543. It seems to extend to a set-off. See *Rawley v. Rawley*, 1 Q. B. D. 460, C. A., decided on similar words in 9 G. 4, c. 14, s. 5, which required the ratification to be in writing, signed by the party to be charged.

The principle of this sect. 2, *supra*, has been extended by the Betting and Loans (Infants) Act, 1892, 55 & 56 V. c. 4, which, by sect. 5, enacts that: "If any infant, who has contracted a loan which is void in law, agrees after he comes of age to pay any money which in whole or in part represents or is agreed to be paid in respect of any such loan, and is not a new advance, such agreement, and any instrument, negotiable or other, given in pursuance of or for carrying into effect such agreement, or otherwise in relation to the payment of money representing or in respect of such loan, shall, so far as it relates to money which represents or is payable in respect of such loan, and is not a new advance, be void absolutely as against all persons whomsoever. For the purposes of this section any interest, commission, or other payment in respect of such loan shall be deemed to be a part of such loan."

*Infant shareholders.*] The liability to calls of infants holding shares in joint-stock and other companies is considered *sub tit. Actions by companies*, 2—*Special defences—Infancy*, *post*, p. 1108.

If the action be on a contract for the sale of shares by the plaintiff to the defendant, a simple defence of infancy is enough, for an infant is not compellable to complete an agreement to buy them.

*Infancy—how proved.*] Infancy must be proved by calling some person who can speak as to the time of the defendant's birth; or by the entry on the register of births, or a certified copy thereof, *vide ante*, p. 127. It cannot be proved by a certificate of baptism, *ante*, p. 218. Nor by declarations of deceased members of his family mentioning the time of his birth. *Haines v. Guthrie*, 13 Q. B. D. 818, C. A. See further *ante*, p. 46. If the defendant were of age when the action was commenced the date of the contract must be shown as well as his non-age at that date. But where the defendant pleaded infancy to an action against him as acceptor of a bill, it was held that the acceptance not being dated, ought to be presumed to have been made shortly after the date of the bill itself according to the common practice, the drawer and acceptor not living far apart; therefore where a



bill at four months was dated 9th November, 1850, and the defendant came of age in March, 1851, the jury rightly presumed that he was not of age when he accepted. *Roberts v. Bethell*, 12 C. B. 778; 22 L. J., C. P. 69.

#### Insanity.

It is not a good defence that the defendant, at the time of the contract entered into, was of unsound mind, unless he prove that the plaintiff knew him to be so insane as not to be capable of understanding what he was about. *Imperial Loan Co. v. Stone*, (1892) 1 Q. B. 599, C. A. See also *Browne v. Joddrell*, M. & M. 105; *Levy v. Baker*, *Id.*, 106, n., where it was held that the plaintiff must also have taken advantage of the defendant's unsoundness of mind to impose on him. The rule is, that the contracts of a lunatic, entered into fairly and *bonâ fide* with a person ignorant of his incapacity, where the transaction is in the ordinary course (as the purchase of an annuity) and is wholly or in part executed, are valid. *Molton v. Camroux*, 2 Exch. 487; Ex. Ch., 4 Exch. 17. Insanity, and the probable knowledge of it by the adverse party, may be proved by showing that it existed and was apparent, either shortly after or shortly before the alleged contract. *Beavan v. M'Donnell*, 9 Exch. 309; 23 L. J., Ex. 326. The mere existence of a delusion in the mind of the defendant, although connected with a contract made by him, is not sufficient to avoid such contract; it is a question for the jury whether the delusion affected the contract. *Jenkins v. Morris*, 14 Ch. D. 674, C. A. See further, *post*, pp. 1051, 1052, *Action for recovery of land by devisee—Incapacity from idiocy or non-sane memory.*

As to proof of insanity by an inquisition finding lunacy or by an order of a Master in Lunacy stating unsoundness of mind, *vide ante*, pp. 196, 199.

By the Sale of Goods Act, 1893, s. 2, a lunatic is liable to pay a reasonable price for necessaries sold and delivered to him. But it would seem that he must have been supplied under such circumstances that an obligation to pay for them is to be implied. See *In re Rhodes*, 44 Ch. D. 94, C. A. A lunatic is liable for necessaries supplied to his wife; *Reul v. Legard*, 6 Exch. 637; 20 L. J., Ex. 309; or moneys expended for her protection. *Williams v. Wentworth*, 5 Beav. 325. Thus, the inquiry as to the necessity of the goods supplied, and their suitability to the defendant's condition, may arise on this plea as in that of infancy. See *Baxter v. Portsmouth*, *Et. of*, 5 B. & C. 170.

As to the liability of a principal on contracts entered into on his behalf, by an agent, after the principal has become insane, see *Drew v. Nunn*, 4 Q. B. D. 661, C. A., cited *ante*, p. 555.

#### Intoxication.

A contract entered into by a person in a state of intoxication is in a similar position to one made by an insane person; see *Molton v. Camroux*, *supra*; it is voidable, not void. *Matthews v. Baxter*, L. R., 8 Ex. 132. See further as to this defence, *Gore v. Gibson*, 13 M. & W. 623. By the Sale of Goods Act, 1893, s. 2, *ante*, pp. 672, 673, he is liable to pay a reasonable price for necessaries sold and delivered to him.

#### Limitation, Statutes of.

The Statutes of Limitation must be specially pleaded; Rules, 1883, O. xix. r. 15, *ante*, p. 309; and upon issue joined thereon the burden of proof lies on the plaintiff. *Wilby v. Henman*, 2 Cr. & M. 658. The commencement of the action is the date of the issuing or the original writ of summons; Rules, 1883, O. ii. r. 1; this date is stated on the statement of claim; App.

C., sect. 1; and would seem, subject to amendment, to be conclusive evidence thereof; see *Harper v. Phillipps*, 7 M. & Gr. 397; *Whipple v. Manley*, 1 M. & W. 432; but after the lapse of six years, strict proof of the regular continuance by other writs was necessary in order to rebut this defence. *Pritchard v. Bagshaw*, 11 C. B. 459; 20 L. J., C. P. 161. But the original writ is now kept alive by renewal by judge's order under Rules, 1883, O. viii. r. 1. The renewal must be made within twelve months in the case of an original writ, and six months in the case of a renewed writ; the day of its date or of renewal being in each case included. A writ issued before the J. Act, 1875, is void unless renewed as prescribed by this rule. *Hume v. Somerton*, 25 Q. B. D. 239. As it was held unnecessary to reply specially the issuing and return of successive writs under 2 W. 4, c. 39 (*Higgs v. Mortimer*, 1 Exch. 711), so it seems to be unnecessary to reply the renewal of the original writ under the new process now substituted. By Rules, 1883, O. viii. r. 2, the production of a writ, purporting to be marked with the seal of the court showing the same to have been renewed according to rule 1, shall be sufficient evidence of such renewal, and of the commencement of the action, as of the first date of such renewed writ for all purposes. "Sufficient evidence," here means *prima facie* evidence. See *Barraclough v. Greenhough*, *ante*, p. 151. It may be proved that the renewal was irregular, and that the writ is therefore void; see *Hume v. Somerton*, *supra*.

A misdated writ, with its indorsement, is amendable under Rules, 1883, O. xxviii. r. 12, *ante*, pp. 291, 292, according to the facts; though the effect may be to defeat the Statute of Limitations. See *Cornish v. Hockin*, 1 E. & B. 602; 22 L. J., Q. B. 142. But there is no power to alter the true date. *Clarke v. Smith*, 2 H. & N. 753; 27 L. J., Ex. 155.

The time of limitation is to be computed exclusively of the day on which the cause of action arose. *Hardy v. Ryle*, 9 B. & C. 603; *Freeman v. Read*, 4 B. & S. 178; 32 L. J., M. C. 226.

The principal Statutes of Limitation are—21 J. 1, c. 16; 4 & 5 A., c. 3 (c. 16 Ruff.); 9 G. 4, c. 14 (Ld. Tenterden's Act); 3 & 4 W. 4, c. 27, s. 40; 3 & 4 W. 4, c. 42, ss. 3 to 7; 19 & 20 V. c. 97 (Mercantile Law Amendment Act, 1856); 37 & 38 V. c. 57, s. 10 (Real Property Limitation Act, 1874), cited *post*, p. 720; and 51 & 52 V. c. 59 (Trustee Act, 1888), s. 8.

Foreign Statutes of Limitation, which bar the remedy only, and not the right, have no operation here; *Huber v. Steiner*, 2 N. C. 202; *Alliance Bank of Simla v. Carey*, *post*, p. 673; even after judgment for the defendant in the foreign court on a plea of the foreign statute. *Harris v. Quine*, L. R., 4 Q. B. 653.

By the Limitation Act, 1623, 21 J. 1, c. 16, s. 3, actions of account, and on the case (other than concerning the trade of merchandise between merchants or their factors or servants, and other than for slander), actions of debt on lending or contract without specialty, or for rent in arrear, are to be brought within six years after the cause of action, and not after. Under the head "case" is here included assumpsit on promises, and the part of the statute above cited therefore includes all the causes of action founded on simple contract, whether expressed to be for a debt, or on a promise or contract, express or implied, formerly prosecuted in the form of debt or assumpsit.

The exception in this statute of merchants' accounts was held to apply only to actions of account, or, perhaps, for not accounting; or at all events only to cases in which account would lie. *Inglis v. Haigh*, 8 M. & W. 769; *Cottam v. Partridge*, 4 M. & Gr. 271. And by 19 & 20 V. c. 97, s. 9, this exception has been abolished, and all such actions shall be commenced within six years after the cause of action, and no claim in respect of a matter which arose more than six years before such action, shall be enforceable by action by reason only of some other matter of claim comprised in the same account

having arisen within six years next before the commencement of such action.

An action of debt on the bye-law of a chartered company is an action on a 'contract without specialty'; *Tobacco Pipe Co. v. Loder*, 16 Q. B. 765; 20 L. J., Q. B. 414; so is an action for calls by a company established under an act of a colonial legislature. *Welland Ry Co. v. Blake*, 6 H. & N. 410; 30 L. J., Ex. 161. But an action given by statute, as for calls on a shareholder in a company, under the Companies Clauses Consolidation Act, 1845, is founded on specialty. *Cork & Bandon Ry. Co. v. Goode*, 13 C. B. 826; 22 L. J., C. P. 198. The liability of a member or contributory of a joint-stock company incorporated under the Companies Act, 1862, to pay calls, is, under sects. 16, 75, 76, a debt in the nature of a specialty debt; whereby the heirs are bound. *Buck v. Robson*, L. R., 10 Eq. 629. So, where an unregistered company is wound up under that Act. *In re Muggerridge*, *Id.* 443. Where the liability of the members of a non-corporate co-partnership is fixed by a deed of settlement, the liability is a specialty debt. *Helby's, Stokes', and Horsey's cases*, L. R., 2 Eq. 167. An instrument under seal, executed in India, is here treated as a specialty, although by Indian law specialty debts have no greater efficacy than simple contract debts, and both are barred by the lapse of three years. *Alliance Bank of Simla v. Carey*, 5 C. P. D. 429.

The stat. 21 J. 1, c. 16, s. 3, *ante*, p. 678, having been construed somewhat strictly, so as to exclude cases which were not, when it passed, regarded as contracts, the Civil Procedure Act, 1833, 3 & 4 W. 4, c. 42, s. 3, enacted that actions of debt on an award (where the submission is not by specialty), or for copyhold fines, or an escape, or money levied on a *fi. fa.*, should be brought within six years after the cause of action.

As to the application of the Statutes of Limitations in actions by and against executors, *vide sub tit., Actions by and against Executors, post*, pp. 1151, 1165.

The Statutes of Limitation applicable to money charged on, or payable out of land, and also to rent, will be found *post*, pp. 719 *et seq.*

By the J. Act, 1873, s. 25 (2), "no claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations." As to the meaning of "express trust," see *Bunner v. Berridge*, *infra*; *Soar v. Ashwell*, (1893) 2 Q. B. 390, C. A., and cases cited therein. An agent who receives money for his principal may in general set up the statute notwithstanding the fiduciary relation between them. *Friend v. Young*, (1897) 2 Ch. 421. So a solicitor is not ordinarily in the position of trustee for his client in respect of moneys received for him; *Watson v. Woodman*, L. R., 20 Eq. 721; nor does a mortgagee hold the proceeds of the sale of mortgaged property on an express trust for the mortgagor; *Bunner v. Berridge*, 18 Ch. D. 254; unless there be a special clause to that effect in the mortgage deed. *In re Bell*, 34 Ch. D. 462. And an agent who receives money for investment for his principal, holds it in general on an express trust. *Burdick v. Garrick*, L. R. 5 Ch. 233; *N. American Land, &c., Co. v. Watkins*, (1904) 1 Ch. 242; *affirm.* (1904) 2 Ch. 233, C. A., but no argument arose on the statute. Where a remedy in equity was correspondent to the remedy at law, the Court of Equity acted by analogy to the Statute of Limitations, and imposed on the remedy it afforded, the same limitation that would be imposed on the proceedings at law; *Knox v. Gye*, L. R., 5 H. L. 656, 674; *Metropolitan Bank v. Heiron*, 5 Ex. D. 319, C. A.; and the statutes now apply to actions for all such claims as fall within them in whatever division of the High Court the action may be brought. *In re Greaves*, 18 Ch. D. 551, 554; *Gibbs v. Guild*, 9 Q. B. D. 59, 64, 67.

Actions against trustees are now, however, in some cases, subject to Statutes of Limitations, for by the 'Trustee Act, 1888 (51 & 52 V. c. 59), s. 8—“(1.) In any action or other proceeding” commenced after Jan. 1st, 1890 (sect. 8 (3)), “against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:— (a.) All rights and privileges conferred by any Statute of Limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him: (b.) If the action or other proceeding is brought to recover money or other property, and is one to which no existing Statute of Limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession: (2.) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.”

The effect of this section is “that except in three specified cases (namely, fraud, retention by a trustee of trust money where an action is commenced against him, and conversion of trust money to his own use), a trustee who has committed a breach of trust is entitled to the protection of the several Statutes of Limitations, as if actions and suits for breaches of trust were enumerated in them.” *How v. El. of Winterton*, (1896) 2 Ch. 626, 640, 641, per Lindley, L. J. And except in those three cases it applies to directors of a company who have in their hands or under their control moneys of the company and who by mistake or carelessness misapply them. *In re Lands Allotment Co.*, (1894) 1 Ch. 616, 632, C. A.

Fraud to take the case out of the protection of this section “must be the fraud of or in some way imputable to the person who invokes the aid of” the section. *Thorne v. Heard*, (1895) A. C. 495, 506, D. P. Sect. 8 does not apply to a trustee in bankruptcy. *In re Cornish*, (1896), 1 Q. B. 99 C. A. See further on this section *Moore v. Knight*, (1891) 1 Ch. 547.

As to whether a claim against an executor or trustee is in any particular case barred by this section or by the Real Property Limitation Act, 1874 (37 & 38 V. c. 57), ss. 8, 10, cited *post*, pp. 719, 720, see *In re Timmis*, (1902) 1 Ch. 176, and cases there cited.

Claims chargeable against the separate estate of a married woman for her debts were, apart from the Trustee Act, 1888, *supra*, barred by analogy to the Statute of Limitations. *In re Ly. Hastings*, 35 Ch. D. 94, C. A.

A company is not a trustee in respect of dividends, declared and become payable to a shareholder. *In re Severn, &c., Bridge Ry. Co.*, (1896) 1 Ch. 559; *In re Artizans' Land, &c., Cor.*, (1904) 1 Ch. 796. Such dividends are in general specialty debts. S. C., and *vide post*, p. 722.

The Statutes of Limitations do not apply to a petition of right. *Rustôm-jeer v. The Queen*, 1 Q. B. D. 487.

A pauper is liable to the guardians for maintenance for a period not

exceeding 6 years notwithstanding stat. 12 & 13 V. c. 103, s. 16. *In re Clabbon*, (1904) 2 Ch. 465.

*When the statute begins to run.*] The statute begins to run from the time when the plaintiff's right first accrued; *Reeves v. Butcher*, (1891) 2 Q. B. 509, C. A.; see *Coburn v. Colledge*, *ante*, p. 509; and from the time of the breach of the promise or of the contract, and not of the discovery of it. Therefore in an action against a solicitor for neglecting his duty six years before, the statute was held a bar, though the omission was only discovered within the six years; *Short v. M'Curthy*, 3 B. & A. 626; *Battley v. Faulkner*, *Id.* 288; *Colvin v. Buckle*, 8 M. & W. 680; and formerly, at law, this was the rule although the defendant had fraudulently concealed the cause of action. *Imperial Gas Co. v. London Gas Co.*, 10 Exch. 39; 23 L. J., Ex. 303. But the rule of equity which now prevails (see J. Act, 1873, s. 25 (11), *ante*, p. 308), at any rate in a case in which a court of equity would have had concurrent jurisdiction, is that in the case of fraudulent concealment of the cause of action, the statute runs from its discovery only; *Brooksbank v. Smith*, 2 Y. & C. Ex. 58; *Metropolitan Bank v. Heiron*, *ante*, p. 679; *Gilbs v. Guild*, 9 Q. B. D. 59, C. A.; even although the wrongdoer took no active steps to prevent detection; *Bulli Coal Mining Co. v. Osborne*, (1899) A. C. 351, J. C.; unless there has been laches on the part of the plaintiff. S. C.; and where the plaintiff had a right to rely on the representations of the defendant, *e.g.*, when they are partners together, the fact that he did so rely on them is not laches. *Betjemann v. Betjemann*, (1895) 2 Ch. 474, C. A. The concealment, without fraud, by a solicitor of his negligence does not prevent the statute from running. *Armstrong v. Milburn*, 54 L. T. 723, E. S. 1886, C. A. See further, Story, Eq. Jur. § 1521*a*.

Where a contract to deliver goods is once broken, the statute runs, and a subsequent refusal to deliver after the loss of the goods, during an inquiry touching the first breach, will not revive the right. *E. India Co. v. Paul*, 7 Moo. P. C. 85. Upon promises to indemnify, the statute runs from the time of damnification. *Huntley v. Sanderson*, 1 Cr. & M. 467; *Reynolds v. Doyle*, 1 M. & Gr. 753. Where a bill of exchange is drawn, payable at a future time, for a sum of money lent by the payee to the drawer, at the time of drawing the bill, the payee may sue for money lent, at any time within six years from the time when the money was to be repaid; *i.e.*, when the bill became due, and not from the time of the loan. *Wittersheim v. Carlisle*, *Cs. of*, 1 H. Bl. 631; *Wheatley v. Williams*, 1 M. & W. 533. Where a loan is made by the plaintiff to the defendant by a cheque, the statute does not begin to run till the payment of the cheque by the plaintiff's bankers. *Garden v. Bruce*, L. R., 3 C. P. 300. Where a bill is not accepted, and the holder gives notice thereof to the drawer, the statute begins to run against him; and he does not acquire a fresh right of action against the drawer on the non-payment when due. *Whitehead v. Walker*, 9 M. & W. 506. The defendant drew a bill, due in May, 1843, payable to the plaintiff, who indorsed it for the acceptor's accommodation, to C.; C. sued the plaintiff on the dishonoured bill in 1847, and received the amount from him in 1850: the plaintiff then sued the defendant on the bill: it was held that the action was barred. *Webster v. Kirk*, 17 Q. B. 944; 21 L. J., Q. B. 159. The accommodation acceptor of a bill of exchange was sued upon it by the holder, whereupon he paid it and sued the person for whose accommodation he accepted, for money paid to his use; it was held that he might do this within six years after payment of the bill, though more than six years after the bill became due. *Angrove v. Tippett*, 11 L. T. 708, H. T. 1865, Q. B.

A note, payable on demand, is payable immediately, and the statute

begins to run from that date. *Christie v. Fonsie*, 1 Selw. N. P. 13th ed. 301; *Norton v. Ellam*, 2 M. & W. 461. But where a note is made payable so many months after demand, the cause of action does not accrue until that number of months after demand made. *Thorp v. Booth*, Ry. & M. 338. So where the note is payable after sight, the statute runs only from the time of presentment. *Holmes v. Kerrison*, 2 Taunt. 323; and see *Savage v. Aldren*, 2 Stark. 232. Where the cause of action does not arise until after request made, the statute will only run from the time of such request. *Gould v. Johnson*, 2 Salk. 422; 2 Wms. Saund. 63 c, d (6). So where S. gave a promissory note to a bank, payable on demand, together with a written agreement stating that the note was deposited with the bank as security for any balance due to them from C., who was about to open an account with them; it was held that the note and agreement must be construed together, and that the statute did not run on the mere existence of a debt from C. to the bank, without a balance having been struck or a demand made on S. *Hartland v. Jukes*, 1 H. & C. 667; 32 L. J., Ex. 162. Where the plaintiff, an attorney, was to look primarily for his costs to a fund in court, and if it were insufficient C. was to pay them, the statute was held not to run till the amount of the fund was ascertained. *Hunter v. Hunter*, 1 R., 3 C. L. 138. Where the defendant promised to pay a bill of exchange barred by the statute "when able," the statute was held to run from the time of his being able, though the plaintiff did not know when this was, and made no demand. *Waters v. Thanet, El. of*, 2 Q. B. 757; *Hammond v. Smith*, 33 Beav. 452; *vide post*, pp. 691, 692. See also *In re Kensington Station Act*, L. R., 20 Eq. 197. Where Y. gave a guarantee to a bank for advances made to their customer M., and interest due from him, interest due within six years before may be recovered from Y. although the claim for advances may be barred. *Parr's Banking Co. v. Yates*, (1898) 2 Q. B. 460, C. A.

Money paid to a banker on an ordinary banking account is money lent to him, and the statute runs from the payment; *Pott v. Clegg*, 16 M. & W. 321; see *Foley v. Hill*, 2 H. L. C. 28; but where money is deposited with a private person to be kept for his use, the statute does not begin to run until there has been a demand and refusal; see Poth. Contr. by Evans, vol. 2, p. 126, followed in *In re Tidd*, (1893) 3 Ch. 154; or even with a banker on a deposit account; see *Atkinson v. Bradford, &c., Building Soc.*, 25 Q. B. D. 377, 381, *per* Ld. Esher, M.R. And where the money is not repayable until the deposit pass-book is produced, the statute does not run until after that event. S. C., C. A.

Where there is a promise to pay a collateral sum on demand, as in the case of a surety, then as a request for payment must be made before action, the statute runs from such request only. *Brown v. Brown*, (1893) 2 Ch. 300, cited *post*. 722, following *Birks v. Tippett*, 1 Wms. Saund. 32. In the case of a surety, W., claiming contribution from a co-surety; *Wolmershausen v. Gullick*, (1893) 2 Ch. 514; or a trustee, W., from a co-trustee; *Robinson v. Harkin*, (1896) 2 Ch. 415; the statute does not run till W.'s liability is ascertained.

As to the application of the Statute of Limitations to a solicitor's bill of costs, *vide ante*, p. 509. As to when it begins to run under 3 & 4 W. 4, c. 42, s. 3, in the case of a copyhold fine, see *Monckton v. Payne*, (1899) 2 Q. B. 603; and in the case of a foreign ambassador, *vide post*, p. 683.

In the case of a right of action falling within 51 & 52 V. c. 59, s. 8, *ante*, p. 680, the statute does not begin to run against a beneficiary until his interest is one in possession. When a trustee has invested the trust funds on an insufficient security, time runs against such a beneficiary from

the time of the investment. *In re Somerset*, (1894) 1 Ch. 231; *How v. Winterton*, *El. of*, cited *ante*, p. 680. So in the case of a director of a company who has by mistake or carelessness misapplied its money, time runs from the date of the misapplication. *In re Lands Allotment Co.*, *ante*, p. 680.

*Disabilities.*] The Act 21 J. 1, c. 16, s. 7, provides that, if the plaintiff be an infant, covert, non compos, *in prison*, or *beyond seas* (as to which now *vide infra*), when the action accrues, the six years shall run from the removal of the disability, or from his return from beyond seas, as the case may be. In the case of a defendant beyond seas at the time of action accrued the action may be brought within six years after his return, by stat. 4 & 5 A. c. 3 (c. 16 Ruff.), s. 19. The operation of this section is not affected by Rules, 1883, O. xi., replacing C. L. P. Act, 1852, ss. 18, 19, allowing writs to be served, or notice of them given, out of the jurisdiction. *Musurus Bey v. Gadban*, (1894) 2 Q. B. 352, C. A. In cases falling within either statute a special reply is necessary.

By 3 & 4 W. 4, c. 42, s. 4, if a person entitled to any action mentioned in that Act (*ante*, p. 679) is, at the time of the accruing of the cause, under age, covert, non compos, or *beyond seas* (*vide infra*), he may bring it within six years after coming of age, &c.; and if a person against whom the action accrues shall then be beyond seas, the action may be brought within six years after his return. By sect. 7, no part of the United Kingdom, the Isle of Man, or the Channel Islands, being dominions of the Queen, shall be deemed beyond seas within the meaning of this Act, or of the stat. 21 J. 1, c. 16.

But now, by the Mercantile Law Amendment Act, 1856 (19 & 20 V. c. 97), s. 10, no person shall be entitled to any further time by reason only that such person, or one or more of such persons, was beyond seas or was in prison when the cause accrued. This section is retroactive, and bars those causes of action falling within its provisions which accrued, but on which no action was commenced, prior to the passing of the Act. *Pardo v. Bingham*, L. R., 4 Ch. 735, following *Cornill v. Hudson*, 8 E. & B. 429; 27 L. J., Q. B. 8. By sect. 11, in the case of joint debtors, the statutes will now run as to such as are not beyond seas, though some of the debtors may be beyond seas; but a judgment recovered in such cases will not *per se* be a bar to another action against the absent debtor after his return. It would appear from the terms of this section that the case of a judgment recovered against one of the joint debtors, who was beyond the seas at the time the cause of action accrued, is not within its remedial operation, and that such a judgment would still be a bar to subsequent action against any other of the joint debtors. Sect. 12 enacts that no part of the United Kingdom, nor the Isle of Man, nor the Channel Islands, being dominions of the Queen, shall be deemed beyond seas within either 4 & 5 A. c. 3, or of this Act. This section is not retroactive. *Flood v. Patterson*, 29 Beav. 295; 30 L. J., Ch. 496.

The proviso in case of persons beyond seas extends as well to persons resident abroad as to the natives of England, and the word "return" in the Acts does not imply that they must have been in this country before. *Jafond v. Ruddock*, 13 C. B. 813; 22 L. J., C. P. 217; *Pardo v. Bingham*, *supra*.

As to the meaning of "beyond the seas" in 21 J. 1, c. 16, s. 7, see *Ruckmaboys v. Mottickund*, 7 Moo. P. C. 4.

The ambassador of a foreign state and accredited to the sovereign, cannot be sued here till such reasonable time after he has presented his letters of recall as may be necessary to wind up his official business and prepare for his departure, even though his successor has been appointed before that time has elapsed, and during that time the statute does not begin to run. *Musurus Bey v. Gadban*, (1894) 2 Q. B. 352, C. A.

When the statute once begins to run, no subsequent disability will prevent its operation. See *Cotterell v. Dutton*, 4 Taunt. 826; and *Rhodes v. Smethurst*, 6 M. & W. 351.

*Subsequent acknowledgment.*] The effect of the Statute of Limitations may be avoided by proof of an unqualified acknowledgment of the debt within six years, which is evidence of a new promise to pay the debt, and not a mere revival of the original promise. *Heyling v. Hastings*, 1 Ld. Raym. 421; *Hurst v. Parker*, 1 B. & A. 93. An oral promise was, before Ld. Tenterden's Act, held sufficient to revive even a written guarantee, not under seal. *Gibbons v. McCasland*, 1 B. & A. 690. The rule was that a subsequent promise was admissible, under a denial of the plea, to defeat the statute, when it proved, or was evidence of, the promise or other contract of the defendant as stated in the declaration. It seems, however, that if the plaintiff rely on an acknowledgment to rebut a defence of the statute, he must state it in his claim or reply, as the omission would be calculated to take the defendant by surprise. See Rules, 1883, O. xix. r. 15, *ante*, p. 309.

By the Statute of Frauds Amendment Act, 1828 (usually known as Ld. Tenterden's Act), 9 G. 4, c. 14, s. 1, in actions of debt or upon the case, grounded upon any simple contract, no acknowledgment or promise, by words only, shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of the stat. 21 J. 1, c. 16, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by, or in some writing to be signed by, the party chargeable thereby; and that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, &c., shall lose the benefit of the said enactments, so as to be chargeable in respect or by reason only of any written acknowledgment or promise, made and signed by any other or others of them; provided always, that nothing herein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever; provided also, that in actions against two or more such joint contractors, &c., if it shall appear at the trial, or otherwise, that the plaintiff, though barred by the stat. 21 J. 1, c. 16, or this Act, as to one or more of such joint contractors, &c., shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment, or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.

By sect. 3, "no indorsement or memorandum of any payment," . . . "upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment so as to take the case out of the operation of either of the said statutes."

By sect. 4, the stat. 21 J. 1, c. 16, "and this Act shall be deemed and taken to apply to the case of any debt on simple contract alleged by way of set-off, on the part of any defendant, either by plea, notice, or otherwise."

The most material change in the law made by this Act is the requiring of an acknowledgment or promise in writing signed by the party chargeable. No alteration is introduced in the language of the required acknowledgment or promise, or with regard to the party to whom it is to be made. See *Haydon v. Williams*, 7 Bing. 163, 166. No particular form is specified: a paper signed by the defendant, though without date, address, or amount due, may be sufficient; *Hartley v. Wharton*, 11 Ad. & E. 934; and although it was formerly held that it must appear on the face of the writing what debt is intended; *Kennett v. Milbank*, 8 Bing. 38; this principle is now



disregarded. See *Green v. Humphreys*, 26 Ch. D. 474, C. A., and cases cited *post*, pp. 688, 689. But an acknowledgment, to take the case out of the statute, must still be such as implies a definite promise to pay. *Brigstocke v. Smith*, 1 Cr. & M. 483.

An oral statement of an account within six years, and a promise to pay the balance, takes the original debt out of the statute by giving a new cause of action on the account stated, provided there are really items of account on both sides. *Smith v. Forty*, 4 C. & P. 126; *Ashby v. James*, 11 M. & W. 542. See *per Alderson, B.*, in *Hopkins v. Logan*, 11 M. & W. 248. But a mere oral statement of an antecedent debt without any new contract or consideration, made within six years, does not constitute a sufficient new cause of action to prevent the operation of the statute. *Jones v. Ryder*, 4 M. & W. 32.

*Acknowledgment by part payment.*] Part payment of the debt is an acknowledgment of its existence, and as such, has always been held to take a case out of the statute, as evidence of a fresh promise to pay the debt; and, as *Ld. Tenterden's Act, ante*, p. 684, leaves the effect of payment as before, the cases relating to part payment are still to be considered as authority. The payment must be such as to warrant the jury in inferring an intention to pay the rest; thus, if the defendant, on paying a part, say that "he owes the money, but will not pay it," this will not entitle the plaintiff to a verdict, unless the jury think that the latter words were spoken in jest. *Wainman v. Kyman*, 1 Exch. 118. It must appear that the payment was on account of the debt for which the action was brought, and that it was made as part payment of a greater debt. *Tippets v. Heane*, 1 C. M. & R. 252. Therefore, payment of a dividend by the inspectors of the debtor's inspectorship deed does not take the debt out of the statute; *Ex pte. Topping*, 34 L. J., Bky. 44; nor payment under a judgment in a defended county court action. *Morgan v. Rowlands*, L. R., 7 Q. B. 493. As to payment by the receiver of a business appointed by the mortgagee thereof, see *In re Hale*, (1899) 2 Ch. 107, C. A. In the case of a trustee investing the trust funds on an insufficient security, payment to the tenant for life of the interest he received thereon, is not an admission or acknowledgment to take the case out of the stat. 51 & 52 V. c. 59, s. 8, *ante*, p. 680. *In re Somerset*, (1894) 1 Ch. 231.

It has been said that a part payment where there are two debts, without any appropriation of it, is insufficient to take either out of the statute. *Burn v. Boulton*, 2 C. B. 476; *Mills v. Fowkes*, 5 N. C. 455. *Sed secus per Martin, B.*, in *Collinson v. Maryesson*, 27 L. J., Ex. 305. And it is otherwise if the debts consist of supplies of the same nature; and even where the debts are unconnected, it may be proper to leave the payment to the jury as evidence of a payment on account of all of them. *Walker v. Butler*, 6 E. & B. 506; 25 L. J., Q. B. 377; and see *Friest v. Young*, (1897) 2 Ch. 421. An appropriation of one payment by the creditor, without the debtor's knowledge or assent, is not *per se* enough to take any particular debt out of the statute; S. C.; and it seems that where a debtor on two separate notes pays interest on account generally, after one had been barred by the statute, it ought to be taken *prima facie* as paid on account of the note not barred, and not to be applied exclusively by the creditor to the note that is barred. *Per Ld. Cranworth*, *Nash v. Hodgson*, 6 D. M. & G. 471, 482; 25 L. J., Ch. 186, 188. See further *In re Boswell*, (1906) 2 Ch. 359. Payment into court as to part of a debt will not, it would seem, take the case out of the statute raised as a defence to the rest. See *Long v. Greville*, 3 B. & C. 10; *Reid v. Dickons*, 5 B. & Ad. 499. Part payment in goods taken as money will be an answer to the statute. *Hart v. Nash*, 2 C. M. & R. 337; *Hooper v. Stephens*, 4 Ad. & E. 71. Payment of interest on

a note, due more than six years ago, will take the note out of the statute. *Bealy v. Greenslade*, 2 C. & J. 61; *Pardou v. Pardou*, 10 M. & W. 562. Part payment may be by bill or note, and this will rebut the statute if so made as to imply a promise to pay the rest, although the bill or note may never be in fact paid. *Turney v. Dodwell*, 3 E. & B. 136; 23 L. J., Q. B. 137. And the delivery of a bill in part payment operates from the delivery, and not from the falling due of the bill. *Irving v. Veitch*, 3 M. & W. 90. To constitute a payment of interest sufficient to take a debt out of the statute, it is not necessary that money should pass between the debtor and creditor, provided the transaction amounts to such a payment. *Maber v. Maber*, L. R., 2 Ex. 153; and see in the case of husband and wife, *Amos v. Smith*, 1 H. & C. 238; 31 L. J., Ex. 423; *In re Dixon*, (1900) 2 Ch. 561, C. A. Payment of a statute-barred debt will not necessarily take the interest thereon out of the statute. *Collyer v. Willock*, 4 Bing. 313.

Where a payment of part is made as and for a payment of the whole that the defendant admits to be due, such payment will not take the rest out of the statute. *Wagh v. Cope*, 6 M. & W. 824. A payment made to the creditor to the use of his debtor by a third party cannot be appropriated by the creditor so as to bar the statute. *Faller v. Lucy*, 1 M. & Gr. 54. Where the defendant authorized an agent to offer the plaintiff a part of his debt in discharge of the whole, and, on the plaintiff's refusal so to accept it, the agent exceeded his authority and paid the sum offered in part discharge, it was held that this was not a part payment to bar the statute. *Linsell v. Bonsor*, 2 N. C. 241. But, generally, payment by an authorized agent is payment by the principal, and the authority is a question for the jury. Payment to the guardians by a receiver of the income of a lunatic W., under an order in lunacy, on account of the maintenance of W. by them, is part payment to bar the statute. *Wandsworth Guardians v. Worthington*, (1906) 1 K. B. 420.

Where A., B., and C., overseers, borrowed money for the parish, and gave promissory notes, signed by them as overseers, for the amount, payment of interest by the vestry or overseers for the time being was held to bar the statute in a suit on the notes against the drawers. *Iew v. Pettet*, 1 Ad. & E. 196; *Jones v. Hughes*, 5 Exch. 104. The trustees of certain legatees lent to the defendant part of the trust money upon a promissory note, describing themselves as such trustees; a payment of the principal and interest to one of the legatees within six years was held to take the case out of the statute. *Meggison v. Harper*, 2 Cr. & M. 322; 4 Tyr. 94. A. gave B. a promissory note in order to get an advance upon it from B.'s banker; B. indorsed it to his banker, who credited him with the amount; it was held that a payment of interest by B. to his banker within six years did not keep alive the liability of A. to the banker on the note. *Harding v. Edgecumbe*, 28 L. J., Ex. 313. As to the effect of payment on account of, or of interest on, simple contract debts of testator, A., by devisee for life of A.'s freehold estates, see *In re Hollingshead*, 37 Ch. D. 651, and *In re Chant*, (1905) 2 Ch. 225. See further, *post* p. 724. Payment on a note to an administrator, who had neglected to take out administration in the diocese in which the note was *bonum notabile*, was held sufficient to bar the operation of the statute as against a subsequent administrator *de bonis non*. *Clark v. Hooper*, 10 Bing. 480. This decision may, it has been said, be supported under the particular circumstances of the case. *Stamford, &c., Banking Co. v. Smith*, (1892) 1 Q. B. 765, 769, 771. But, in general, a payment to a third party will not bar the operation of the statute: thus part payment by the maker, S., of a promissory note to the payee, K., after K. had indorsed away the note to B., was held to be no bar to the statute, in an action by B. against S., K. having no authority to receive payment on behalf of B. S. C.

A part payment within six years, though proved only by an oral or

unsigned admission of the defendant, will take a case out of the statutes. *Cleave v. Jones*, 6 Exch. 573. But such admission cannot be proved by the production of a book by the plaintiff, confidentially entrusted to him as the defendant's attorney in the course of business, in which book payment of interest by the defendant to the plaintiff within six years was entered. S. C., 7 Exch. 421; 20 L. J., Ex. 238, Ex. Ch. An answer to a bill in chancery against the defendant, admitting the payment of certain sums, but denying that they were paid as interest on the alleged debt due to the plaintiff, is enough to take the debt out of the statute, if the jury be satisfied by other evidence that they were in fact so paid. *Baidon v. Walton*, 1 Exch. 617. As to the use of admissions made in the book of a testator of the receipt of interest by him, to rebut the statute when set up against his executor, see *Bradley v. James*, 13 C. B. 822; 22 L. J., C. P. 193, *ante*, p. 58.

The 9 G. 4, c. 14, s. 1 (*ante*, p. 684), prevents an acknowledgment or promise by one of several co-contractors from taking the case out of the statutes, but part payment was unaffected by that act. *Whitcomb v. Whiting*, 2 Doug. 652; 1 Smith's L. C. But by the Mercantile Law Amendment Act, 1856, s. 14, when there are several co-contractors or co-debtors bound or liable jointly only, or jointly and severally, or executors, &c., of any contractor, no such co-contractor, &c., shall lose the benefit of the Statute of Limitations, so as to be chargeable by reason only of payment of any principal, interest, or other money, by any other co-contractor, &c. This section is not retroactive, and payment by a co-contractor before the Act prevented the operation of the Statute of Limitations. *Jackson v. Woolley*, 8 E. & B. 784; 27 L. J., Q. B. 448, Ex. Ch. The section applies even if the payment be made with the knowledge and consent of the defendant, the co-debtor. *Per Crompton, J.*, S. C., 8 E. & B. 783, 784; 27 L. J., Q. B. 182. Payment by a continuing partner, B., does not bar the statute as against one, A., who has retired; *Watson v. Woolman*, L. R., 20 Eq. 721; *semble, contra* as to an existing partner. S. C. So if made by B. on behalf of A. as his agent. *Tucker v. Tucker*, (1894) 3 Ch. 429, C. A.

*Acknowledgment—By whom.*] Since 9 G. 4, c. 14, an acknowledgment signed by an agent in the name of the principal, and with his assent, was held insufficient in *Hyde v. Johnson*, 2 N. C. 776. But now, by 19 & 20 V. c. 97, s. 13, an acknowledgment or promise made in a writing, signed by an agent of the party chargeable thereby, duly authorized to make it, has the same effect as if signed by the party himself. An acknowledgment made by an agent since the passing of this last Act is sufficient to bar the statute in the case of a debt contracted before the Act. *Leland v. Murphy*, 16 Ir. Ch. Rep. 500, M. R.

Even before Ld. Tenterden's Act it was held that, as against an executor, a mere acknowledgment is not sufficient to take the case out of the statute, but there must be an express promise. *Tullock v. Dunn*, Ry. & M. 416; *Scholey v. Walton*, 12 M. & W. 510. An admission by a bankrupt in his balance-sheet will not take the debt out of the statute as against his trustee. *Pott v. Clegg*, 16 M. & W. 321; *Ex pte. Topping*, 31 L. J., Bky. 44. An acknowledgment by an infant under age, of a debt for necessities supplied to him, is an answer to a defence of the statute. *Willins v. Smith*, 4 E. & B. 180; 24 L. J., Q. B. 62.

As to acknowledgment of debt on behalf of a joint-stock company, see *Lowndes v. Garnett, &c.*, *Gold Mining Co.*, 33 L. J., Ch. 418.

The 9 G. 4, c. 14, s. 1, expressly provided that in future a promise by one of several debtors shall not deprive the rest of the benefit of the statute. *Ante*, p. 684.

An agreement stamp is not necessary on instruments given in evidence as acknowledgments; 9 G. 4, c. 14, s. 8, and *vide ante*, p. 234; but an unstamped promissory note cannot be used for this purpose, for the section does not exempt such an instrument from requiring a note stamp. *Jones v. Ryder*, 4 M. & W. 32; *Parniter v. Parniter*, 2 D. F. & J. 526; 30 L. J., Ch. 508; *vide ante*, pp. 243, 244.

*Acknowledgment—To whom.*] Before the case of *Tanner v. Smart*, 6 B. & C. 603, *infra*, there was a good deal of confusion as to the nature of the acknowledgment which was necessary to take a case out of the Statute of Limitations; and the earlier decisions cannot be relied on as authorities. It is now settled that the acknowledgment must be made to the creditor or his agent. *Stamford, &c., Banking Co. v. Smith*, *ante*, p. 686. See also *Everett v. Robertson* and *Ex pte. Topping*, cited *post*, p. 691; *Howcutt v. Bouser*, and *Forsyth v. Bristow*, *post*, p. 723; *Wilby v. Elgee*, L. R., 10 C. P. 497, and *In re Emmett*, 95 L. T. 755, Mich. S., 1906, *cor. Kekewich*, J.

*Acknowledgment—What sufficient.*] “The legal effect of an acknowledgment of a debt barred by the Statute of Limitations is that of a promise to pay the old debt, and for this purpose the old debt is a consideration in law. In that sense and for that purpose the old debt may be said to be revived. It is revived as a consideration for a new promise. But the new promise and not the old debt is the measure of the creditor’s right. If a debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it; for which promise the old debt is a sufficient consideration. But if the debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him.” *Per Wigram, V.-C., Philips v. Philips*, 3 Hare, 281, 299, 300. This was in effect the law laid down in *Tanner v. Smart*, 6 B. & C. 603, which overruled many previous cases. *Accord. Buckmaster v. Russell*, 10 C. B., N. S. 745, *per Williams, J.*; *Chasemore v. Turner*, *infra*. See also *Mitchell’s Claim*, L. R., 6 Ch. 822, 828.

But the reports still show considerable difference of opinion as to the effect of the words on which the creditor relies for proof of the supposed promise. A mere admission of the debt without any expressions as to the intention or ability to pay, may be sufficient. See the observations in *Hart v. Prendergast*, 14 M. & W. 741, 742, 746. But if the admission be so qualified as to show present inability to pay, and only the hope of coming to “some satisfactory arrangement,” in event of increased means, it is insufficient though coupled with a disclaimer of any wish to rely on the statute. *Rackham v. Marriott*, 2 H. & N. 196; 26 L. J., Ex. 315, Ex. Ch.; see *Cassidy v. Firman*, L. R., 1 C. L. 9, Ex. Such expressions in a letter as “you will certainly be repaid;” “wait a little and all will be right;” amount to a promise, though the letter may also explain the source from which the writer expects to obtain funds. *Collis v. Stack*, 1 H. & N. 605; 26 L. J., Ex. 138. So “I will try to pay you a little at a time if you will let me; I am sure I am anxious to get out of your debt. I will endeavour to send you a little next week;” *Lee v. Wilmot*, L. R., 1 Ex. 364; and “the old account between us which has been standing over so long has not escaped our memory, and as soon as we can get our affairs arranged we will see you are paid;” *Chasemore v. Turner*, L. R., 10 Q. B. 500, Ex. Ch.,—were held to be sufficient promises. See also *Godwin v. Culley*, 4 H. & N. 373; *Cornforth v. Smithard*, 5 H. & N. 13; 29 L. J., Ex. 228, where Pollock, C.B., intimates that stronger words would be required to re-establish a debt already barred than to keep alive a debt before it is barred. It has been held that a letter containing a request

“to send in your account” is sufficient; *Quincey v. Sharpe*, 1 Ex. D. 72; *Curwen v. Milburn*, 42 Ch. D. 424, affirmed on another ground in C. A.; see also *Banner v. Berridge*, 18 Ch. D. 254; even though coupled with a denial of the correctness of the amount. *Skeet v. Lindsay*, 2 Ex. D. 314; see, however, *Spong v. Wright*, 9 M. & W. 629, *post*, p. 690. And a general admission of some debt being due, coupled with evidence to prove the amount, is sufficient. *Cheslyn v. Dalby*, 4 Y. & C. 238; *Waller v. Lacy*, 1 M. & Gr. 54; *Langrish v. Watts*, (1903) 1 K. B. 636, C. A. But without such evidence damages can only be nominal. *Dickinson v. Hatfield*, 1 M. & Rob. 141.

There are many reported cases in which particular letters and other written communications have been held sufficient to prove a promise; but the language in each varies, and is not likely to be exactly repeated in other cases, so that a collection of them is of little use as a guide to the decision of such points when they arise at N. P.; nor can any reported cases on this head be relied upon before the case of *Tanner v. Smart*, *ante*, p. 688. A promise to pay a *proportion* of a joint debt has been held sufficient to entitle the plaintiff to such proportion, though no sum is specified; the plaintiff may prove the amount by other evidence. *Lechmere v. Fletcher*, 1 Cr. & M. 623; 3 Tyr. 450; *Bird v. Gammon*, 3 N. C. 883. Where a promissory note given to two payees, A., and B., his wife, was barred by the statute, and the maker, after the death of A., indorsed his name and the date on the note, this has been held a sufficient acknowledgment. *Bourdin v. Greenwood*, L. R., 13 Eq. 281.

*Acknowledgment—What not sufficient.*] A paper admitting the debt, and signed by the defendant on the occasion of an agreement that it should be extinguished by an existing set-off, cannot be used to show a promise to pay; for it did not, in fact, contemplate any future payment at all. *Cripps v. Davis*, 12 M. & W. 159. Where, in answer to a letter from the plaintiff's solicitor, the defendant wrote, “As soon as I am able to attend to my concerns, I will wait on Captain C. (the plaintiff), whom I shall be able to satisfy respecting the misunderstanding which has occurred between us,” Gibbs, C.J., thought it not sufficient to take the case out of the statute. *Craig v. Cox*, Holt, N. P. 380. So where, in answer to a demand for charges relative to the grant of an annuity, the defendant said he thought it had been settled at the time the annuity was granted; that he had been in so much trouble since, that he could not recollect anything about it. *Hellings v. Shum*, 1 B. Moore, 340; 7 Taunt. 611. So, where the defendant, having denied the existence of the debt, said, on being requested to look at documents in proof of it, “It is no use for me to look at them, for I have no money to pay it now.” *Snook v. Mears*, 5 Price, 626. So, where the defendant referred the plaintiff to his attorney, “who was in possession of his determination and ability.” *Bicknell v. Keppel*, 1 N. R. 20. Where A. admits a debt due to B. only on the understanding that a cross claim is to be also allowed, and the arrangement goes off, this is no admission by A. to bar the statute. *Francis v. Hawkesley*, 1 E. & E. 1052; 28 L. J., Q. B. 370; *Goate v. Goate*, 4 H. & N. 29. See also *Mitchell's Claim*, L. R., 6 Ch. 822.

Where the debtor stated in writing that arrangements had been making to enable him to discharge the account, that funds had been appointed of which B. was trustee, to whom he had handed the account, and that B. had authorized him to refer the plaintiff to him; this was held not sufficient to take the case out of the statute, the debtor not charging *himself* by the acknowledgment. *Whippy v. Hillary*, 3 B. & Ad. 399. So, if the debtor merely refer the creditor to certain funds in the hands of others, and tell

him to "pay himself" out of them, this is no promise charging himself. *Routledge v. Ramsay*, 8 Ad. & E. 221.

Where the acknowledgment was, "I cannot afford to pay my new debts, much less my old ones," it was held to be insufficient. *Knott v. Farren*, 4 D. & Ry. 179. So, "I will see my attorney, and tell him to do what is right." *Miller v. Caldwell*, 3 D. & Ry. 267. So, where the defendant, on being arrested, said, "I know that I owe the money, but the bill I gave was on a 3d. receipt stamp, and I will never pay it;" the acknowledgment was held insufficient. *A'Court v. Cross*, 3 Bing. 329. The following letter from the defendant to plaintiff's attorney was held not sufficient: "Since the receipt of your letter (and indeed for some time previously), I have been in almost daily expectation of being enabled to give a satisfactory reply to your application respecting the demand of Messrs. M. against me. I propose being in Oxford to-morrow, when I will call upon you on the matter." *Morrell v. Frith*, 3 M. & W. 402. "Send me your bill, and, if just, I will not give you the trouble of going to law," is not sufficient, as it contains no admission of any debt. *Spong v. Wright*, 9 M. & W. 629; see, however, *Quincey v. Sharpe*, 1 Ex. D. 72; and *Skeet v. Lindsay*, 2 Ex. D. 314, *ante*, p. 689. The writing must import a distinct and unqualified acknowledgment of a debt, from which a promise may be inferred by the court. *Fearn v. Lewis*, 6 Bing. 349; *Williams v. Griffith*, 3 Exch. 335; *Green v. Humphreys*, 26 Ch. D. 474, C. A. And mere general expressions of a hope that the debtor may be in a condition to pay at a future day are not sufficient. *Hart v. Prendergast*, 14 M. & W. 741; *Smith v. Thorne*, 18 Q. B. 134; 21 L. J., Q. B. 199, Ex. Ch.

Where the defendant acknowledges the debt, but insists that it is paid or discharged, the whole of his admission must be taken together, and the case will not be taken out of the statute. Thus, where the defendant said, "I have paid the debt, and will send you a copy of the receipt," but such a copy was never sent, Lord Ellenborough held the acknowledgment insufficient. *Birk v. Guy*, 4 Esp. 184; *Anon.*, cited Holt, N. P. 381. Where the acknowledgment was, "You owe me more money; I have a set-off against it," it was held not sufficient. *Swann v. Sowell*, 2 B. & A. 759. "I acknowledge the receipt of the money, but the testatrix gave it me," was also held not sufficient. *Owen v. Wolley*, B. N. P. 148.

Where the defendant, in his acknowledgment, rests his discharge upon a written instrument to which he refers with precision, evidence of that instrument has been admitted to show that it does not operate as a legal discharge. *Partington v. Butcher*, 6 Esp. 66; *Hellings v. Shaw*, 1 B. Moore, 344; 7 Taunt. 608. But the doctrine is adverted to by the court with expressions of doubt in *Beale v. Nind*, 4 B. & A. 568, and can only be supported on the assumption that such an acknowledgment amounts to a conditional promise.

The following acknowledgment, "I have sent you a note for the money due to you, which your mother left for you," sent with a promissory note, on a receipt stamp, was held insufficient without the promissory note, and that not being properly stamped, could not be looked at. *Parmiter v. Parmiter*, 2 D. F. & J. 526; 30 L. J., Ch. 508.

Where the expressions of the defendant are ambiguous, it was formerly held to be a question of fact for the jury whether they amounted to an acknowledgment of the debt. *Lloyd v. Maund*, 2 T. R. 760; and see *Linsell v. Bonsor*, 2 N. C. 241. But this has been questioned in later cases, and it has been since decided that the construction of a doubtful document, given in evidence to defeat the statute, is for the court and not for the jury; though, if intrinsic facts are adduced in explanation, these facts are for the consideration of the jury. *Morrell v. Frith*, 3 M. & W. 402; *Routledge v.*

*Ramsay*, 8 Ad. & E. 221; *Smith v. Thorne*, 18 Q. B. 134; 21 L. J., Q. B. 199, Ex. Ch.

An acknowledgment since action brought is not sufficient. *Bateman v. Pinder*, 3 Q. B. 574, overruling *Yea v. Fouraker*, 2 Burr. 1099.

A. and B. were joint and several makers of a promissory note, and A. having made an assignment for the benefit of his creditors, B. gave to the payee of the note the following memorandum:—"I hereby consent to your receiving the dividend under A.'s assignment, and do agree that your doing so shall not prejudice your claim on me for the same debt." It was held that this was insufficient as against B. *Cockrill v. Sparkes*, 1 H. & C. 699; 32 L. J., Ex. 118. Where there were disputed accounts, and the parties agreed to refer them to an arbitrator "to ascertain the amount due," the amount to be paid "at such times and in such proportions as the arbitrator may appoint;" it was held to be insufficient. *Hales v. Stevenson*, 11 W. R. 33, M. T. 1862, Q. B.; Ex. Ch. 11 W. R. 952, T. T. 1863. In *Bush v. Martin*, 2 H. & C. 311; 33 L. J., Ex. 17, the claim was for work and labour as an attorney against commissioners under a local improvement Act. The commissioners appointed a committee to inquire into the state of their finances, and the committee delivered a signed report, in which the sum claimed was shown to be due to the plaintiff. The commissioners adopted the report, and ordered a rate to be levied in accordance with the recommendation of the committee to defray the sums therein found to be due. This was held not to be sufficient; Pollock, C.B., relying on *Emery v. Day*, 1 C. M. & R. 245, where a somewhat similar acknowledgment was attempted to be set up; but no decision was there given as to whether or no the acknowledgment was sufficient, because the plaintiff failed to produce it.

Where the defendant had presented a petition for arrangement with his creditors under the 7 & 8 V. c. 70, and had inserted in his accounts the debt on which the action was brought, and thereby proposed to assign all his property to trustees "for the future payment or compromise of such debts and engagements," this was held to be insufficient. *Everett v. Robertson*, 1 E. & E. 16; 28 L. J., Q. B. 23. So the insertion of a debt in the schedule to a deed of inspectorship for administering the estate of the debtor will not take the debt out of the statute, though the schedule be verified by the debtor's oath. *Ex pte. Topping*, 34 L. J., Bky. 44. This case overrules *Eicke v. Nokes*, 1 M. & Rob. 359.

A letter written "without prejudice," cannot be relied on when the terms it proposes have not been accepted. *Mitchell's Claim*, L. R., 6 Ch. 822; and *vide ante*, p. 62.

*Acknowledgment—conditional.*] When the promise relied upon is conditional, the plaintiff must show the condition performed; *Mitchell's Claim*, *supra*; thus where the defendant promised to pay the debt when he was able, it was ruled that the plaintiff was bound to show that the defendant was then of sufficient ability to pay. *Davies v. Smith*, 4 Esp. 36; *Besford v. Saunders*, 2 H. Bl. 116. So where the promise was, "I cannot pay the debt at present; but I will pay it as soon as I can," it was held necessary for the plaintiff to show the defendant's ability to pay. *Tanner v. Smart*, 6 B. & C. 603. If the debtor promises to pay the old debt "when he is able," or "by instalments," or "in two years," or out of a certain fund, the creditor can claim nothing more than the new promise gives him. *Per Wigram, V.-C.*, in *Phillips v. Phillips*, 3 Hare, 281, 299, *ante*, p. 688, cited in *Smith v. Thorne*, 18 Q. B. 139; 21 L. J., Q. B. 199, Ex. Ch. See also *Chasemore v. Turner*, L. R., 10 Q. B. 500, Ex. Ch., and *Meyerhoff v. Frölich*, 3 C. P. D. 333; 4 C. P. D. 63, C. A. And the statute runs from the time of becoming able to pay, though the plaintiff had no notice of the ability, and made no

demand. *Waters v. Thanet, Et. of*, 2 Q. B. 757; *Hammond v. Smith*, 33 Beav. 452.

A doubt has existed whether the plaintiff is bound to claim specially on such qualified promise, or can show, under the reply taking issue on the defence of the statute, that the promise has become absolute by the performance of the condition; but it seems to be now settled that the conditional promise may, after performance of the condition, be shown under issue taken on a defence of the statute; *per Parke, B.*, in *Hart v. Prendergast*, 14 M. & W. 743, 745; *Smith v. Thorne*, 18 Q. B. 134, 143; 21 L. J., Q. B. 199, Ex. Ch.; and such is the practice, though cases may occur of a promise so qualified as to require a special claim, as to pay in a particular manner.

Whether the promise be qualified or not, is a question of construction for the court and not for the jury, except where extrinsic evidence affects the construction. *Routledge v. Ramsay*, 8 Ad. & E. 221. *Vide ante*, p. 690.

*Mutual accounts, &c.*] Before the 9 G. 4, c. 14, *ante*, p. 684, it was held that where there had been mutual current and unsettled accounts between the parties, and any of the items were within six years, such items were evidence (under the replication that the defendant did promise, &c.) as an admission of an open account so as to take the case out of the statute, like any other acknowledgment. *Culling v. Shouilding*, 6 T. R. 189; 2 Wms. Saund. 127 (6). But since that statute, there must be part-payment, or something equivalent to it, or a distinct written acknowledgment, to have this effect. *Williams v. Griffiths*, 2 C. M. & R. 45; *Mills v. Powkes*, 5 N. C. 455; *Cotton v. Partridge*, 4 M. & Gr. 271. See also as to merchants' accounts, *ante*, p. 678.

*Limitation of actions in special cases.*] There are certain cases in which the limitation of actions is governed by special Acts. The following are some of these. Thus the stat. 35 G. 3, c. 125, ss. 7, 8, 9, prescribes the formalities required before a debt becomes recoverable from an heir-apparent to the crown, who has a separate establishment, and limits the period for its recovery.

By 56 & 57 V. c. 61, s. 1, where an action is brought against any person for anything done in pursuance or execution or intended execution of any statute, or of any public duty or authority, it must be brought within six months of the act complained of. This section and the cases relating thereto are collected, *sub tit. Actions against constables, &c.*, *post*, pp. 1131 *et seq.*

The stat. 22 & 23 V. c. 49, s. 1, prohibits the payment after a certain time by guardians, of debts contracted by them. See *Midland Ry. Co. v. Edmonton Union*, (1895) A. C. 485, D. P.; *W. Ham Union v. S. Mathew, Bethnal Green*, (1896) A. C. 477; *Manchester, &c., Ry. Co. v. Doncaster Union*, (1897) 1 Q. B. 117, C. A.; *Sharpyngton v. Fulham Guardians*, (1904) 2 Ch. 449. But the Public Health Act, 1875 (38 & 39 V. c. 55), s. 9, does not extend this provision to them when acting as the local sanitary authority. *Dearle v. Petersfield Union*, 21 Q. B. D. 447, C. A.

### Merger.

Where a debtor gives his creditor a higher security for the debt due, and co-extensive with it, the debt is merged by operation of law, irrespectively of the intention of the parties. *Price v. Moulton*, 10 C. B. 561; 20 L. J., C. P. 102. But it is doubtful if the merger will take place, where the deed contains a proviso against it. See *Commrs. of Stamps v. Hope*, (1891) A. C. 476, 483, *per J. C.* And if the security so given is not co-extensive with the debt, the latter will exist as a collateral security, and there will be no



merger. *Holmes v. Bell*, 3 M. & Gr. 213; *Bell v. Banks*, *Id.* 258; *Norfolk Ry. Co. v. M'Namura*, 3 Exch. 628; *Ansell v. Baker*, 15 Q. B. 20; *Boaler v. Mayor*, 19 C. B., N. S. 76; 34 L. J., C. P. 230.

If a bond be given for rent due, even on a parol demise, this does not operate as a merger, for rent is a debt of equal degree with a debt by speciality. *Newport v. Godfrey*, 2 Vent. 184; 3 Lev. 267; 4 Mod. 44; *Gage v. Acton*, 1 Salk. 325; *Davis v. Gyde*, 2 Ad. & E. 623; 1 Roll. Abr. Dett. (Extinguishment), A. pl. 2, p. 605, l. 1.

See further as to merger, *ante*, p. 599.

### Payment.

Payment must be specially pleaded; Rules, 1883, O. xix. r. 15, *ante*, p. 309; and without a defence of payment it cannot be given in evidence, though only for the purpose of showing that interest is not due on the debt demanded, the debt itself being admitted by payment into court. *Adams v. Palk*, 3 Q. B. 2.

Payment cannot be shown under a set-off. *Linley v. Polden*, 3 Dowl. 780; and see *Lewis v. Samuel*, 8 Q. B. 685. It is, however, sometimes difficult to say whether a receipt or retainer of money by a creditor amounts to a payment or a set-off. See *Thomas v. Cross*, 7 Exch. 728; 21 L. J., Ex. 251. But, probably, if the effect of the transaction were wrongly stated, a judge would amend in such a case. In an action against one of two joint and several guarantors, the reduction of the defendant's liability by the payment by the other guarantor of part of the amount, cannot be set up without a defence of payment pleaded. *Laurie v. Scholefield*, L. R., 4 C. P. 622. In this case the court allowed the plea to be added upon terms.

It is difficult to understand the reasoning upon which the decision in one case, and an alleged dictum in another is founded that, where goods are sold for ready money, and the delivery in exchange for money takes place immediately, no debt arises and that consequently, in an action for goods sold and delivered, in such a case it was not necessary to plead payment, but that the nature of the transaction might be shown under the plea of never indebted. Of course, if this view be taken of the transaction, there is, strictly speaking, no payment, for when there is no debt there can be no payment. But it is scarcely possible to suppose a case of exchange of goods for money, which is not preceded by a prior offer and acceptance, and it is upon the contract thus made, and which the defence of payment confesses and avoids, that the action is brought. The ruling in *Bussey v. Barnett*, 9 M. & W. 312, which is usually relied on for the doctrine under discussion, seems to be contrary to the opinion of Parke, B., in *Goodchild v. Pledge*, 1 M. & W. 363. It was also disputed in *Littlechild v. Banks*, 7 Q. B. 739; and in *Smith v. Winter*, 12 C. B. 487; 21 L. J., C. P. 158, was said to have gone to "the very verge of the law." In *Tinninus v. Gibbins*, 18 Q. B. 726; 21 L. J., Q. B. 403, *Ld. Campbell* said, that "where money is paid over the counter at the time of sale, there must be a moment of time when the purchaser is indebted to the vendor." It is said, however, that a similar opinion was again expressed by the court in *Wool v. Bletcher*, 4 W. R. 566, E. T. 1856, Ex. In *Smith v. Winter*, *supra*, in debt for work and labour, it was held that where work was to be done by a debtor for his creditor, as a set-off against the debt, that in an action for work and labour this might be shown under the general issue. But this is obviously an entirely different case.

An account stated between plaintiff and defendant, and payment of the balance, is evidence under a defence of payment, though it *may* be specially pleaded according to the facts. *Callander v. Howard*, 19 C. B. 290; 19 L. J., C. P. 312.

Where, in answer to a claim for 10*l.* 13*s.* 4*d.*, the defendant sent a bank bill for 10*l.*, which the plaintiff said he should not accept in discharge of his claim, but nevertheless retained, it was held that there was evidence of payment. *Caine v. Coulton*, 1 H. & C. 764; 32 L. J., Ex. 97. See *Ackroyd v. Smithies*, 54 L. T. 130, M. Sit. 1885, Q. B. D., *per Cur.* But the mere retention and cashing by the payee of a cheque sent in settlement of outstanding accounts, does not preclude him from treating the cheque as a payment on account only, and suing for the balance. S. C.

Where the plaintiff's particulars admit a payment, he can recover only the amount by which his claims, as proved, exceed the payment as alleged. *Rowland v. Blaksley*, 1 Q. B. 403; see also *Prie v. Rees*, 11 M. & W. 576. And if it gives credit thus, "Cr.,—by bills of exchange, 1,500*l.*," this will be taken to be a payment by the defendant, and the plaintiff cannot show that it was a payment by another person for which the defendant is not entitled to credit. *Smethurst v. Taylor*, 12 M. & W. 545. But, the plaintiff may explain that the payment for which the particulars give credit, was not made on account of the balance he claims. *Mercy v. Galot*, 3 Exch. 851. In this case the plaintiff seems to have included in the particulars items which he could not have recovered, but which had been paid by the defendant. In another case, the particulars claimed a balance of 29*l.* for goods sold, and gave credit for 902*l.* paid; the plaintiff proved a claim of 949*l.* for goods sold; it appeared that 84*l.* worth of the goods had been taken back, and defendant insisted at the trial that this sum, added to the sum credited, left nothing for the plaintiff to recover; held, that the plaintiff might turn the balance in his favour by showing that he had given credit for 84*l.* as part of the payment. *Lamb v. Micklethwait*, 1 Q. B. 400. Where credit is given for a sum paid, whether before or after action, a defence of payment applies only to the balance, and proof of payment of that amount is sufficient. *Eastwick v. Harman*, 6 M. & W. 13. Where the plaintiff proceeded in his particulars for a "balance" of 37*l.*, and the particulars stated sales to the amount of 100*l.*, and gave no credit for specific payments, and the defendant pleaded and proved a set-off of 5*l.* with other pleas, it was held that the defendant was not necessarily entitled to deduct the set-off from 37*l.*; but the jury might find that sum to be the "balance" after deducting the 5*l.* *Townson v. Jackson*, 13 M. & W. 375. See also *Ward v. Wallis*, (1900) 1 K. B. 675, *ante*, p. 615.

Where a creditor directs his debtor to transmit money or a bill in payment by the post, and it is lost (without default of the debtor), the creditor must bear the loss; *Warwicke v. Noakes*, 1 Peake, 98; and where no directions are given about the mode of remittance, yet if this be done in the usual way of business between the parties, it seems that the debtor is discharged. *Id.*, *per* Ld. Kenyon, C.J.; *vide post*, pp. 699 *et seq.*

As to payment of bills or notes, see *ante*, pp. 401 *et seq.*

A usual way of proving payment is by the production of a receipt signed by the plaintiff or his agent. *Vide Admissions; Receipts; ante*, p. 65; and *Stamps, ante*, p. 271.

As to proof of payment of legacies, see *Stamps, ante*, p. 272.

[*Payment to agent.*] Payment to an authorized agent is sufficient. *Goodland v. Blewith*, 1 Camp. 477; *Coates v. Lewes, Id.* 444; *Owen v. Barrow*, 1 N. R. 101. Thus, payment to the solicitor, while an action is subsisting, is good; *Anon.*, 1 Dowl. 173; but not to his clerk, who shows no other authority than his master's order to receive it; *per* Ld. Kenyon, C.J., *Coore v. Cullaway*, 1 Esp. 115. The solicitor's authority to receive seems to continue as long as the retainer; and this is presumed to continue after judgment until payment, voluntarily, or under execution. *Bevins v.*

*Hulme*, 15 M. & W. 88, 96. Payment to the solicitor's agent in the country is not good. *Yates v. Freckleton*, 2 Doug. 623. But payment to a person found in a merchant's counting-house, and appearing to be entrusted with the conduct of the business there, is a good payment to the merchant, though the person was, in fact, not employed by him. *Barrett v. Deere*, M. & M. 200; and see *Wilmott v. Smith*, *Id.* 238. But, this is on the assumption that the payment relates to the merchant's business; for if it be payment in respect of a private debt due to him, as a mortgage debt, or a legacy, it will not be sufficient. *Sanderson v. Bell*, 2 Cr. & M. 304, 313. So, if a shopman, authorized to receive cash over the counter, obtain payment elsewhere in another way, and does not pay over the amount to his principal, this is not a discharge. *Kaye v. Brett*, 5 Exch. 269. An agent employed to sell land has no authority, as such, to receive payment. *Mynn v. Joliffe*, 1 M. & Rob. 326. So, an auctioneer, though he is authorized to receive the deposit, has no general authority to receive the purchase-money; *Sykes v. Giles*, 5 M. & W. 645; and, generally, an agent for taking a bond, or for negotiating or concluding a contract, has no implied authority to receive money due under it. Story on Agency, § 98. Even the possession of the instrument, as the possession by the agent, of a conveyance to secure a loan of money negotiated by the agent, is no authority to receive the principal, although the creditor may have sometimes permitted the agent to receive interest. *Wilkinson v. Candlish*, 5 Exch. 91. So possession of an executed conveyance, with a receipt indorsed by vendor or mortgagor, was no sufficient authority to the solicitor of vendor or mortgagor to receive the purchase-money or loan. *Viney v. Chaplin*, 2 De G. & J. 468; 27 L. J., Ch. 434; *Expte. Swinbanks*, 11 Ch. D. 525, C. A., distinguished in *Gordon v. James*, 30 Ch. D. 249, C. A. This is now otherwise by the Conveyancing and Law of Property Act, 1881, 44 & 45 V. c. 41, s. 56; even where the vendor is a trustee. Trustee Act, 1893, 56 & 57 V. c. 53, s. 17. It seems that under these sections, in the absence of anything to suggest the contrary, the person paying the money must assume that the solicitor producing the deed is acting for the person having power to give a discharge. *King v. Smith*, (1900) 2 Ch. 425, 432, *per* Farwell, J., doubting the decision of North, J., in *Day v. Woolwich, &c., Building Soc.*, 40 Ch. D. 491.

Possession of a negotiable security is evidence of authority to receive payment. Story on Agency, § 104, citing *Owen v. Barrow*, 1 N. R. 103. See further, as to payment of a bill of exchange, cheque, or promissory note, the Bills of Exchange Act, 1882, s. 59, *ante*, p. 401. Payment to the factor who sold the goods, and who was known to sell as such, is good against the principal, though made prematurely. *Fish v. Kempton*, 7 C. B. 687. A special defence of payment to agent D., of whom the plaintiff bought the goods, believing him to be the principal, must state that D. was ostensible owner of the goods by permission of the plaintiff. *Drakeford v. Piercy*, 7 B. & S. 515.

As a general rule, when a creditor C. employs an agent A. to receive a debt, A. must receive it in money, and if he set it off against a debt from himself, C. is not bound to treat this as payment; *Barker v. Greenwood*, 2 Y. & C., Ex. 418; *Scott v. Irving*, 1 B. & Ad. 605; *Sweeting v. Pearce*, 7 C. B., N. S. 449; 29 L. J., C. P. 265; 9 C. B., N. S. 534; 30 L. J., C. P. 109, Ex. Ch.; *Pearson v. Scott*, 9 Ch. D. 198; *Crossley v. Magniac*, (1893) 1 Ch. 594; though if C. knew that there was a general usage of the trade or market in which the transaction took place that debts should be set off in this way, and he did not object to it, he would be taken to be bound by the usage. *Stewart v. Aberlein*, 4 M. & W. 211, cited, *ante*, p. 449l, and *Sweeting v. Pearce*, *supra*. So where goods are bought through a broker, and the purchaser pays for them by an advance on his general account with

the broker before the delivery of the goods, it is a question for the jury whether, by the custom of the trade, such payment is good as against the principal. *Catterall v. Hindle*, L. R., 2 C. P. 368, Ex. Ch. So payment to a clerk or servant by cheque, bill, or note, is good, if it be in the usual course of business; *Thorold v. Smith*, 11 Mod. 87, 88; or if the cheque, &c., be subsequently paid; *Bridges v. Garrett*, L. R., 5 C. P. 456, Ex. Ch., per Blackburn, J., and see *Williams v. Evans*, L. R., 1 Q. B. 352, 354; even though the payment was by cheque payable to order, which the clerk cashed at the banker's by forging the indorsement; for the payment by the banker is protected by 16 & 17 V. c. 59, s. 19, and Bills of Exchange Act, 1882, s. 60, *ante*, p. 406. *Charles v. Blackwell*, 2 C. P. D. 151, C. A. The cheque must, however, be in such form that the agent can hand it over to his principal. *Papè v. Westacott*, (1894) 1 Q. B. 272, C. A. The defendant, having purchased copyhold land, was admitted by his solicitor, C. who had been appointed by the steward of the manor as his deputy to admit the defendant. The defendant gave C. a cheque, crossed by C.'s request to C.'s bankers, for the amount of the lord's fine, steward's fees, and C.'s charges as his solicitor. The amount of the cheque was duly paid to C.'s bankers, who retained the money in discharge of a debt due to them by C. It was held a good payment of the fine by the defendant as against the lord. *Bridges v. Garrett*, L. R., 5 C. P. 451, Ex. Ch. This decision turns on the cheque having been paid, the transaction being the same as if the amount had been paid to C.'s bankers; *vide Id.* 456, per Blackburn, J., and *Papè v. Westacott*, (1894) 1 Q. B. 272, 279, 283. But payment to a particular agent, e.g., an auctioneer, must not be made by bill. *Williams v. Evans*, *supra*; and see *Sykes v. Giles*, 5 M. & W. 645. It seems, however, that payment of the deposit at an auction may, in accordance with the usage, be made by cheque. *Farrer v. Lucy, Hartland & Co.*, 31 Ch. D. 42, C. A. But payment for a document of title must not be made by cheque. *Papè v. Westacott*, *supra*. As to the form in which a cheque or bill given to an agent should be drawn, see S. C., and *Hogarth v. Wherley*, L. R., 10 C. P. 630.

A payment to one of several persons who have deposited money in a bank, and who are not partners, is not good as against the others. *Innes v. Stephenson*, 1 M. & Rob. 145; *Stewart v. Lee*, M. & M. 158. But a payment to one partner of a debt due to the partnership is payment to all; and a receipt by one is *prima facie* evidence of payment against all; but it may be rebutted by proof that it was given in fraud of the other partners in order to defeat the action. *Farrar v. Hutchinson*, 9 Ad. & E. 641. But in case of a separate debt to a partner, payment to his firm is insufficient unless he authorized the firm to receive it. *Powell v. Brodhurst*, (1901) 2 Ch. 160.

*Payment by agent.*] Payment by an agent will support an averment of payment by the principal, though the latter has not in fact repaid the agent. *Adams v. Dunsey*, 6 Bing. 506. As to payment by a broker of the premium on a marine insurance policy see 6 E. 7, c. 41, s. 54, *ante*, p. 449*m*.

Payment by one of several partners is payment for all; but where one of several partners paid a sum of money to a creditor in consideration that the creditor would assign the debt to a trustee for the partner, it was held that, in an action brought by the trustee in the name of the creditor against the partnership, the above facts did not support a plea of payment. *M'Intyre v. Miller*, 13 M. & W. 725. Where it was agreed between A., B., and C., that A. should advance money to B. in anticipation of money of B. that was coming into A.'s hands, and on receiving in the meantime the security of C.'s acceptance, which was to be satisfied out of such money; it was held that, on receipt of B.'s money by A., it might be relied on by C. as payment by him in an action against him by A. on the acceptance. *Hills v. Mesnard*,

10 Q. B. 266. In an action against the surety of A., a bankrupt, there was a plea of payment by A., and acceptance in satisfaction by the plaintiff: held, on issue taken on the plea, that a payment by A. to the plaintiff, which was recovered back by A.'s assignees as a fraudulent preference, would not support the plea, and that the verdict and judgment of the assignees was evidence, but not conclusive, for the plaintiff to show that the payment was illusory. *Pritchard v. Hitchcock*, 6 M. & Gr. 151. See also *Petty v. Cooke*, L. R., 6 Q. B. 790.

Payment by a third person, if made on behalf of the defendant, accepted by the plaintiff, and adopted by the defendant, is a good defence. *Simpson v. Eggington*, 10 Exch. 845; 24 L. J., Ex. 312; *Belshaw v. Bush*, 11 C. B. 191; 22 L. J., C. P. 24; *Kemp v. Bulls*, 10 Exch. 607; 24 L. J., Ex. 47. But where payment is made by an unauthorized agent, the creditor and agent may, before the debtor has affirmed the payment, rescind the transaction, and the creditor repay the money, and the payment is then at an end. *Walter v. James*, L. R., 6 Ex. 124. So payment by a third person without the debtor's knowledge, and not on behalf of the defendant, but as an advance for the creditor's convenience, is no payment, though pleaded as such by defendant. *Lucas v. Wilkinson*, 1 H. & N. 420; 26 L. J., Exch. 13.

*Appropriation of payments.*] In general, the party who pays money has, at the time of payment, a right to direct the application of it; *Anon.*, Cro. Eliz. 68; *The Mecca*, (1897) A. C. 286, 293, D. P. *per* Ld. Macnaghten; but where money is paid to a creditor generally, without any specific appropriation by the party paying, and the creditor has several demands against the party paying, he may, "up to the very last moment," elect to apply the money paid to whichever of those demands he pleases. S. C.; *Seymour v. Pickett*, *infra*.

The appropriation by the debtor need not be express; it may be inferred from conduct or circumstances indicating his intention. *Newmarch v. Clay*, 14 East, 239. The intention of the debtor ought to be notified at or before the time of payment. *Mayfield v. Watsley*, 3 B. & C. 357. But the creditor may unless he has previously determined his right of election, make the appropriation at any subsequent period, even while he is being examined as a witness in an action by him against the debtor. *Seymour v. Pickett*, (1905) 1 K. B. 715, C. A.; nor will an entry in his private books applying it to a particular demand, but not communicated to the party paying, preclude him from applying it afterwards to another demand. *Simson v. Ingham*, 2 B. & C. 61. The creditor in such cases might, even before the Judicature Acts, have applied the payment to the discharge of a prior and purely equitable demand, and have sued his debtor at law for the subsequent legal debt. *Bosanquet v. Wray*, 6 Taunt. 597. But this could only be done if the equitable debts were of agreed and ascertained amount; for it was not competent for the creditor to apply it in satisfaction of some equitable demand, the amount of which could only be ascertained by an account in equity or general settlement of partnership. *Goddard v. Hodges*, 1 Cr. & M. 33. It seems, however, that the Judicature Acts have now abolished the distinction between a legal and an equitable demand, though in some cases it cannot be ascertained if the latter exist until an account has been taken. The creditor may apply it to a debt barred by the Statute of Limitations: though we have seen that part payment, so appropriated by the payee only, will not *per se* take the whole debt out of the statute. *Mills v. Fowkes* and *Friend v. Young*, cited *ante*, p. 685. Where the party paying was indebted to the party receiving, for a sum due from his wife *dum sola*, and also on another demand, the party receiving might apply the money to the first demand. *Goddard v. Cox*, Str. 1194. And this would apply to cases in which a husband is still liable for

his wife's ante-nuptial debts, as to which *vide sub tit., Actions against Husband and Wife, post*, pp. 1169 *et seq.*

In some instances, and in the absence of any proof of special appropriation, the law will direct or presume the application of money paid generally. Of this nature are accounts current with bankers and others, where there are various items of debt on one side and credit on the other, occurring at different times, and no special appropriation is made by the parties; successive payments will then be applied to the discharge of antecedent debts in the order of time in which they stand. *Story, Eq. Juris. § 459, b.; Kinnaird v. Webster*, 10 Ch. D. 139. Such cases stand on the presumed intention of the debtor, or of both parties arising out of the nature of the dealings between them. Thus, where one of several partners dies while the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, who joins the transactions of the old and new firms in one entire account, the payments made from time to time by the surviving partners will be applied to the old debts. *Per Bayley, J., Simson v. Ingham*, 2 B. & C. 72; *Clayton's case*, 1 Mer. 572, 608; *Brooke v. Enderby*, 2 B. & B. 71; *Hooper v. Keay*, 1 Q. B. D. 178; *accord. L. & County Bank v. Ratcliffe*, 6 Ap. Ca. 722, D. P. So payments by a debtor, from time to time, to surviving partners, upon one general account, including an old debt due to the former firm, will be applied in the first place to such old debt. *Bodenham v. Purchas*, 2 B. & A. 39. But where the old debts are not brought into the new account, general payments on the account are not to be considered as made in discharge of an old debt. *Simson v. Ingham, supra.* When the circumstances rebut the presumption as to the intention of the debtor the rule above laid down as to appropriation of payments will not apply. Thus, where a person in a fiduciary capacity, draws out, for his own private purposes, sums from a mixed fund of his own and of trustee moneys, it is presumed that he draws out his own moneys only, as otherwise he would commit a breach of trust. *In re Outway*, (1903) 2 Ch. 356 following *In re Hullett's Estate*, 13 Ch. D. 696, C. A., *diss.* Thesiger, L.J. *Secus*, as between *cestuis que trusts*, whose money the trustee has paid into his account at his bankers, for in such case the principle in *Clayton's case, supra*, applies. S. C.; *In re Stenning*, (1895) 2 Ch. 433. Specific appropriation by the creditor excludes the principle. *Mutton v. Peat*, (1899) 2 Ch. 556; reversed in C. A. on the facts, (1900) 2 Ch. 79. Where there are distinct demands, one against persons in partnership, and another against one only of the partners, if the money paid be the money of the partners, the creditor is not at liberty to apply it to the debt of the individual. *Thompson v. Brown*, M. & M. 40. Where goods are from time to time supplied to a mining company, conducted on the cost-book principle, and a payment is made on account of these goods to the seller generally, he is entitled to apply these payments in satisfaction of items of his claim, which accrued due before a fresh partner entered the firm, although the payment was made after that event. *Geake v. Jackson*, 36 L. J., C. P. 108. The general rule that interest is presumed to be paid before principal does not apply to the case of interest on an overdrawn banking account, which, according to the practice of bankers, has from time to time been converted into principal. *Parr's Banking Co. v. Yates*, (1898) 2 Q. B. 460, C. A.

In the absence of special application by either party, there is no rule by which a general payment is applied on any principle, grounded on the comparative burden of different debts, or with reference to the interest of the debtor or of his sureties. *Mills v. Fowkes, ante*, p. 685. Thus the law will not, in favour of a surety, direct the application of money, paid generally, to the discharge of the debt secured, without some circumstances to show

that it was so intended; *Plomer v. Long*, 1 Stark. 153; *Williams v. Rawlinson*, 3 Bing. 71; *In re Sterry*, 25 Ch. D. 692, C. A.; and where a surety joined in a money bond to secure advances by a bank to his principal, and it appears that the security was intended, though not expressed, to be a continuing one, payments will not be applied to the extinction of the bond in preference to later debts. *Henniker v. Wigg*, 4 Q. B. 792; *City Discount Co. v. McLean*, L. R., 9 C. P. 692, Ex. Ch. The case of *Marryatts v. White*, 2 Stark. 101, occasionally cited in proof of the doctrine that payment will be applied in favour of sureties, is one in which the evidence tended to show that the payments were, *in fact*, made by the debtor in relief of the surety, and not on account of an earlier debt, to which creditor claimed to apply it. See also *Kinnaird v. Webster*, 10 Ch. D. 139. The surety, on a promissory note given to secure a loan to a member of a money club, cannot rely on the monthly subscriptions and premiums paid by his principal, as payments in reduction of his liability on the note. *Wright v. Hickling*, L. R., 2 C. P. 199.

When A has a demand against B's wife as executrix, and also another demand against B. in his own right, and B. makes a general payment, A. cannot apply it to the former demand; for the obligation to pay it depends on whether or no there are assets. *Goddard v. Cox*, Str. 1194. Where there are two demands, one legal and the other illegal, and a general payment is made, the law will apply it to the discharge of the legal demand. *Wright v. Lainy*, 3 B. & C. 165. But the party receiving money may himself apply it to a demand for spirituous liquors supplied in quantities not amounting to 20s. at a time, for the stat. 24 G. 2, c. 40, *ante*, p. 669, only prevents the seller from maintaining an action therefor. *Cruickshanks v. Rose*, 1 M. & Rob. 100, *cor. Ld. Tenterden*, C.J. And in such a case the creditor may apply the payment to the demand for spirituous liquors, although his particulars claim the whole demand; and he may make the appropriation at any time before the matter comes before the jury. *Philpott v. Jones*, 2 Ad. & E. 41. The same principle would seem to apply to a demand for beer, &c., falling within the provisions of the County Courts Act, 1888 (51 & 52 V. c. 43), s. 182, *ante*, p. 670. So an unregistered dentist may apply a payment to professional fees which he cannot recover, *vide ante*, p. 514. *Seymour v. Pickett*, (1905) 1 K. B. 715, C. A.

A suspense account opened by A. and B. with a bank by deposit of a sum of money, with power to the bank to appropriate the sum in payment of a liability of A., B., and C. to them, does not, until appropriation, operate in favour of C., as payment. *Commercial Bank of Australasia v. Wilson, Official Assignee of*, (1893) A. C. 181, J. C.

[*Payment by a bill or note.*] If a bill or note payable to bearer be delivered without indorsement, a distinction has been drawn between the cases in which it has been given in exchange for goods or other securities, sold at the time, and those in which it has been given in payment of a pre-existing debt. The former transactions amount, it is said, to a barter of the bill, with all its risks. *Fenn v. Harrison*, 3 T. R. 757, 759; *Ex pte. Shuttleworth*, 3 Ves. 368; *Camidge v. Allenby*, 6 B. & C. 373, 381. But when the security is delivered in payment of a pre-existing debt, the delivery does not operate as payment, unless the transferee makes the security his own by laches (as to which *vide post*, p. 701). *Ward v. Evans*, 2 Ld. Raym. 928; *Camidge v. Allenby*, *supra*. Bank notes, other than those of the Bank of England, seem to fall within this rule. S. CC.; *Moore v. Warren*, 1 Str. 415; *Turner v. Stoues*, 1 D. & L. 122; *Robson v. Olliner*, 10 Q. B. 704; *Timmins v. Gibbins*, 18 Q. B. 722; 21 L. J., Q. B. 403; *Lichfield Union v. Greene*, 1 H. & N. 884; 26 L. J., Ex. 140; see

Byles on Bills, 16th ed., pp. 188 *et seq.*; Chitty on Bills, 11th ed., pp. 369, 370.

The legal effect of accepting, on account of a debt, a bill, or note, not treated as cash, is that of a conditional payment. It implies an agreement to suspend the remedy on the original demand during the currency of the bill or note; *Griffiths v. Owen*, 13 M. & W. 58, 61; *Belshaw v. Bush*, *infra*; except in the case of specialty debts, or rent, in which last cases no such implication is held to arise; *Davis v. Gyde*, 2 Ad. & E. 623; *Worthington v. Wigley*, 3 N. C. 454; *Belshaw v. Bush*, 11 C. B. 191, 204; 22 L. J., C. P. 24, 29; *Bramwell v. Eglinton*, 5 B. & S. 39; 33 L. J., Q. B. 130; even in these cases, however, an agreement seems implied, not to enforce another remedy, *e.g.*, distress, during the currency of the bill. *Palmer v. Bramley*, (1893) 2 Q. B. 405, C. A. A bill given by a stranger and received by the creditor on account of the debt has the same effect as one given by the debtor, if such payment be adopted by him. *Belshaw v. Bush*, *supra*; *Constable v. Andrew*, 2 Cr. & M. 298. Taking a bill "for and on account, and in payment of the price," is not a satisfaction of the debt, but only a conditional payment. *Bottomley v. Nuttall*, 5 C. B., N. S. 122; 28 L. J., C. P. 119; *Kay v. Fenwick*, 1 C. P. D. 745, C. A. So even although the cheque given has been initialled by the drawee bank to certify that it has funds in hand for payment. See *Gaden v. Newfoundland Savings Bank*, (1899) A. C. 281, J. C. When the bill or cheque has been paid, the payment relates back to the time when it was given. *Felix Hadley & Co. v. Hadley*, (1898) 2 Ch. 680. Where a purchaser gives the seller an order upon a third person entitling him to receive cash, instead of which the vendor elects to take a bill, in such case, though the bill is dishonoured, the purchaser is discharged. *Vernon v. Boverie*, 2 Show. 296; *Smith v. Ferrand*, 7 B. & C. 19. But it is otherwise if the order is upon the purchaser's agent, and the seller takes from him a cheque which is dishonoured. *Everett v. Collins*, 2 Camp. 515. Where the master of a vessel took from the freighter's agent abroad, who was furnished with funds to pay him the freight, a bill upon a third person, which was dishonoured, it was held by Gibbs, C.J., that the freighter was not thereby discharged. *Marsh v. Pedler*, 4 Camp. 257.

There may be some difficulty in saying precisely what is the duty of a creditor to whom a cheque is sent by his debtor in discharge of the debt. The question is, whether the debtor has the right to throw on his creditor the burden of accepting the cheque as payment, or sending it back, and this would in some cases depend on the usages of trade and the previous dealings between the parties. If there were no such right, then the sending the cheque would go for nothing; if there were any such right, then the creditor, by retaining the cheque, might reasonably be presumed to have accepted it in discharge of the debt. The whole is a question of fact, which is, perhaps, best left to the decision of the jury. See *Pearce v. Davis*, 1 M. & Rob. 365; *Boswell v. Smith*, 6 C. & P. 60; *Hough v. May*, 4 Ad. & E. 954. *Vide ante*, pp. 695, 696.

Proof that bills have been given for a debt (and *qy.* that the bills are due) is *primâ facie* evidence of payment, without showing that such bills were in fact paid, and it is for the plaintiff in an action for goods sold to show that they have been dishonoured. *Hebden v. Hartsink*, 4 Esp. 46; *Stedman v. Gooch*, 1 Esp. 4. So, if a cheque be received as cash, this is evidence of payment at the time it was so received without showing that it was subsequently honoured. *Curmarthen & Cardigan Ry. Co. v. Manchester & Milford Ry. Co.*, L. R., 8 C. P. 685, cited *ante*, p. 590. The vendor of goods received an acceptance of the vendee, and returned it with a request to make it payable at a banker's; but the vendee kept the bill; it was held that there was no defence to an action for goods sold. *Widders*



v. *Gorton*, 1 C. B., N. S. 576; 26 L. J., C. P. 165. Where a cheque given in payment of a debt has been stopped, the rights of the parties are the same as if it had not been given. *Cohen v. Hale*, 3 Q. B. D. 371.

As to payment by a crossed cheque, see the Bills of Exchange Act, 1882, s. 80, cited *ante*, p. 410.

Where a negotiable bill or note has been received by the creditor and afterwards lost, this is an answer to an action on the original consideration. *Crowe v. Clay*, 9 Exch. 604; 23 L. J., Ex. 150, Ex. Ch. See also the cases, *ante*, p. 357, and *Charles v. Blackwell*, 2 C. P. D. 151, C. A., *ante*, p. 696.

If the value of the security be diminished by the creditor's laches or misconduct, it is made his own, and operates as payment of the debt. *Alderson v. Langdale*, 3 B. & Ad. 660, 663; *Cannidge v. Allenby*, *Lichfield Union v. Greene*, *ante*, p. 700. A vendor took from his vendee, as collateral security, a bill accepted by a third person, indorsed by the drawer and payee to the vendee; the bill was dishonoured, but no notice thereof was given by the vendor; it was held, in an action for goods sold, that the laches of the plaintiff operated so as to make the bill payment *pro tanto*. *Peacock v. Purssell*, 14 C. B., N. S. 728; 32 L. J., C. P. 266. See also *Yglesias v. River Plate Bank*, 3 C. P. D. 60, 330, C. A. So, a creditor who takes from his debtor's agent on account of the debt, the cheque of the agent, is bound to present it for payment within a reasonable time, and if he fail to do so, and by his delay alter for the worse the position of the debtor, the debtor is discharged, although the latter was not a party to the cheque. *Hopkins v. Ware*, L. R. 4 Ex. 268. See also *Smith v. Mercer*, L. R., 3 Ex. 51. The defendant gave the plaintiff a cheque on his bankers in payment of a claim, and the cheque was duly presented by post by the plaintiff's bankers to the defendant's bankers, who neither remitted the amount nor returned the cheque till after their stoppage: it was held that there was no payment. *Heywood v. Pickering*, L. R., 9 Q. B. 428.

[*Other kinds of payment.*] A payment may be made by the mere transfer of figures in an account without any money passing. *Eyles v. Ellis*, 4 Bing. 112; *Bodenham v. Purchas*, 2 B. & A. 39.

In an action on a bill of exchange the defendant pleaded payment. It appeared that the plaintiff had sold shares for A. on credit, but that A., being in the want of money, obtained an advance from the plaintiff of the amount due for the shares, the defendant giving his acceptance also for the amount as further security; but it was agreed between the plaintiff and defendant and A., that the plaintiff should apply the proceeds of the sale of the shares when paid in payment of the bill. The plaintiff received the proceeds: it was held that these facts constituted payment. *Hills v. Mesnard*, 10 Q. B. 266.

If a debtor pay a sum of money to a third person by direction or with the assent of his creditor in discharge of a liability of the creditor, it is the same as if the money were paid into the creditor's own hands. *Waller v. Andrews*, 3 M. & W. 312; *Bramston v. Robins*, 4 Bing. 11; Chit. Contr., 14th ed. 631.

If goods be accepted in satisfaction of a debt this constitutes payment. *Cumman v. Wood*, 2 M. & W. 465; *Houper v. Stephens*, 1 Ad. & E. 71. In neither of these cases did the question arise upon a plea of payment, but it seems that giving goods in satisfaction might be proved under that defence.

## Release.

A release must be specially pleaded, Rules, 1883, O. xix. r. 15, *ante*, p. 309; and the evidence depends on the reply. After breach, a contract can only be discharged by a release under seal, or by accord and satisfaction; but before breach it may be discharged by parol. *Ante*, pp. 28, 29. Even although the defence merely alleges a release, it must be supported by proof of a deed. *Thames, Haven Dock v. Brymer*, 5 Exch. 696, 711, 712. See also *Young v. Austen*, L. R., 4 C. P. 553; and *Abrey v. Crux*, L. R., 5 C. P. 37, cited *ante*, p. 401.

As to proof of deed, *vide ante*, pp. 132 *et seq.*, and *post*, p. 716.

As to effect of cancelled deed, *vide post*, p. 717.

As to effect of alteration of deed, *vide ante*, pp. 661, 662.

As to the defence of accord and satisfaction, *vide ante*, pp. 659 *et seq.*

Where there were cross debts, and the plaintiff sued for the whole of his debt, and defendant pleaded a release of the whole, it appeared that plaintiff had signed a composition deed releasing the defendant from any debt owing to the plaintiff; the deed left the amount of debt released in blank; and the blank had, after execution, but without the plaintiff's authority, been filled up with the *whole* amount of the debt sued for; held that, on a finding by the jury, that the debt meant to be released was the difference between the plaintiff's debt and a set-off of less amount, the plaintiff was entitled to a verdict on the issue of *non est factum* replied to the release. *Fazakerly v. McKnight*, 6 E. & B. 795; 26 L. J., Q. B. 30. *Semb.* the defendant should have pleaded the set-off and a release of the difference. See Bullen & Leake on Pleading, 3rd ed. 671.

A release of one of two joint, or joint and several debtors, is a discharge of all. *Nicholson v. Revill*, 4 Ad. & E. 675; even from a joint judgment debt. *In re E. W. A.*, (1901) 2 K. B. 642, C. A. But although a release of the whole debt given to one of two joint, or joint and several, contractors enures to the benefit of both, yet receiving a portion of a debt and putting an end to an action against one of them is not a release of the other. *Watters v. Smith*, 2 B. & Ad. 889. And a release to one of several contractors if qualified—as a release reserving the right to join the releasee in a suit for the purpose of recovering against the others—is not pleadable as a release of all. *Solly v. Forbes*, 2 B. & B. 38. So a release of one co-debtor; *Willis v. De Castro*, 4 C. B., N. S. 216; 27 L. J., C. P. 243; or joint tortfeasor, *Rice v. Reed*, (1900) 1 Q. B. 54, C. A.; reserving remedies against the other; or a release of the principal debtor, reserving rights against a surety; *Kcarsley v. Cole*, 16 M. & W. 128; *Price v. Barker*, 4 E. & B. 760; 24 L. J., Q. B. 130; *Green v. Wynn*, L. R., 4 Ch. 204; *Bateson v. Gosling*, L. R., 7 C. P. 9; amount only to a covenant not to sue, and not to a release, and are not pleadable by the co-debtor. So where the original contract reserves to the creditor the right of giving a release to the principal debtor without discharging the surety, a release granted to the debtor is not pleadable by the surety. *Cowper v. Smith*, 4 M. & W. 519; *Union Bank of Manchester v. Beech*, 3 H. & C. 672; 34 L. J., Ex. 133. But where the right is not reserved in the original contract or release itself, oral evidence of the reservation cannot be given. *Cocks v. Nash*, 9 Bing. 341. See further, *ante*, pp. 17, 484, 485.

An unqualified covenant not to sue has the effect of a release on the ground of avoiding circuity of action; 2 Wms. Saund. 47 *gg*; *Id.* 150 (2); *Ford v. Beech*, 11 Q. B. 853; but a covenant by one of several joint creditors not to sue the defendant is not pleadable as a release to an action by all. *Walmesley v. Cooper*, 11 Ad. & E. 216. And a covenant not to sue for a

certain time was at law inoperative as a bar. 2 Wms. Saund. 47 *gg*, 48; *Id.* 150 (2); *Thimbleby v. Barron*, 3 M. & W. 210; *Ford v. Beech*, *supra*. When, however, such a covenant is founded on valuable consideration, it now forms on equitable principles a bar to an action brought within the time. See *Edwards v. Walters*, (1896) 2 Ch. 168, *per* Lindley, L.J. And it was so, even at common law, if there were a proviso that it should be pleadable in bar to any action brought within the time. *Gibbons v. Vouillon*, 8 C. B. 483; *Walker v. Nevill*, 3 H. & C. 403; 34 L. J., Ex. 73; *Corner v. Sweet*, L. R., 1 C. P. 456.

It may be observed that the same principles apply in the case of joint tortfeasors, A. and B., viz., that while the unqualified release of A. will release B.; *Cocke v. Jennor*, Hob. 66; a covenant not to sue A. will not do so. *Duck v. Mayeu*, (1892) 2 Q. B. 511, C. A.

The discharge in bankruptcy of A. does "not release any person who at the date of the receiving order was a partner or co-trustee with the bankrupt, or was jointly bound, or had made any joint contract with him, or any person who was surety, or in the nature of a surety for him;" Bankruptcy Act, 1883, s. 30 (4). And "the acceptance by a creditor of a composition or scheme shall not release any person who under" the Bky. Acts, 1883, 1890 "would not be released by an order of discharge if the debtor had been adjudged bankrupt;" *Id.* 1890, s. 3 (19). So in the case of a joint and several liability, a composition accepted by the joint creditors does not affect the several liability. *Simpson v. Henning*, L. R., 10 Q. B. 406, Ex. Ch.

Fraud practised on the releasor must be replied, if relied upon; *Wild v. Williams*, 6 M. & W. 490; and where the clerk of the defendant's attorney procured a cunningly-worded release from an illiterate plaintiff, this was held evidence of fraud. *Sargent v. Wedlake*, 11 C. B. 732. As to fraud, *vide ante*, pp. 663 *et seq.*

Fraud can only be relied on in reply to a release, contained in a contract, when the plaintiff can disaffirm the contract, and remit the defendant to his former state. *Urquhart v. Macpherson*, 3 Ap. Ca. 821, J. C.

### Rescission.

Before breach, a simple contract may be rescinded and discharged by a mutual oral agreement. *Milton v. Edgeworth*, 6 Bro. P. C. 587, and see cases *ante*, pp. 28, 29. To a declaration on a general breach of contract to deliver goods weekly for a year, it was pleaded that the contract was rescinded before breach. It was held that if there were a single breach before rescission, the plea failed *in toto*. *Burgess v. De Lane*, 27 L. J., Ex. 154.

Where there is an agreement good under the Statute of Frauds, an invalid oral agreement to vary the terms does not operate by way of rescission of the original agreement. *Noble v. Ward*, L. R., 2 Ex. 135, Ex. Ch.

The defence is sometimes pleaded in the form of exoneration and discharge, but the defendant must prove a proposition to exonerate on the part of the plaintiff acceded to by himself, which is to effect a rescinding of the contract previously made. *King v. Gillett*, 7 M. & W. 55, 59.

As to rescission of contract of marriage, see *Davis v. Bomford*, 6 H. & N. 245; 20 L. J., Ex. 139, cited *ante*, p. 497.

### Sale of Goods Act, 1893.

See *Frauds, Statute of, and Sale of Goods Act, 1893, ante*, p. 665.

*Set-off and Counter-claim.*

The plea of set-off was first given by 2 G. 2, c. 22, s. 13, and 8 G. 2, c. 24, ss. 4, 5, which enabled mutual debts to be set off between the plaintiff and the defendant; this right is now very much extended, for, by Rules, 1883, O. xix. r. 3, "A defendant in an action may set off, or set up by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a cross action, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross-claim. But the court or a judge may, on the application of the plaintiff before trial, if in the opinion of the court or judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof." By O. xxi. r. 10, "Where any defendant seeks to rely upon any grounds as supporting a right of counter-claim, he shall, in his statement of defence, state specifically that he does so by way of counter-claim." By r. 16, although the action of the plaintiff is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with; and by r. 17, *ante*, p. 295, the court may give judgment for the defendant for any balance found in his favour. Under O. xix. rr. 15 *et seq.*, *ante*, p. 309, all matters in answer to a counter-claim or set-off must be pleaded in the same way as if it were a statement of claim. O. xvi. r. 3, provides that the improper or unnecessary joinder of a co-plaintiff shall not defeat a set-off or counter-claim, if the defendant prove it against the other plaintiffs. The nature of a counter-claim was much considered by the C. A. in *McGowan v. Middleton*, 11 Q. B. D. 464.

A counter-claim must contain, in itself, a specific statement of the facts on which relief is claimed, and it is not sufficient that those facts are stated in the defence, which forms with it one document in consecutive paragraphs, unless they are incorporated in the counter-claim by reference. *Holloway v. York*, 25 W. R. 627, M. R.; *Crove v. Barnicot*, 6 Ch. D. 753. In these cases leave to amend the counter-claim was refused. It is sufficient, however, if the counter-claim refer to facts previously stated in the pleadings, without repeating them *in extenso*. *Birmingham Estates Co. v. Smith*, 13 Ch. D. 506. And it is not necessary that the counter-claim should be separately headed as such. *Lees v. Patterson*, 7 Ch. D. 866.

As to the delivery of particulars of set-off and their effect, *vide ante* p. 88.

The distinction between a set-off and counter-claim is still material for some purposes, and especially with reference to costs, *vide ante*, p. 299. A set-off alleges a liquidated demand due from the plaintiff to the defendant, which balances the liquidated claim of the plaintiff, and shows that on the whole account, between the plaintiff and the defendant, nothing is due to the plaintiff. A set-off to an amount equal to the plaintiff's claim is therefore a defence to the action. As to what constitutes such liquidated demand, *vide post*, p. 706. A counter-claim, which is a creature of the J. Acts, *vide supra*, is, on the other hand, in the nature of a cross-action by the defendant, which may be made, although in respect of or against a claim for unliquidated damages. *Stooke v. Taylor*, 5 Q. B. D. 576 *et seq.*, *per* Cockburn, C.J.; *Baines v. Bromley*, 6 Q. B. D. 694, *per* Brett, L.J. See also *Stumore v. Campbell*, (1892) 1 Q. B. 314, C. A.; *Gathercole v. Smith*, 7 Q. B. D. 626, C. A. Matters are sometimes raised by counter-claim which amount to a defence to the action. See *Lowe v. Holme*, 10 Q. B. D. 286. And as to the converse case, see *Bunkes v. Jarvis*, *post*, p. 706. As to costs generally in

the case of a set-off or counter-claim, *vide ante*, p. 299. As to the effect of the County Court Acts, 1888, s. 116, *vide ante*, pp. 301 *et seq.*

Where the defendant has been obliged to finish work which the plaintiff had contracted to do, and for which he seeks to recover a general money claim, the amount laid out by the defendant is not a set-off, but matter of deduction on a denial of the debt. *Turner v. Diaper*, 2 M. & Gr. 241. So, if the defendant finds materials for work done by the plaintiff for him, he may deduct the value of such materials in an action for the work, without a set-off. *Newton v. Forster*, 12 M. & W. 772. So, where there are no cross demands, but the nature of the employment or dealings necessarily constitutes an account consisting of receipts and payments, debts and credits, the balance only is the debt. See *Green v. Farmer*, 4 Burr. 2221; *Le Loir v. Bristow*, 4 Camp. 134.

If the defendant put in evidence to prove a set-off an account rendered by the plaintiff, he must take both sides of the account even where the plaintiff was an attorney, and the other side of the account consisted of the plaintiff's bill of costs, and no signed bill had been delivered by the plaintiff under the statute. *Harrison v. Turner*, 10 Q. B. 482. It has been held that a solicitor's bill may be set off without any previous delivery of a signed bill: for the 6 & 7 V. c. 73 (cited *ante*, p. 501), only prevents a solicitor from bringing "any action" before such delivery. *Brown v. Tibbits*, 11 C. B., N. S. 855; 31 L. J., C. P. 206; in which the decisions under the old Acts, 3 J. 1, c. 7, and 2 G. 2, c. 23, which were not uniform, are reviewed. See however, *Rawley v. Rawley*, 1 Q. B. D. 460, C. A., decided on similar words in 9 G. 4, c. 14, s. 5.

In *Original Hartlepool Collieries Co. v. Gibb*, 5 Ch. D. 713, Jessel, M.R., held that a cross claim, on a counter-claim, must have been complete at the date of the writ, on the ground that such proceeding was in lieu of a cross action brought at the same time as the plaintiff's action. In *Beddall v. Maitland*, 17 Ch. D. 174, however, Fry, J., gave relief on a counter-claim in respect of a cause of action accrued to the defendant after writ issued; and in *Toke v. Andrews*, 8 Q. B. D. 428, the plaintiff was allowed, in answer to such a counter-claim, to claim a debt which accrued due after writ issued. And a pecuniary set-off, which has arisen since action brought, may be so pleaded under Rules 1883, O. xxiv. r. 1. *Ellis v. Munson*, 35 L. T. 585, C. A. A set-off must continue due up to the time of trial. *Eyton v. Littledale*, 4 Exch. 159: until judgment the two debts remain separate and distinct. *In re Hiram Maxim Lamp Co.*, (1903) 1 Ch. 70; see also *In re G. E. B.*, (1903) 2 K. B. 340, C. A. Where a counter-claim is founded on a continuing cause of action, damages are now, under Rules 1883, O. xxxvi. r. 58, *ante*, p. 311, assessed down to the time of assessment. The rule was formerly otherwise. See *Original Hartlepool Collieries Co. v. Gibb*, *ante*, p. 705. In order to reply the Statute of Limitations with effect, it must appear that the set-off was barred before action. *Walker v. Clements*, 15 Q. B. 1046. This principle will apply to a counter-claim.

As to set-off to action brought by assignee of *chose in action*, *vide post*, p. 708.

By the Truck Act, 1831 (1 & 2 W. 4, c. 37), s. 5, extended by the Truck Amendment Act, 1887 (50 & 51 V. c. 46), in an action for wages of an artificer or workman in certain trades, a set-off for goods supplied by the employer cannot be relied on. See also 37 & 38 V. c. 48, s. 5. But a special reply of these statutes would be necessary. See on these Acts, *Hewlett v. Allen*, (1894) A. C. 383, D. P.

As to the plaintiff's right to reserve his evidence until the set-off has been proved, see *Williams v. Davies*, 1 Cr. & M. 464, and other cases cited *ante*, p. 278.

Where the issues in the claim and counter-claim are the same, the plaintiff is not entitled to adduce fresh evidence to contradict the defendant's evidence. *Green v. Sevin*, 13 Ch. D. 589.

*Nature of the debt set off, and of the debts against which it is set off.*] As above observed, it is still sometimes necessary to determine whether the defendant has a strict right of set-off as distinguished from a counter-claim, and for this purpose the following principles and decisions may be found useful. The debt set off may now be either a legal or an equitable debt. *Agra and Masterman's Bank v. Leighton*, L. R., 2 Ex. 56. So the defendant can now set off a bond given by the plaintiff to a third party and assigned to the defendant. *Cochrane v. Green*, 9 C. B., N. S. 448; 30 L. J., C. P. 97. So a set-off may be met by a reply that the plaintiff is suing as trustee only, and that the defendant had had notice of the assignment of the debt. *Watson v. Mid Wales Ry. Co.*, L. R., 2 C. P. 593; and see *Wilson v. Gabriel*, 4 B. & S. 243; *Christie v. Tunton, &c., Co.*, (1893) 2 Ch. 175; and *Richardson v. Stormont, Todd & Co.*, ante, p. 581. Thus where bonds are issued by a company, with the intention that they should be negotiable, it cannot, as against the equitable assignee of the bond, set off a debt due to the company from the obligee of the bond in whose name the action is brought. *Diekson v. Swansea Vale, &c., Ry. Co.*, L. R., 4 Q. B. 44; *Higgs v. Northern Assam Tea Co.*, L. R., 4 Ex. 387; *In re Northern Assam Tea Co.*, L. R. 10 Eq. 458; *In re Imperial Land Co. of Marseilles*, L. R., 11 Eq. 478; *In re Hercules Insur. Co.*, L. R., 19 Eq. 302. See further as to the principles on which a set-off was allowed in equity, *Middleton v. Pollock*, L. R., 20 Eq. 29. Where a trustee T. sues to recover a debt due to his *cestui que trust* B., the defendant may, as a defence thereto, set off a claim for unliquidated damages due to him from B. to the amount of T.'s claim. *Banks v. Jarvis*, (1903) 1 K. B. 519. A joint and several note of the plaintiff and others to defendant may be set off against a debt due from defendant to plaintiff alone. *Owen v. Wilkinson*, 5 C. B., N. S. 526; 28 L. J., C. P. 3. But a debt due from the plaintiff to the defendant and another jointly, cannot be set off against a debt due to the plaintiff from the defendant alone. *Bowycar v. Pawson*, 6 Q. B. D. 540. The two debts must be mutual and due in the same right. *Arnold v. Bainbrigge*, 9 Exch. 153; 23 L. J., Ex. 59; *Stunmore v. Campbell*, (1892) 1 Q. B. 314, C. A. Where on A.'s death, a banker, B., transferred the balance of A.'s account to the account "of C. executor of A.," C. being also residuary legatee; held that this balance might be set off against other overdrawn accounts of C. with B., the legatees not having given B. any notice of claim on the balance. *Bailey v. Finch*, L. R., 7 Q. B. 34. See also *Taylor v. Taylor*, L. R., 20 Eq. 155. But where A. had a separate account with a banker, C., which was overdrawn, and A. and B. had also, as executors of D., a joint account with C., A. being residuary legatee of D., and A. and B. jointly liable for some unpaid claims; it was held that one account could not be set off against the other, because a court would not, without any terms, or any further inquiry, compel B. to transfer the joint account to A. alone. *Ex pte. Morier*, 12 Ch. D. 491, C. A. A set-off is not an equity which runs with a bill or note indorsed when overdue; and therefore a set-off between the maker and indorser of such a note cannot be set up against the indorsee. *Whitehead v. Walker*, 10 M. & W. 696; *Oulds v. Harrison*, 10 Exch. 572; 24 L. J., Ex. 66; *Ex pte. Swan*, L. R., 6 Eq. 344. An antecedent debt cannot be set off against an instalment of a pension which is by statute not transferable. *Gatherine v. Smith*, 17 Ch. D. 1, C. A.; 7 Q. B. D. 626, C. A.

A judgment might be pleaded by way of set-off though a writ of error were pending thereon; *Reynolds v. Beerling*, cited 3 T. R. 188; see *Curling*

v. *Innes*, 2 H. Bl. 372; and where, in an action on a promissory note for 30*l.*, the plaintiff took a verdict for the whole sum, and the defendant had at the same sittings an action against the plaintiff for 11*l.*, to which there was a set-off of the note, the court held that, notwithstanding the verdict, the note might be set off. *Baskerville v. Brown*, B. N. P. 180; 2 Burr. 1229; *Evans v. Prosser*, 3 T. R. 186. A debt cannot be set off till it is actually due; *Rogerson v. Ladbroke*, 1 Bing. 99; but where it has become due after action brought, it may now be so pleaded. *Ellis v. Munson*, *ante*, p. 705. A debt barred by the Statute of Limitations cannot be set off; and if pleaded the plaintiff may reply the statute; B. N. P. 180; *Francis v. Dodsworth*, 4 C. B. 202, 220, *per cur.*; and it must be replied if relied on. Rules, O. xix. r. 15, *ante*, p. 309. See as to this reply, *ante*, p. 704.

Where A. sues B. for money deposited by him with B. for a special purpose which has failed, B. cannot set-off a debt due to him from A.; it is matter for counter-claim only. *Stumore v. Campbell*, (1892) 1 Q. B. 314, C. A.; following *Brandão v. Barnett*, 12 Cl. & F. 787.

A defendant may counter-claim a several claim against one of two joint plaintiffs and another several claim against the other plaintiff. *Manchester, &c., Ry. Co. v. Brooks*, 2 Ex. D. 243.

*By and against executors.*] *Vide post*, p. 1153.

*By factors and agents.*] An agent employed to recover a sum of money is entitled to retain a just allowance for his labour and service therein, and as such allowance is not in the nature of a cross demand or mutual debt, he may give it in evidence under a denial of the debt in an action for money had and received. *Dale v. Sollet*, 4 Burr. 2133. See also the cases cited *ante*, p. 705.

Where a factor sells goods as his own, and the buyer, A., knows nothing of any principal, A. may, in an action by the principal for the price, set off a debt due to himself from the factor. *George v. Cluggett*, 7 T. R. 359; *Carr v. Hinchliff*, 4 B. & C. 547. So if, on a sale of goods to defendant, an agent hold himself out as owner, and the plaintiff, the real owner, ostensibly allowed him to do so, then the plaintiff's claim is subject to any right of set-off existing between the agent and defendant. *Ramozzoli v. Bowring*, 7 C. B., N. S. 851; 29 L. J., C. P. 30; *Borries v. Imperial Ottoman Bank*, L. R., 9 C. P. 38; *Ex pte. Dixon*, 4 Ch. D. 133. So where an agent is allowed as principal to collect a debt for the plaintiff, the real principal. *Montagu v. Forwood*, (1893) 2 Q. B. 350, C. A. But this principle only applies where "the agent has been permitted by the principal to hold himself out as the principal," and the person dealing with the agent has believed that the agent was the principal, and has acted on that belief. *Cooke v. Eshelby*, 12 Ap. Ca. 271, 275, D. P., *per* Ld. Halsbury, C. So if the factor were known to be such, and to sell in that character, no such set-off can be pleaded against the principal; *Fish v. Kempton*, 7 C. B. 687; even though the defendant did not know who the principal was; *Semenza v. Brinsley*, 18 C. B., N. S. 467; 34 L. J., C. P. 161. See *Mildred v. Muspons*, 8 Ap. Ca. 874, D. P., cited *ante*, p. 605; and if, before the goods are all delivered, and before any part is paid for, the purchaser is informed that they belong to the plaintiff, it has been ruled that the purchaser cannot set off a debt due to him by the factor. *Moore v. Clementson*, 2 Camp. 22; see *Warner v. M'Kay*, 1 M. & W. 591; on this last case see *Fish v. Kempton*, 7 C. B. 687, 693, *per* Cresswell, J. Where the buyer has no belief on the subject as to whether his seller is principal or agent, there can be no set-off against the principal. *Cooke v. Eshelby*, *supra*. If the purchaser buy through an agent, the knowledge of the agent that the apparent seller is an agent, will affect the

purchaser and exclude the set-off. *Dresser v. Norwood*, 17 C. B., N. S. 466; 34 L. J., C. P. 48, Ex. Ch. Where A.'s agent, B., by A.'s authority, employs a sub-agent C., to sell A.'s goods in B.'s name, there is no privity between A. and C. (*vide ante*, p. 605), and if C. has, before notice of A.'s title, sold them, and with B.'s assent blended the proceeds in his general account with B., A. can only recover the proceeds from C., subject to the deduction of any sum due from B. to C. *New Zealand, &c., Land Co. v. Watson*, 7 Q. B. D. 374, C. A.; explained in *Kaltenbach v. Lewis*, 10 Ap. Ca. 61, D. P. But where C. had sold the goods for B., and before delivery or payment B. died, and after the sale, but before receiving the proceeds, C. had notice of A.'s title, it was held that C. could not set off a debt due from B. to him. S. C. So in the case of goods sold after the revocation of C.'s authority by B.'s death, no such set-off is available, as the sale is wrongful. S. C., 24 Ch. D. 54, C. A. This head of set-off arises from the rule of law that a vendor, who accredits his agent and authorizes him to contract, as principal, with a purchaser, who knows him only as principal, cannot, by resuming the character of principal, deprive his vendee of the equities which he has against the apparent vendor, whether by common law (as by payment), or by a set-off. It has been held that a broker (whose character differs materially from that of a factor), in selling goods without disclosing the name of his principal, acts beyond the scope of his authority, and that the buyer, therefore, cannot set off a debt due from the broker to him in an action for the price by the principal; *Baring v. Corrie*, 2 B. & A. 137; *Cooke v. Eshelby*, *ante*, p. 707; though, of course, the relation is capable of being modified by the course of dealing between the broker and his principal. See notes to *George v. Clagett*, 2 Smith's L. C. A mutual credit with an agent who becomes bankrupt is not within the principle of *George v. Clagett*, *ante*, p. 707, in a case where the damages are unliquidated. *Turner v. Thomas*, L. R., 6 C. P. 610.

If a creditor sue one of two debtors jointly liable, the defendant may show that fact and plead a set-off of a debt due from plaintiff to the defendant, and his co-debtor. *Stackwood v. Dunn*, 3 Q. B. 822.

*In action by company in course of winding up.*] See *post*, p. 1109.

*To action by assignee of chose in action.*] A builder, D., entered into a contract with the defendant to build a house; D. assigned his interest in the contract to the plaintiff, who sued the defendant thereon under J. Act, 1873, s. 25 (6), *ante*, pp. 307, 308; it was held that the defendant might set off or deduct from the plaintiff's claim, the damages he had sustained by D.'s breach of the contract, but could not recover damages against the plaintiff. *Young v. Kitchin*, 3 Ex. D. 127. See also *Newfoundland, Government of, v. Newfoundland Ry. Co.*, 13 Ap. Ca. 199, J. C., and *Roxbury v. Cox*, and *Webb v. Smith*, *ante*, p. 620.

### *Tender.*

On issue joined as to the tender, the date of the writ, as stated on the statement of claim, is evidence of the commencement of the action. See *Whipple v. Mantley*, 1 M. & W. 432.

The defence of tender is only applicable to liquidated claims; *Davys v. Richardson*, 21 Q. B. D. 202, C. A.; and to cases where the party pleading has been guilty of no breach of his contract. *Hume v. Peploe*, 8 East, 168, 170, *per* Ld. Ellenborough, C.J. Hence, where a debt is payable on a day certain, as on an acceptance, a defence of payment *post diem* is generally inapplicable. S. C. *Poole v. Tumbridge*, 2 M. & W. 223; 2 Wms. Saund.



48 *b* (i). Where a note is payable on demand, a tender of the amount and interest *de die in diem* is a good defence. *Norton v. Ellam*, 2 M. & W. 461, 463, *per Parke*, B.

*By whom a tender must be made.*] The tender need not be made by the debtor himself; it is sufficient if made by his agent; and a tender by an agent, at his own risk, of more than the money given to him by his principal, is good. *Read v. Goldring*, 2 M. & S. 86, *post*, p. 710.

*To whom a tender must be made.*] A tender to a person authorized by the creditor to receive money for him is sufficient. *Goodland v. Blewith*, 1 Camp. 477; *Kirton v. Braithwaite*, 1 M. & W. 310. Where a clerk, in the habit of receiving money for his master, was directed by him not to receive the sum in question, for that he had put it into the hands of his attorney, and the clerk, on tender made, refused to receive the money, assigning the reason, it was held to be a good tender to the principal. *Moffat v. Parsons*, 5 Taunt. 307. So if he refuse, saying he had no instructions. *Finch v. Boning*, 4 C. P. D. 143, *per* Ld. Coleridge, C.J. But a tender made to the managing clerk of the plaintiff's attorney, who at the time disclaimed any authority from his master to receive the debt, was held insufficient. *Bingham v. Allport*, 1 Nev. & M. 398; *accord. per Parke*, B., *Watson v. Hetherington*, 1 Car. & K. 36. A tender of the debt sued for to the solicitor on the record, while he continues to be such, is a good tender to the principal. *Crozer v. Pilling*, 4 B. & C. 26. And a tender to a person in the office of the plaintiff's solicitor, to whom the defendant was referred by the clerk in the office, and who refused the tender only as being not enough, was held a good tender without showing who that person was. *Willmot v. Smith*, M. & M. 238. So a tender to a person in the plaintiff's (a merchant) place of business, who appeared to be conducting it, is good, though not, in fact, entrusted to receive money. *Barrett v. Deere*, *Id.* 200. But it is otherwise where the payment is not connected with the plaintiff's business, but quite collateral to it. *Sunderson v. Bell*, 2 Cr. & M. 304. Where the money was brought to the house of the plaintiff and delivered to his servant, who appeared to go with it to his master and returned saying that his master would not take it, it was held to be evidence from which the jury might infer a tender. *Anon.*, 1 Esp. 349. A tender of a partnership debt to one of several partners is sufficient. *Douglas v. Patrick*, 3 T. R. 683. As to a tender to a company registered under the Companies Act, 1862. See *Charles Duval & Co. v. Gans*, (1904) 2 K. B. 692, *per* Mathew, L.J.

*Tender—To what amount.*] Tender of a part of one entire debt is inoperative; *Dixon v. Clark*, 5 C. B. 365; and the debtor cannot apply a set-off in reduction of the amount due so as to make a tender of the balance good. *Scarles v. Sudgrave*, 5 E. & B. 639; 25 L. J., Q. B. 15; *Phillpotts v. Clifton*, 10 W. R. 135, M. T. 1861, Ex. If the objection appears on the record, the defence may be objected to in point of law; otherwise the plaintiff must reply that the sum tendered was part of a larger amount due, which formed one entire cause of action. *Hesketh v. Pawcett*, 11 M. & W. 356; *Dixon v. Clark*, *ante*, p. 709; *Scarles v. Sudgrave*, *supra*. If a man tender more than he ought to pay it is good; for the other ought to accept so much as is due to him. *Wade's case*, 5 Rep. 111; *Astley v. Reynolds*, Str. 916. Thus proof of a tender of 20*l.* 9*s.* 6*d.* in bank notes and silver will support a plea of tender of 20*l.* *Dean v. James*, 4 B. & Ad. 546. But it seems that such a tender is only good where it is made in moneys numbered, so that the creditor may take what is due to him; therefore a tender of a 5*l.*

note, requiring change, is not good. *Betterbee v. Davis*, 3 Camp. 70; *Robinson v. Cook*, 6 Taunt. 336; *Watkins v. Robb*, 2 Esp. 711; *Brady v. Jones*, 2 D. & Ry. 305. But a tender of too much, without requiring change, is good. *Reed v. Goldring*, 2 M. & S. 86. So, tender of enough to pay one of several items in a bill, if offered in satisfaction of the whole, is not good; but if specifically applied by the debtor to that one item at the time of payment, it is a good tender. *Hardingham v. Allen*, 5 C. B. 793. And where a greater sum is tendered than the sum pleaded, and the creditor refuses to receive it only on the ground that the amount is not sufficient, and not on account of the form of the tender, the tender is good. *Black v. Smith*, Peake, 88; *Saunders v. Graham*, Gow, 121. So where defendant laid down a gross sum in coin, and desired the plaintiff to tell him what was due, and to take principal and interest out of it, this was held good. *Bevans v. Rees*, 5 M. & W. 306. Where a party has several demands for unequal sums against several persons, a tender of one sum for the debts of all is not a good tender of any one of the debts. *Strong v. Harvey*, 3 Bing. 304. A tender to one of several partners, including a debt due to the partnership, and also a debt due to that one partner individually, is a good tender of the partnership debt, unless objected to on account of the form of the tender. *Douglas v. Patrick*, 3 T. R. 683; and see *Black v. Smith*, *supra*. A tender to the creditor's solicitor, who has demanded payment, need not include the costs of the solicitor's letter. *Kirton v. Braithwaite*, 1 M. & W. 310; and see *Cuine v. Coulton*, 1 H. & C. 764; 32 L. J., Ex. 97.

*Tender—In what kind of money.*] By the Coinage Act, 1870 (33 & 34 V. c. 10), s. 20, and sched. 2, the stats. 56 G. 3, c. 63, and 29 & 30 V. c. 65, are repealed, subject to the provision that—(3) “Every branch of the mint which at the passing of this Act” (4th April, 1870) “issues coins in any British possession shall, until the date fixed by any proclamation, made in pursuance of this Act, with respect to such branch mint, continue in all respects to have the same power of issuing coins, and be in the same position as if this Act had not passed, and coins so issued shall be deemed, for the purpose of this Act, to have been issued from the mint.”\*

By sect. 4, “A tender of payment of money, if made in coins which have been issued by the mint in accordance with the provisions of this Act, and have not been called in by any proclamation made in pursuance of this Act, and have not become diminished in weight, by wear or otherwise, so as to be of less weight than the current weight, that is to say, than the weight (if any) specified as the least current weight in the first schedule to this Act, or less than such weight as may be declared by any proclamation made in pursuance of this Act, shall be a legal tender,—

In the case of gold coins for a payment of any amount;

In the case of silver coins for a payment of an amount not exceeding 40s., but for no greater amount;

In the case of bronze coins for a payment of an amount not exceeding 1s., but for no greater amount.

Nothing in this Act shall prevent any paper currency which under any Act, or otherwise, is a legal tender from being a legal tender.”

The schedule gives least current weights in the case of gold coins only.

Sect. 11 empowers her majesty in council by proclamation among other things—(5) To call in coins; (6) To direct that any coins other than gold,

\* By proclamations under 29 & 30 V. c. 65, s. 1, the gold coins issued by the branch mints at Sydney and Melbourne were made, and have continued to be, a legal tender.

silver or bronze, may be current and a legal tender up to 5s.; (7) To direct that coins coined in any foreign country may be a legal tender at prescribed rates, having regard to the weight and fineness of the coin as compared with the current coins of the realm; (8) To direct the establishment of branch mints in her Majesty's dominions.

By the 3 & 4 W. 4, c. 98, s. 6, it is provided that a tender of a note or notes of the Bank of England, expressed to be payable to bearer on demand, shall be a legal tender to the amount expressed in such note or notes for all sums *above 5l.* on all occasions on which any tender of money may be legally made, so long as the Bank of England shall continue to pay on demand their said notes in legal coin; provided that no such note shall be deemed a legal tender of payment by the Bank of England, or any of its branch banks. It may be observed that these notes are not a legal tender in Ireland, 8 & 9 V. c. 37, s. 6; or Scotland, *Id.* c. 38, s. 15.

The party to whom the tender is made is not obliged to state his objection to receiving it, but if he do so he must rely on the objection he states, and he will be taken to have waived other objections. Thus, if he claim a larger amount than that offered, and give that alone as a reason for not accepting it, he cannot afterwards object that the tender was in country bank notes; *per* Bayley, B., in *Polglass v. Oliver*, 2 C. & J. 17; *Lockyer v. Jones*, Peake, 180, n. A tender of a cheque on a banker may be good under the like circumstances. *Wilby v. Warren*, Tidd, Prac., 9th ed. 187; *Jones v. Arthur*, 8 Dowl. 442, *cor.* Coleridge, J. But such a tender is bad if objected to on that ground. *Johnston v. Boyes*, (1899) 2 Ch. 73.

*Tender—Money must be produced.*] The actual production of the money due is necessary unless the creditor dispense with the production of it at the time, or do anything which is equivalent to a dispensation. *Thomas v. Evans*, 13 East, 101; *Polglass v. Oliver*, *supra*. In *Thomas v. Evans*, *supra*, the defendant left 10*l.* with his clerk for the plaintiff, of which the clerk informed the plaintiff when he called, and the plaintiff said he would not receive the 10*l.* nor anything less than his whole demand, but the clerk did not produce the 10*l.*, this was held to be no tender; and *Dickinson v. Shee*, 4 Esp. 68, is to the same effect. But where the defendant went to the plaintiff and told him he had 8*l.* 18*s.* 6*d.* in his pocket, which he had brought for the purpose of satisfying his demand, but the plaintiff told him "he need not give himself the trouble of offering it, for that he would not take it," the tender was held to be good. *Douglas v. Patrick*, 3 T. R. 684; and see *Ryler v. Townsend*, 7 D. & Ry. 119. The agent of the defendant met the plaintiff in the street and told him that he was come to settle the business between the defendant and him, and that he was desired by the defendant to offer him 4*l.*; the plaintiff said he would not take it; the witness then said he would give him the other 10*s.* out of his own pocket, and run the risk of being repaid; he then pulled out his pocket-book and told the plaintiff that if he would go into a neighbouring public-house he would pay him, but the plaintiff said he would not take it; this was held to be a good tender of 4*l.* 10*s.* *Reud v. Goldring*, 2 M. & S. 86. Where a witness stated that the defendant was willing to give the plaintiff 10*l.*, and the witness offered to go and fetch that sum, but that the plaintiff said "she need not trouble herself, for he could not take it," this was held to be a good tender. *Harding v. Davies*, 2 C. & P. 77. And see also *Polglass v. Oliver*, *supra*, from which it would appear that the tender in *Thomas v. Evans*, *supra*, ought to have been held sufficient. Where money was offered by letter, which the plaintiff declined by letter, saying, "I decline your tender," this was held insufficient. *Powney v. Blomberg*, 14 Sim. 179. On a plea of tender of 1*l.* 12*s.* 6*d.*, the jury found specially that the defendant's attorney called on

the plaintiff, and said "I come to pay you 1*l.* 12*s.* 6*d.* which the defendant owes you"; that the attorney put his hand in his pocket, but did not produce the money, the plaintiff saying, "I can't take it; the matter is now in the hands of my attorney." It was held that, upon this finding, the defendant was not entitled to judgment. *Finch v. Brook*, 1 N. C. 253; S. C., 1 Scott, 70. But the court seems to have been of opinion that a dispensation of the production might have been inferred from the above facts, and found by the jury. See *Ex pte. Danks*, 2 D. M. & G. 936; 22 L. J., Bky. 73.

*Tender must be unconditional.*] In order to support a plea of tender, there must be evidence of an *unqualified* offer. An offer of payment, clogged with a condition that it should be accepted as the balance due, does not amount to a legal tender. *Evans v. Judkins*, 4 Camp. 156; *Hurham v. Smith*, 2 Camp. 21; *Strong v. Hurvey*, 3 Bing. 304; *Thougl v. May*, 4 Ad. & E. 954. But a tender, accompanied by a statement by the defendant that "he has come to pay the amount of his (the plaintiff's) bill," is sufficient, though the plaintiff insisted that "it was not his bill," and refused it on that account; for such statement is no more than is implied in every tender, viz., that the debtor intends to cover the whole demand, and asserts that it does so. *Henwood v. Oliver*, 1 Q. B. 409; *Bowen v. Owen*, 11 Q. B. 130. So a tender of the full amount demanded, accompanied with a protest, is good. *Scott v. Uxbridge & Rickmansworth Ry. Co.*, L. R., 1 C. P. 596; *Greenwood v. Sutcliffe*, (1892) 1 Ch. 1, C. A. If the tender cannot be accepted without supplying evidence of an admission that no more is due, then it is conditional, and therefore bad. *Bowen v. Owen*, *supra*. So where a tender is accompanied with a demand of a receipt in full of all demands. *Glasscott v. Day*, 5 Esp. 48; *Higham v. Baddely*, Gow, 213; *Ryder v. Townsend*, 7 D. & Ry. 119. Where the defendant tendered the money, saying, "If you will give me a stamped receipt, I will pay you the money," and the plaintiff refused to take it, Abbott, C.J., held this to be no tender. *Laing v. Meuder*, 1 C. & P. 257. It was held in that case that the debtor ought to present a piece of paper, stamped with the *ad valorem* receipt stamp, to the creditor, and require him to give a receipt; if the latter refused to do so, and to pay for the receipt stamp, he was liable to a penalty by the 43 G. 3, c. 126, ss. 4, 5. This enactment was repealed by 33 & 34 V. c. 99, and under the Stamp Act, 1891, s. 103, the payee of money is liable to a penalty if, in any case where a receipt would be liable to duty, he refuse to give a receipt duly stamped, and he is bound also, under sect. 101 (2), to cancel the stamp if adhesive; but as there is no provision, as in the earlier Act, that the debtor must present a receipt for the creditor to sign, the creditor must now find the stamp; as, however, the stamp is a uniform one of 1*d.*, this is productive of no hardship, especially as the duty may now be denoted by adhesive postage stamps, *vide ante*, pp. 228, 271. But though a party tendering money cannot, in general, demand a receipt for it, yet where the creditor did not object to the demand of a receipt, but only that the sum was insufficient, the tender was held good. *Richardson v. Jackson*, 8 M. & W. 298. Some doubt seems to have been expressed in this case as to whether the demand of a receipt in any case would render a tender insufficient. Where a cheque is sent in a letter requesting a receipt in return, this is not a conditional tender. *Jones v. Arthur*, *ante*, p. 711. But where two quarters' rent, due Michaelmas and Christmas, was demanded, and the tenant tendered the Christmas only, and demanded a receipt for that quarter's rent, this was held to be no sufficient tender, even of that quarter's rent, the contest between the parties being whether one or two quarter's rent was due. *Finch v. Miller*, 5 C. B. 428. Where the defendant tendered a sum of money, and at the same time

delivered a counter-claim upon the plaintiff, and the plaintiff did not take up the money or paper, but simply said, "You must go to my attorney," the tender was held insufficient. *Brady v. Jones*, 2 D. & Ry. 305.

Whether a tender be conditional or not is a question for the jury, where the words or facts accompanying it are disputed. *Eckstein v. Reynolds*, 7 Ad. & E. 80. But if the goodness of it turns on the meaning or legal effect of a letter or writing accompanying it, then the question is for the judge. *Semble, Bowen v. Owen*, 11 Q. B. 130. And the same rule would seem, on principle, to apply to unwritten expressions used by the party tendering, where the tenor of them is not disputed.

*Tender—Prior or subsequent demand and refusal.*] The defence will be defeated by showing a demand and refusal prior or subsequent to the tender. *Bennett v. Parker*, 1 R., 2 C. L. 89, Ex.; *Poole v. Tumblebridge*, 2 M. & W. 223, 226; 1 Wms. Saund. 33 c (2). The demand and refusal must now be replied specially. Rules, 1883, O. xix. r. 15, *ante*, p. 309. The demand must be proved to be of the precise sum tendered. *Spybey v. Hide*, 1 Camp. 181; *Rivers v. Griffiths*, 5 B. & A. 630. The demand must be by a person authorized at the time to receive the money; and therefore a demand by a clerk of the plaintiff's solicitor (who does not bring his master's receipt) is insufficient. *Coore v. Callaway*, 1 Esp. 115. And the subsequent adoption of an unauthorized demand is not enough. Story on Agency, § 247. A subsequent demand upon one of two joint debtors is sufficient. *Peirse v. Bowles*, 1 Stark. 323. A letter sent by the plaintiff and received by the defendant, demanding the sum tendered, is not sufficient evidence of a subsequent demand; for, at the time of the demand, the defendant should have an opportunity of immediately paying the sum demanded. *Edwards v. Yeates*, Ry. & M. 360; but see *Hayward v. Hague*, 4 Esp. 93.

END OF VOL. I.









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